The Free Speech Rights of Teachers and Social Media Policies for School Districts

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The Free Speech Rights of Teachers and Social Media Policies for School Districts

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DEDICATION

I want to dedicate this paper to those administrators who work tirelessly to improve the lives of the next generation. For those who have been targets of social media, either directly or indirectly, I hope this study helps you navigate the slippery slope of the First Amendment. You may have the next Mr. Pickering on your staff.

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CHAPTER 1: PROBLEM STATEMENT, RATIONALE, AND KEY TERMS

The use of social media has impacted every part of our society. Its effect on the school environment has been undeniable. With the rapid expansion of technology, "teachers find themselves operating ahead of policy guidelines or professional development and support" (Bartow, 2014, p. 54). School districts must show teachers how to utilize such media in a productive manner and demonstrate to students how to use social media safely (Puzio, 2013).

Problem Statement and Rationale

Teachers' use of social media is blurring the lines between their professional and personal lives (Russo et al., 2010). This unprecedented access to teachers' lives on social media can "muddy the boundaries between school and non-school jurisdictions" (Foulgar et al., 2009, p. 13). With few court cases specifically addressing the topic of teacher discipline for inappropriate social media use, school districts are scrambling to determine their abilities to enact policies that balance the free speech rights of school district employees against the right of the district to preserve the trust of the school community, maintain proper teacher and student relationships, and maintain an appropriate working environment.

Since few school districts have social media policies, teachers must decide between using a tool that has the potential to enhance and expand the reach of the classroom and risking disciplinary action from administrators if the interaction does not meet acceptable standards that are often undefined. Strong, well-developed policies provide districts with a comprehensive plan that addresses the expectations of school employees as they interact with students and other members of the school community in the social media environment. Employees also need to know what may happen if they engage in inappropriate behaviors,

but most current policies do not have clear consequences for improper online behavior (Foulgar et al., 2009).

Research Questions

There are times when employees' online behavior can have a negative impact on the school environment or is reasonably perceived by school administrators as having the potential to do so. Administrators are left wondering what they can do to protect their schools and districts from inappropriate use of social media by school employees, yet none want to be sued for infringing upon the free speech rights of the employees. The following research questions were created to guide this study with the ultimate goal of creating a framework for use by administrators when considering how to handle employees' use of social media and to identify characteristics of a sound social media policy:

1. What limitations can school and district administrators place upon the free speech rights of public school employees?
2. Which Louisiana laws could aid in the development of social media policy in public schools?
3. What might a social media policy framework look like that would aid school and district administrators when considering disciplinary action with regard to employee conduct?
4. What are the characteristics of current social media policies in Louisiana?

Organization and Scope of the Review

This review is organized into three distinct sections. The first section begins with a review of the most important court cases involving the First Amendment free speech rights of teachers and other public employees. The evolution of the free speech standard will be traced

as the courts clarified and modified their stance in response to new fact scenarios. Next, cases involving students' free speech rights and limits will be examined since these cases have been applied in determining the limits of teachers' speech. Cases where these various standards were applied will be analyzed to determine the current legal climate regarding employee discipline and free speech. The research will include an analysis of United States Supreme Court rulings as well as those of state and district courts.

Other related topics will be discussed, and the leading cases on those topics will be included. Those topics include true threats, cyberbullying, and academic freedom. These topics are not a central focus to this study, but they do provide some additional limits and parameters that are worthy of consideration for this topic.

The research will conclude with an analysis of current social media policies. Although few district policies currently exist in Louisiana, those existing policies as well as those of larger metropolitan districts across the country will be analyzed to identify commonalities.

Conceptual/Operational definitions. The following conceptual and operational definitions are used:

Social media. Social media is any online media application that is used to communicate with others. Communication can occur in an open group setting that is visible to anyone using the site. It may be restricted by the user to small groups or private, individual communication. Some people "use social media as a platform for building a professional public identity" (Leibler & Chaney, 2014, p. 4). The broad nature of this definition allows for inclusion of other media as technology grows (Bartow, 2014). Email does not fall into this

category since it is not a public forum. Operationally, one defines social media as the use of a social network, such as Facebook, Instagram, or MySpace, to communicate with others.

Social network. A social network is a web-based system that allows for communication between users (Leibler & Chaney, 2014). Examples are Facebook, Twitter, MySpace, LinkedIn, and Instagram. Liebler and Cheney (2014) define social networks as cyberspaces where users "(1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system" (p. 3). These sites allow people to post information that may be shared with others on the site or may be restricted by the user. Users choose to join these groups and to connect through social media networks in a variety of ways, such as belonging to the same organization, sharing similar media interests, having the same occupations, or through shared friends. Operationally defined, a social network is a specific site people visit in cyberspace for social interaction. Visitors may engage in a discussion or merely observe the interactions of others in the group.

Scope. This research covers relevant cases as far back as the 1950s to the present. Cases to be analyzed include those related to teacher free speech, public employee free speech, and student free speech. Because the use of social media is a newer avenue of communication, many of these cases deal with printed materials, such a letters to newspapers or printed paper documents, but their application to communication in cyberspace has been consistently recognized by the courts.

Limitations. There are some limitations to the research. Cases involving colleges and universities will not be included since professors at the collegiate level are given greater

academic freedom than those at the K-12 level. Courts have consistently held teachers at the K-12 level to a much higher moral standard than the standard applied to other professions since children and teenagers are more vulnerable than their college counterparts. Although the framework may be used as a national model, the final analysis and resulting framework will be based upon Supreme Court cases with additional consideration given to any applicable Louisiana cases and statutes.

Significance and Rationale for the Critical Analysis

Social media has fundamentally changed the way that society operates. Schools and businesses seek to maintain a positive online presence by monitoring websites and creating policies and procedures that seek to protect their online reputations. Social Networking Statistics (2015) reports that Facebook alone has over 1.3 billion users. Social media users spend over three hours per day on social networking sites (Sluder & Andrews, 2010). Given its popularity, social media has the potential to have a tremendous influence—positive or negative—on our everyday lives.

Social media has the potential to be a powerful communication tool between teachers and students that can be used to reach students after the formal school day ends (Puzio, 2013). Communication is important in building teacher-student relationships (Baez & Caulfield, 2012). "Teacher's effectiveness often depends on his or her rapport with students" (Estrada, 2010, p. 283). Teachers claim that social media can be used to deepen relationships with students and can lead to uncovering abuse, emotional problems, and even bullying at school (Delgado, 2013; Fleisher, 2012). Networking outside school hours allows teachers to learn about the varied interests of their students and "breaks down barriers and builds trust and respect…and serves as a forum for students and teachers to address other school-related

issues such as bullying or depression" (Puzio, 2013, p. 1105). It is important to understand that teachers who desire to develop appropriate relationships with students do not have to use social networking, although some choose to do so. Schools must show students how to use social media safely and teachers how to utilize such media in a productive manner (Puzio, 2013).

School districts need to develop policies that respect employees' First Amendment right to freedom of speech and inform their employees of proper online professional behaviors. These policies must be balanced with a school district's responsibility to maintain an educational environment that promotes its vision and mission and the rights of the employer. This study analyzes relevant court decisions and makes recommendations for the creation of sound social media policies for employees.

Chapter Summary

Social media has greatly impacted the school environment, but little guidance exists for teachers who wish to interact with students through social networking sites. When school employees post questionable material on social media, administrators need guidance to determine if that speech is constitutionally protected or if they can take disciplinary action against the employee, especially when that speech impacts the school environment and the relationship between teachers, students, and the community. This study seeks to find relevant court cases that will support a framework for school and district administrators to use to determine if the speech is protected and to recommend characteristics of a sound social media policy.

CHAPTER 2: REVIEW OF THE LITERATURE AND RESEARCH

When used effectively, "social media is merely a supplement to more traditional methods of communication" (Delgado, 2013, p. 4). For example, teachers use social media for educational purposes because they realize that, when used appropriately, social media can enhance the overall educational program by increasing communication skills, encouraging higher levels of engagement, and developing technology skills (Bartow, 2014; Puzio, 2013). The use of social networks allows students to communicate with experts all over the world (Bartow, 2014). Teachers can extend their influence beyond the regular school day (Shiller, 2015).

Social media is even influencing the hiring of teachers. Employers report that they often search potential and current employees' social media profiles to see if any unsuitable content is present (Russo et al., 2010). Policies quickly arose to protect the privacy rights of employees. In 2012, Illinois and California adopted laws that prohibited employers from requiring potential employees to provide information that would give access to the potential employee's social networking accounts (Liebler & Chaney, 2014).

With new technology and unprecedented access to students' and employees' personal lives, school districts across the country are scrambling to make sure employees use social media in a professional and ethical manner. When used properly, social media becomes a valuable medium for schools to use to reach not only their students but also community stakeholders. Bartow (2014) discovered that teachers used social media to connect with parents, thereby increasing parent participation. Social networking sites can even keep the community stakeholders informed about events at the school (Delgado, 2013).

With all the positive aspects of the use of social media, there are unintended consequences as well. A potential downside to its use involves the ability of students to view teachers' personal information through online social networking sites. Social media influences social norms by encouraging users to be transparent and more open than in times past (Liebler & Chaney, 2014). This transparency exposes a teacher's private behaviors that were once undetected (Estrada, 2010). With this new, off-campus access to teachers' personal lives, the distinction between personal and professional boundaries and relationships becomes more and more difficult to establish (Decker, 2014; Russo et al., 2010). This becomes even more problematic when the behaviors of the teacher are in conflict with the norms and values of the community.

"By virtue of their position, teachers must adhere to the highest standards in order to be worthy of and maintain public confidence" (Russo et al., 2010, p. 13). Teachers are expected to reflect the moral standards of the community in which they serve (McNee, 2013). Teacher conduct is often detailed in state legislation and regulation and in standards for professional practice (Russo et al., 2010). Some states have a licensing clause stating teachers are expected to display behaviors that are appropriate for the position (Sluder & Andrews, 2010). These standards and expectations may apply to teachers when they use social media, but few policies exist that state how these expectations extend to cyberspace.

Unfortunately, social media can also have a negative impact on the school environment. Reports of social media misuse are common, and their impact inside and outside the school range from mild annoyance to extreme cases of suicide (Conn, 2010). When posts are made that are considered lewd or offensive or which display unpopular opinions, teachers can seriously and irreparably damage their personal and professional

reputations (Liebler & Chaney, 2014). “Social media tools blur the line of whether a speaker is perceived as speaking to a specific and presumed private audience, a public expression of one’s own personal views, or a representative viewpoint of an entire institution” (Liebler & Chaney, 2014, p. 1).

In response to teachers’ use of social media, school districts have struggled with the imposition of policies for teachers’ and students’ use of social media, though most at least acknowledge the need for formalizing these expectations. Some school districts and state legislatures desire limitations on teacher-student online interactions as a way to discourage inappropriate interactions and communications and preventing “potentially unprofessional rapport with students” (Russo, et al., 2011, p. 11). This fear of the misuse of social media to engage in inappropriate relationships has caused the creation of strict electronic communication and social media guidelines in some districts (Papandrea, 2012). These restrictions seem to be based on a presumption of inappropriate relationships between teachers and students and the assumption that all relationships between teachers and students outside the classroom are dangerous to the well-being of the students (Decker, 2014; Puzio, 2013). “An assumption that the communications are inappropriate or invasive of the private interactions in a teacher’s life, could be extremely damaging to that teacher’s reputation” (Delgado, 2013, p. 7-8).

The number of reports of inappropriate teacher-student interactions that involve the use of electronic communication and social media seems to be escalating. New York City schools report growing numbers of accusations of inappropriate teacher-student interactions involving social media with two complaints in 2008, fourteen in 2009, fifty-nine in 2010, and sixty-nine in 2011 (Chen & McGeehan, 2012; Fleisher, 2012). Schools and districts have

initiated polices in an effort to protect their students from potential sexual predators (Grisham, 2014; Schroeder, 2013). Puzio (2013) reports that studies have suggested 10% of students have experienced sexual misconduct by a school employee. Given these statistics, one can understand the drive behind creating policies that limit school employees' access to students. Surprisingly, only about forty districts across the nation have social media policies, and teachers' unions in states like New York and Missouri stand ready to defend their members, who may be disciplined for their use of social media (Mathews, 2012).

Recent reports of teachers' misuse of social media are consistently found across the country, and media attention given to these cases brings increased scrutiny of teachers' online behaviors (McNee, 2013). The literature is replete with examples of teacher online misbehavior. A California teacher sent over 1,200 Facebook messages to a student and was charged with sexual misconduct. Another teacher in Illinois sent over 700 text messages to a student and was found guilty of sexual abuse and assault. Teachers have made derogatory comments about their students. Comments such as "I hate my school," "Most ghetto school in Charlotte," and referencing students as "germ bags" have resulted in employee discipline (Decker, 2014, p. 3). A Florida teacher's license was permanently revoked when he asked for students' email addresses and sent sexual and profanity-laced jokes to them. A substitute in Iowa was charged with sexual exploitation after it was revealed that an improper relationship had developed that included the use of social media. Another teacher was disciplined for posting pictures of students' work and critiquing it. A teacher in Georgia was charged with criminal stalking of a former student who was sixteen years old. In a five-year span, eighty-seven Missouri teachers lost their licenses for inappropriate messages between students and teachers (Delgado, 2013).

Additionally, teachers have faced discipline for posting their personal opinions on current events. A teacher was suspended and later reinstated for posting a comment about same-sex couples when he said he "almost threw up" after seeing a picture of a gay couple (Decker, 2014, p. 4). A New Jersey special education teacher posted negative comments about a LGBT display on a bulletin board at her school and resigned under pressure over the summer (McNee, 2013).

Some extreme examples of teacher behavior and discipline have occurred. Teachers have been disciplined when others posted an inappropriate picture of them online without their knowledge or permission. A Texas art teacher was fired when a friend posted nude pictures of her on her friend's MySpace page. She eventually won a cash settlement from the district (Foulgar et al., 2009).

Incidents like these above appear to be the catalyst behind social media policies. School district policies address a variety of aspects of social media use, including restricting teacher-student interactions online. For example, the Missouri state legislature passed and later repealed a broad ban on social networking for teachers after its constitutionality was questioned (O'Donovan, 2012). When giving consideration to the balancing of employees' constitutional rights, protecting the reputations of teachers, and preventing inappropriate relationships, school districts are left with little guidance (Decker, 2014). A senior policy analyst for a national teachers' union called social media policy "a very slippery slope" (Grisham, 2014, para. 10). Current laws typically address teacher-student interactions and prohibit the means of communication without focusing on the content (Decker, 2014). Russo (2010) quoted an unnamed attorney for the National School Boards Association as stating,

"This is a new frontier in education, where technology and social norms are outpacing law and policy" (p. 2).

The cultural climate toward strict policies restricting adults' access to minors seems understandable given the recent high profile cases involving Penn State and religious scandals (Puzio, 2013). On November 5, 2011, Jerry Sandusky, a former football coach at Penn State, was arrested and charged with sexually abusing boys who were part of his charity over a period of twelve years. The investigation found evidence suggesting that Sandusky's superiors failed to report accusations of the abuse to law enforcement agencies (Scolforo & Elliott, 2013). Further distrust stems from the decades- long sex abuse scandal which has engulfed the Catholic Church. Over 16,000 people in the United States have claimed that they were victims of abuse. Subsequent investigations found evidence that these victims' claims had been reported to church officials but not to law enforcement agencies for full investigation and prosecution of offenders (Childress, 2014).

Some states have enacted social media policies in an attempt to prevent the development of inappropriate teacher-student sexual relationships even though little evidence exists that social networking has been used by teachers to develop inappropriate relationships with students (Puzio, 2013). "For states and schools to prohibit a teacher's use of social networking technologies is to prevent teachers from utilizing one of the most relevant and promising tools of communication and knowledge in today's society" (Puzio, 2013, p. 1120).

Few court cases exist that offer specific guidance on how and when school employees can be disciplined for speech that occurs through social media. The First Amendment is often cited as a protection for all employees who are disciplined for social media use, but this protection only extends free speech rights to public employees. Currently, there are over

twenty million public employees. Private employees do not have these same protections (Hudson, 2002). “Government has more authority to regulate the speech of its employees than it does to regulate the speech of the general citizenry” (Hudson, 2002, p. 2). Courts have held that districts can restrict teachers’ speech if it inhibits the school’s goal of educating children (Estrada, 2010).

The review of the literature will begin with a historical context as it relates to the extent of teachers’ First Amendment free speech rights in the realm of early media. This section of the review will trace the early free speech cases and then chronicle the steps that the courts took to refine and further clarify these decisions.

Conceptual Framework

The conceptual framework reflects an analysis of the research. When creating a social media policy, there are multiple factors that impact its formation, and each factor has a different degree of impact on that policy.

Figure 1 shows the different elements that impact the creation of social media policies. The greatest policy influences are derived from the cases that have been decided by the United States Supreme Court. Secondary influences come from lower court rulings involving school employees and public employees. A third influence comes from United States Supreme Court cases where students’ free speech rights were either defined or clarified. In Louisiana, applicable Louisiana Revised Statutes impact social media policy development. The last influence that is included in the framework is the standard of the community. Although the impact of the community standard is minimal compared to the others, policy makers must still have an awareness of its influence.

Historical Context

During the nineteenth and twentieth centuries, courts strongly favored the right of the employer to discipline its employees. "Until the late twentieth century, government employers had the same rights as private employers to discipline their employees for their speech" (McNee, 2013, p. 1824). Historically, a teacher was "primarily a public employee, and secondarily a citizen" (Ryan, 1988, p. 696). In the 1952 case of *Adler v. Board of Education,* it was determined that teachers could not establish their own terms of employment. In this case, teachers found to be associating with groups who wanted to overthrow the government were dismissed (Ryan, 1988). In 1954, a Los Angeles teacher was terminated for refusing to answer questions related to her possible affiliation with the Communist Party (Hudson, 2002). During this period, public employers enjoyed great latitude in regulating their employees.

The pendulum began to shift in favor of the employee in the 1960s. The case most often referenced in such situations is the famous *Pickering v. Board of Education* (1968), which ultimately was decided by the United States Supreme Court. Although the *Pickering* case predates social media, it is still used as the litmus test to determine the extent or limitation of a public employee's constitutional right to free speech.

United States Supreme Court Free Speech Cases Involving Public Employees

According to Hudson (2002), there are three categories of First Amendment cases. First, there are cases where an employee is fired because the speech was disruptive. Second, there are cases where an employee "suffered an adverse employment action in retaliation for First Amendment-protected conduct" (Hudson, 2002, p. 5). Third, there are cases that result from the difference between the employee and the employer's political affiliation.

To date, no Supreme Court ruling has expressly dealt with private communications of teachers and students on social media, so lower courts have relied primarily on the Court's decisions relative to public employee speech and student speech when necessary (Delgado, 2013). This can be problematic as "regulating teacher speech in the same way as student speech would overly protect teacher speech in that it would protect the wrong kinds of speech—speech that could harm the educative purpose of the school" (McNee, 2013, p. 1844). This section details the cases that impact both teachers and public employees as a means to determine the current climate of the Court relative to teacher discipline and free speech. The decisions of the lower courts specifically involving teacher speech on social media will be thoroughly discussed in Chapter 4.

Pickering v. Board of Education (1968). The *Pickering* case involved Illinois public school teacher Marvin L. Pickering. Mr. Pickering wrote a letter to a local newspaper that stated his dissatisfaction with the local school superintendent, whom he blamed for the failure of a local tax. Subsequently, Mr. Pickering was fired. He challenged this disciplinary action as a violation of his right to free speech under the First and Fourteenth Amendments to the United States Constitution. The Circuit Court and Supreme Court of Illinois affirmed the dismissal. The ruling was appealed all the way to the United States Supreme Court, which eventually ruled on the case and determined that, in matters such as this, the free speech rights of the teacher as a public employee must be weighed against the interest of the employer to maintain a conducive working environment (Schroeder, 2013). The lower courts were reversed. The Court considered whether or not the teacher had inside knowledge about the school matter (Ryan 1988). The Supreme Court ruled "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of

public importance may not furnish the basis for his dismissal from public employment" (*Pickering*, 1968); therefore, his speech was protected under the First Amendment, and his dismissal was not justified.

From this case, the court created a two-part test to determine if an employee's speech is entitled to First Amendment protections. The first part states that one must determine if the content of the speech is a matter of public concern (Schroeder, 2013). If the matter is a public concern, then it is further analyzed to determine if the "employer's interests in prohibiting the speech outweigh the teacher's interests in making the speech" (Schroder, 2013, p. 26). These standards were more fully established and clarified with subsequent rulings. The *Pickering* case provided the earliest standards for a teacher's right to speak, and subsequent cases have given further clarification to the application of the *Pickering* ruling.

Connick v. Myers (1983). While the previously-discussed *Pickering* case remains the standard by which many teacher free-speech cases are judged, *Connick v. Myers* (1983) provided further clarification of the Unites States Supreme Court's standards. Myers was an assistant district attorney who was upset about a transfer. As a result of what she considered to be unfair treatment by her employer, she created a questionnaire with fourteen questions and distributed it to her coworkers. Connick, the district attorney, terminated Myers on the grounds that she refused the transfer. Myers challenged her dismissal, claiming a violation of her first Amendment rights and that her termination was a result of retaliation for the distribution of the questionnaire. The Court examined Myers' questionnaire relative to content, form, and context. The Court determined Myers' questionnaire only contained one question about pressure to work on political campaigns that would be protected under the

public concern standard. The majority of the questions dealt with personnel matters and personal gripes.

The Court upheld her dismissal since relationships in the office, which are important to the proper functioning of the office, may have become strained as a result of the questionnaire's content (Papandrea; 2012 Ryan, 1988; Schroeder, 2013). The Supreme Court ruled:

> Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is mostly accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. (*Connick,* 1983)

The survey was created and distributed at the office during working hours; therefore, the interest of the employer to maintain an appropriate working environment and employee relationships surpassed Myer's First Amendment rights. Employers may take action against an employee if their speech is thought to disrupt the workplace (Hudson, 2002). This case gave further clarity to the wide latitude that the Court affords employers in the public arena (Schroeder, 2013). Under the *Connick* standard, when speech is focused on personal issues rather than public concern, the courts favor the employer (White, 2013).

The major implication of the *Connick* case was its clarification of the public concern standard under *Pickering*. *Connick* created a two-part test. First, the plaintiff must establish the issue to be of public concern. This is defined as "relating to any matter of political, social, or other concern to the community" (*Connick v. Myers,* 1983). Second, the plaintiff must

prove that his or her right to free speech is more important than the employer's interest in providing a conducive work environment. If these two conditions are satisfied, then the court measures the impact of the speech on the working environment and working relationships; thus, the *Pickering-Connick* test was established (Hudson, 2002).

The effect of the speech on the school or workplace environment is one area in which the law continues to evolve. The definition for disruption seems to vary. "Without an actual disruption standard, all speech can be theoretically disruptive, and thus potentially punishable" (McNee, 2013, p. 1849). There are cases where teachers were disciplined for a potential disruption since many posts come to the attention of the administrator through parents at the school; however, the courts do seem to differentiate between a community disruption and a school disruption (McNee, 2013). Delgado (2013) suggests that if time investigating the concerns interrupts the school environment, then school officials may reasonably restrict the speech.

Garcetti v. Cebellos (2006). The next major ruling with free speech implications provides guidance on speech made pursuant to one's job versus speech made as a private citizen. In *Garcetti v. Ceballos* (2005), a public official, Assistant District Attorney Richard Ceballos, believed he was unjustly "reassigned to another position, transferred to another courthouse, and denied a promotion" (Schroeder, 2013, p. 50). At a defense counsel's request, Ceballos researched the facts surrounding the issuance of a search warrant and believed a sheriff had inaccurately presented facts to obtain the warrant. He created a memo of these facts, which he submitted to the prosecuting attorneys. The prosecution proceeded with the case, but Ceballos was called to testify for the defense. Ceballos believed this caused his reassignment, transfer, and other employment actions. In applying the *Connick* test, the

lower courts determined the memo was generated as part of his regular duties and did not receive First Amendment protection. The Ninth Circuit reversed that decision and stated the information was of public concern and did not disrupt the workplace. The United States Supreme Court reversed the Ninth Circuit and said "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline" (*Garcetti*, 2008). The Court determined that Ceballos spoke in his capacity as a public employee and not as a private citizen; therefore, his speech was not protected under the First Amendment, and the employer's actions were constitutionally permissible (Schroeder, 2013; Williamson, 2013). "An employee who speaks not as a citizen, but rather as a self-interested employee, will not be entitled to constitutional protection. Thus, focusing on the speaker's motive for speaking appears to be crucial under this analysis" (Ryan, 1988, p. 702).

The implication of this ruling is significant. Prior to applying the *Pickering* test, a court must first analyze the case according to the *Garcetti* standards before applying *Pickering* and *Connick* guidelines respectively (Delgado, 2013). For each case, special consideration must be given to "content, form, and context analysis" (Ryan, 1988, p. 707). For the balancing test, the court examines if the comments were made against a person the employee encounters on a daily basis, if it creates a problem with a supervisor or with coworkers, if relationships needed to do the job are threatened, and if the speech hinders the operations of the workplace (McNee, 2013).

Mt. Healthy City Board of Education v. Doyle (1976). In some cases, a teacher's speech forms only part of the reason the employee suffered an adverse employment action. In

the case of *Mt. Healthy City Board of Education v. Doyle* (1976), Doyle claimed he was fired for speaking on a local radio station against a teacher dress code. The board said that this was only a contributing factor to his dismissal. Further reasons for his dismissal included making obscene gestures to students, cursing students, and engaging in a physical altercation with another teacher (Hudson, 2002). Doyle also argued with cafeteria workers concerning food portions. During his third year, he became president of the local teachers' union (Ryan, 1988). The United States Supreme Court found his radio speech was protected but found the lower court erred and "should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct" (*Mt. Healthy*, 2008). As a result of the *Doyle* decision, an employee must now show "he or she has suffered an adverse employment action," the speech was of public concern, the "free-speech interest trumps the employer's interest in maintaining an efficient workplace," and the speech was the main reason for employee discipline (Hudson, 2002, p. 32). "The school can escape liability by demonstrating that it would have taken the adverse action anyway, even without the protected speech" (McNee, 2013, p. 1832). McNee (2013) refers to this as the "same-decision-anyway defense" (p. 1839).

Givhan v. W. Line Consolidated School District (1979). The time and place standards for public employees' First Amendment claims were defined in *Givhan v. W. Line Consolidated School District*. Givhan, a public school teacher, criticized her principal privately in his office concerning perceived discriminatory policies, and at the end of the year, her contract was not renewed. Her dismissal was reversed by the district court but reinstated by the Fifth Circuit. The United States Supreme Court reversed the decision once

more on the grounds that First Amendment speech is protected even if conveyed in a private setting. “A public employee does not forfeit his First Amendment protection against governmental abridgement of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly” (*Givhan*, 1979). The Court recognized the importance of the relationships among office staff as well. “When a government employee personally confronts his immediate superior, the employing agency’s institutional efficiency may be threatened not only by the content of the employee’s message but also by the manner, time, and place in which it is delivered” (*Givhan*, 1979). These standards are readily applied to the contents of one’s social media communication.

Rankin v. McPherson (1987). In *Rankin v. McPherson* (1987), McPherson, a public employee in the constable’s office, was fired after saying that she hoped the assassination attempt on President Reagan was successful. The Supreme Court found her speech was protected since it was related to a public concern under *Pickering* and was not related to her position in the office. The court then moved to determine if the state could prove that relationships were impaired to such a degree that the office could not function properly in accordance with the *Givhan* ruling. “Petitioners have not met their burden of demonstrating a state interest justifying respondent’s discharge that outweighs her First Amendment rights, given the functions of the Constable’s office, respondent’s position therein, and the nature of her statement” (*Rankin*, 1987). When applied to social media, the implications of this decision are numerous. First, one needs to consider the status of the employee within the organization. Employees with higher status may be held to higher standards than those whose position holds lesser influence. The court stated “some attention must be paid to the responsibilities of the employee within the agency” (*Rankin*, 1979); therefore, disciplinary

actions for speech against employees with little influence may not be upheld. Second, employers need to determine if there was any impact on the efficiency of the workplace and on the relationships necessary to conduct business. In this case, Rankin did not give consideration to this when considering his termination of McPherson's employment. If Rankin had been able to prove this, perhaps the outcome would have been different.

City of San Diego v. Roe (2004). In the case of *City of San Diego v. Roe* (2004), Roe was a policeman who was selling videos of himself stripping in a police uniform and engaging in sexual acts alone. He sold the videos on eBay under a fake name. The police department fired him, and the district court upheld that decision. Upon appeal, the Ninth Circuit ruled in favor of Roe, determining the speech was protected as a matter of public concern. The Supreme Court overturned the Ninth Circuit, saying this expression was not protected under the First Amendment and further defined public concern as "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication" (*City of San Diego*, 2004). This case is significant because it further defines the concept of a public concern.

Lane v. Franks (2014). *Lane v. Franks* is the most recent United States Supreme Court ruling concerning public employees' free speech rights. Lane worked for a youth program at a community college in Alabama. He discovered that Schmitz, a state representative, was on the payroll but not actually performing any work. Lane terminated Schmitz's employment. Franks, the community college president, terminated twenty-nine employees, including Lane, and Lane sued Franks because Lane believed the termination was in retaliation for his testimony against Schmitz. The Supreme Court unanimously decided that his testimony was considered citizen speech since he had a duty to give "truthful sworn

testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities" (Lane, 2014, p. 8). This case gives further clarification to the *Garcetti* test. With this ruling, the Court provided protection for employees from retaliation by their employers when upholding their sworn oath in the court.

Free Speech Court Cases Involving Students' Free Speech

Because of the limited number of court decisions specifically addressing teacher free speech issues, precedents from students' cases involving free speech have been used. This section will discuss those cases that have been commonly cited by courts when deciding cases for school employees and their right to free speech. With the popularity of students' use of social media, it is important to understand the implications and limitations of its use and how it might impact future school policies and operations.

No specific federal statutes currently exist that allow administrators to discipline students for online behavior; however, there are some common themes among student speech cases that provide guidance for school administrators (Conn, 2010). Student speech can be restricted when it is likely to disrupt the school (*Tinker v. Des Moines*, 1969). Educators can exercise control over student speech in school-sponsored activities (*Hazelwood v. Kuhlmeier*, 1988). The implication of these rulings is that "if these rules can be applied to students' off-campus speech, it is possible that some courts will apply them to teachers' off-campus speech" (Papendrea, 2012, p. 1628).

Tinker v. Des Moines School District (1969). The famous case of *Tinker v. Des Moines School District* (1969) was directly related to students' free speech rights. Students wore black arm bands to protest the Vietnam War and were suspended (Schroeder, 2013). The Supreme Court ultimately ruled that the wearing of the armbands did not cause a

substantial disruption in the school environment and did not infringe on the rights of any other students. The Court stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker*, 1969). *Tinker* has been used in teacher free speech cases because the school authorities must prove that the speech substantially interfered with the function of the school (Schroeder, 2013).

Hazelwood School District v. Kuhlmeier (1988). *Hazelwood* (1988) has been sparingly used to regulate teacher speech within the school since it dealt specifically with the regulation of student speech as part of a school-sponsored activity. A school administrator excluded two articles from the school newspaper because the articles potentially violated the privacy rights of students and dealt with pregnancy and divorce, which the principal believed was not appropriate material for all students. The Supreme Court upheld the school administrator's decision on the basis stating "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (*Hazelwood,* 1988). Although it dealt with the editing of a student publication by school administrators, this decision has been broadened to include teachers' speech when it is part of school-sponsored, public-funded events (Delgado, 2013; McNee, 2013; Schroeder, 2013). It is important to note that *Hazelwood* does not require any balancing (Papandrea, 2012). When applied to teacher use of social media, this ruling would allow administrators to monitor and regulate any social media that is used for academic purposes even if the site contains a mixture of personal and professional material.

Bethel School District No. 43 v. Fraser (1986). Precedent for on-campus student speech was more clearly defined in *Bethel School District No. 43 v. Fraser* (1986). A student delivered a speech with strong sexual connotations at a high school assembly. The Court upheld the school's discipline and stated schools can regulate student speech that is lewd and obscene on campus. "We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech" (*Bethel,* 1986); thus, any lewd or sexually explicit social media speech where students are present online may be cause for employee discipline. Again, when school employees mix personal and professional content, the courts appear to favor the ability of the employer to discipline the employee for inappropriate content.

Morse v. Frederick (2007). In *Morse v. Frederick* (2007), a student held a sign saying "Bong Hits 4 Jesus" during a school-sponsored viewing of the Olympic torch as it passed the school (Delgado, 2013, p. 17). The student was suspended, and the Supreme Court upheld the student's suspension because it was a school-sponsored event (Conn, 2010). The decision stated "the governmental interest in stopping student drug abuse allows schools to restrict student expression that they reasonably regard as promoting such abuse" (*Morse,* 2007). In *Morse,* the Court was concerned about a message that promoted drug use, which was contradictory to the school's educational goals and could be a potential safety concern; thus, messages that interfere with school safety may not be protected speech (Willard, 2011).

Thomas v. Board of Education (1979). *Thomas v. Board of Education* (1979) is a case where students published and distributed a parody of the school newspaper outside of school. The publication contained articles that were sexual in nature. The school administration suspended the students for five days. A district court upheld the suspension,

and the students appealed. The Second Circuit reversed the lower court and determined that the disruption to the school was minimal and subsequently reinforced the notion for school administrators that "the arm of authority does not reach beyond the schoolhouse gate" (*Thomas*, 1979). If applied to social media, this case may provide some protection for employees who profess unpopular but not overly disruptive opinions outside the school environment.

With these court cases, the courts have laid a basic foundation for the framework of future litigation concerning the school system's right to regulate the speech of its employees. These types of cases are becoming more and more prevalent with the explosive growth of social media. Willard (2011) noted, "If the material is considered offensively lewd or indecent, the courts generally apply the *Fraser* standard. Otherwise, the courts have applied *Tinker*" (p. 93).

True Threats

Teachers and school administrators may be the targets of online threats by students, their parents, or even other school employees. A review of current literature does not reveal any cases where school employees made threats through social media against teachers or administrators, but multiple cases are found where students made threats against school employees or other students; therefore, such a scenario involving adults is not unrealistic, and applying student precedent to school employee conduct is worth considering.

The idea of what constitutes a true threat against a school employee should be clearly defined in a social media policy. The First Amendment does not protect all types of speech.

> Free speech protections do not extend . . . to certain categories or modes of expression, such as obscenity, defamation, and fighting words. The government is

> permitted to regulate speech that falls within these categories because the speech is of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Doe v. Pulaski County School District*, 2002, p. 622, internal citations and internal quotation marks omitted)

For example, political rhetoric at a rally may be protected even when the words are inflammatory because the courts have recognized that such words are meant to stir political feelings and not incite violence (Rothman, 2001). Speech that is intended to produce fear and intimidation in its target is not protected as "these emotional and physical effects outweigh free speech concerns and demand that threatening speech be limited" (Rothman, 2001, p. 291). The Supreme Court has stated that consideration must be given to the political context of the speech. This is aligned with the ruling in *Givhan* that established the content, time, place, and manner of speech concerns. The Court has ruled that threats against individuals are not likely to be protected (Rothman, 2001). According to Rothman (2001), speech that was never intended to reach the target should receive protection. This may cause social media users to set their privacy settings in such a way that access to their online posts are highly restricted and may, therefore, receive a greater degree of protection.

As discussed earlier, not all speech is protected by the First Amendment. In the school environment, school officials can censor student speech that creates a substantial disruption in the school environment (*Tinker v. Des Moines Independent Community School District*, 1969), is profane or vulgar (*Bethel School District No. v. Fraser*, 1986), or that promotes illegal drug use or other activities that are in conflict with the mission of the school (*Morse v. Frederick*, 2007).

In addition, it is well settled that individuals do not have a constitutional right to engage in speech that constitutes a true threat to another person. This principle has been applied in the school environment, perhaps most notably in *Doe v. Pulaski County School District* (2002). In that case, J.M., a seventh grade student "drafted two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder" his former girlfriend, whom the court identified as K.G. (p. 619). Although J.M. did not deliver either message directly to K.G., another seventh grader obtained a copy of one of the messages and delivered it to K.G. Ultimately, school authorities learned of the letter and expelled J.M. for the remainder of the school year. He then sued, claiming a violation of his First Amendment right to free speech. Although a federal district court ruled in J.M.'s favor, that decision was reversed in an en banc decision of the Eighth Circuit Court of Appeals. In reaching its decision, the appellate court ruled that J.M.'s speech constituted a true threat and was not constitutionally protected. The court defined true threat to be "a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another" (p. 624).

J.M. argued that he had not delivered his threatening message to K.G., and thus, he could not be punished for writing it; however, the court rejected this line of reasoning, pointing out that J.M. clearly intended for K.G. to know about the letter. Moreover, the court ruled that the J.M.'s message was indeed threatening and that a reasonable person would interpret it as such. As the court pointed out, "the letter was extremely intimate and personal, and the violence described in it was directed unequivocally at K.G." (p. 625). In the court's view, "a reasonable recipient would have perceived J.M.'s letter as a serious expression of an intent to harm K.G." Thus, the letter was a "true threat," and school authorities did not

violate J.M.'s First Amendment rights when they expelled him based on the letter's threatening content (p. 626).

In other cases, school administrators have disciplined students for speech that authorities considered to be true threats; however, courts have usually been content to evaluate the speech under *Tinker's* "substantial disruption" standard without addressing whether the speech also constituted a true threat. For example, in *Bell v. Itawamba School Board* (2015), the Fifth Circuit Court of Appeals upheld a Mississippi school district's disciplinary action against a high school student who had composed a rap song that contained descriptions of violent acts directed at two coaches, which the student later posted on social media. Bell was a high school student who posted a rap song first on Facebook then on YouTube that alleged that two coaches had improper relationships with female students and threatened action against them with phrases "hit you with my ruger," "going to get a pistol down your mouth," and "get no mercy." Although the rap song was composed off campus without the use of any school resources, the court ruled that school officials reasonably forecasted that the song would cause a "substantial disruption" at the school against two named coaches, based on the song's threatening and intimidating language (p. 400). Thus, the student's lyrical expression could be censored under the *Tinker* standard without the necessity of determining whether the song's language constituted a true threat.

Likewise, the Second Circuit Court of Appeals concluded that a student's instant messaging icon showing a figure pointing a pistol accompanied by threatening words toward an English teacher could be censored under *Tinker's* substantial disruption standard without the need to conduct a "true threat" analysis.

Although some courts have assessed a student's statements concerning the killing of a school official or a fellow student against the true threat standard," the court observed

> We think that school officials have significantly broader authority to sanction student speech than the [true threat] standard allows. With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker v. Des Moines Independent Community School District.* (*Wisniewski v. Weedsport Central School District*, 2007, p. 38, internal citations and internal punctuation omitted)

Social Media and Academic Freedom

In the world of higher education, most universities agree that professors enjoy a right to academic freedom in the classroom that gives them a certain amount of discretion to make decisions about how to teach their courses. This right, however, is subject to several restrictions. For example, college instructors have no First Amendment right to curse at their students (*Martin v. Parrish*, 1986). They do not possess a constitutional privilege to advance their religious beliefs in the classroom of a public university (*Bishop v. Aronov*, 1991) or to press their homophobic views on students (*Piggee v. Carl Sandburg College*, 1996).

Moreover, an influential decision by the Fourth Circuit Court of Appeals ruled that professors at a public university enjoy no free-standing constitutional right to academic freedom, although they enjoy the same First Amendment protections that other public employees retain as outlined in the U.S. Supreme Court's *Pickering* decision. In *Urofsky v. Gilmore* (2000), six professors employed at public colleges and universities in Virginia challenged a Virginia statute that restricted state employees from accessing sexually explicit

materials on computers owned by the state. The professors argued that they had a constitutional right to academic freedom under the First Amendment that prohibited the state of Virginia from enforcing statutory restrictions on their work computer. The court acknowledged that the professors enjoyed the right to express their views as citizens on matters of public concern as outlined in *Pickering*, but in the court's view, the professors were not expressing themselves as citizens when they accessed computers owned by their state employers. On the contrary, the court pointed out, "[t]he speech at issue here--access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties--is clearly made in the employee's role as employee" (pp. 408-409). Since the statute did not affect the professors' speech in their capacity as citizens speaking on matters of public concern, the law did not infringe on their First Amendment rights.

The Fourth Circuit court then examined the professors' argument that they enjoyed an independent constitutional right to academic freedom that gave them greater First Amendment protection for their speech than the right enjoyed by other public employees under *Pickering*. After engaging in an extensive analysis of federal jurisprudence on the issue of academic freedom, the court concluded that the U.S. Supreme Court "has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so" (p. 414). On the contrary, "to the extent [the Supreme Court] has constitutionalized a right of academic freedom at all, [it] appears to have recognized only an institutional right of self-governance in academic affairs" (p. 414). In other words, assuming that academic

freedom is a constitutional right under the umbrella of the First Amendment, that right extended to universities to govern their own affairs, not to individual university professors.

More recently, federal courts have applied the Supreme Court's *Garcetti* opinion to rule that K-12 school teachers have no First Amendment protection when speaking in their official capacities as school employees (*Williams v. Dallas Independent School District*, 2007). The most recent decision in this line of cases is *Brown v. Chicago Board of Education* (2016), in which the Seventh Circuit Court of Appeals affirmed the right of a school board to suspend a teacher for using a racial epithet, which the teacher uttered in the context of an informal teaching exercise designed to impress upon the students that the use of racist language was never acceptable. Under *Garcetti*, the court ruled the teacher had no valid constitutional argument because he was clearing speaking in his official capacity as a school employee. The court indicated it did not agree with the school board's action, quoting Justice Antonin Scalia's observation that some conduct was "stupid but constitutional" (Westlaw pagination *1).

In summary, although K-12 teachers may avail themselves of a constitutional right to speak out as citizens on matters of public concern, that right does not extend to any expressions that they make in their official capacity as employees. Moreover, they enjoy no independent constitutional right to speak under the concept of academic freedom.

Cyberharassment by Students

Student behavior in cyberspace is becoming increasingly problematic. "Cyberharassment and cyberthreatening of teachers and administrators have also reached worrisome proportions. Female students, once lagging in technology savvy behind their male counterparts, have become among the most vicious perpetrators of technological bullying and

harassment" (Conn, 2010, p. 91). By 2009, forty-one states had anti-bullying laws. Though most students use social media to communicate with their friends, others have used it to retaliate against teachers, administrators, and their peers (Conn, 2010). Students have created fake social media profiles for teachers and school administrators, but "educators often find themselves on the wrong side of the First Amendment" when seeking to discipline students for this behavior (Conn, 2010, p. 89). Such activities become difficult to regulate since they take place outside the school.

Decisions in cases involving students creating fake profiles for administrators seem to favor the students' right to free speech. In *Layshock v. Hermitage School District* (2011), a student created a fake MySpace profile with the principal's picture on it. Comments purportedly made by the principal on the site discussed drug and alcohol use and sexual comments, such as "big blount," "big keg behind my desk," and "big hard-on" (*Layshock*, 2011). Most students at the school knew about the profile and even accessed it at school. Layshock was suspended and ordered to attend the alternative school for the rest of the year. During litigation, the district failed to show that a substantial disruption occurred. The Third Circuit affirmed the lower court's ruling, and Layshock returned to his regular school (Conn, 2010). "We hold that, under these circumstances, the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline" (*Layshock*, 2011).

The case of *Draker v. Schreiber* was decided by the Texas Court of Appeals. Two students created a fake online profile of their administrator that included a picture taken from the school's website and the administrator's personal information. Comments supposedly made by the administrator were sexually explicit. The principal sued for alleged intentional

emotional distress. After losing at the district court, she amended her claim since she had lost for defamation and negligence, but the appellate court affirmed the lower court decision to dismiss her claim (Conn, 2010). If she had not amended her claim, she may have been successful at the appellate court.

In *A.B. v. State* (2008), a student's friend created a fake principal profile where the student used profanity to protest the principal's stance against body piercings. She then created another personal page for others to post their opinions where she continued her personal attack against the administrator. Local law enforcement "instituted delinquency proceedings against her for what would have been, if she were an adult, felony harassment" (Conn, 2010, p. 95). The state did not meet its burden of proof for intentional harassment, and the topic was considered an issue of public concern. The lower court's decision supporting six counts of harassment charges against the student was reversed (Conn, 2010).

There are a few cases where the school's administration was successful. In *Doninger v. Niehoff*, a student was denied the opportunity to run for senior class secretary because of negative posts about her principal on her personal blog. The court said it was reasonable to assume the student's communications would cause a disruption at the school, and running for office is not a right but a privilege (Conn, 2010).

In the case of *Wisniewski v. Board of Education of the Weedsport Central School District*, a middle school student was suspended after posting a picture showing a bullet passing through his English teacher's head with the caption "Kill Mr. VanderMolen" (Conn, 2010, p. 93). The court upheld his suspension since it could disrupt the school (Conn, 2010).

Kowalski v. Berkeley County School Board (2011) is a case where Kowlaski, a high school student, created a MySpace page that accused a fellow classmate of having herpes.

She created the site off campus, but the audience for the site consisted of mostly students and was accessed from the school at an afterschool class. The targeted student, Shay, and her parents complained to the school administration who ultimately suspended Kowlaski from school for five days and from social events for ninety days. The Fourth Circuit upheld the school's actions and stated the school had adequately notified Kowlaski of the policies against bullying and creating a disruption in the educational environment. This case sets a precedent essentially affirming the school's ability to discipline students, and potentially teachers, for off-campus social media activities that create an intimidating or hostile school environment.

Courts are careful to distinguish between discipline that is based on speech and that which is based on conduct. In *Requa v. Kent School District* (2007), a Washington high school student received a forty-day suspension when he took video of a teacher without her knowledge and posted it on a social media site. Students in the video were shown making vulgar gestures to the teacher when she was not looking. The student's suspension was upheld because his conduct violated the school's electronic use policy and sexual harassment policy and was not based upon speech (Conn, 2010).

Current Social Media Policies

The need for a specific social media policy detailing the school district's expectations for proper teacher-student interaction has become very apparent (Puzio, 2013). Such policies should be written clearly. "Generally, the more vague and expansive an employer's social media policy's prohibitions regarding employee speech, the more likely they will be considered to be unlawfully overbroad" (Liebler & Chaney, 2014, p. 6). This is one argument currently being fought in West Virginia's Kanawha County School District. The overly broad

policy is being challenged by the American Civil Liberties Union of West Virginia and the American Federation of Teachers. They contend that the policy currently under review would give school administrators access to any device brought onto the school campus, even those of guests attending an event at school without just cause (Quinn, 2016).

Districts have employee conduct policies that provide general guidelines for proper teacher-student relationships, but few policies explicitly extend into the realm of social media. Districts have developed electronic communication policies that prohibit or severely limit teacher-student communications, but these policies do not necessarily apply to the use of social media on a teacher's personal, off-duty time (Papandrea, 2012). Prohibiting teacher-student interaction is problematic because speech on social networking websites can trigger the First Amendment freedom of speech along with the freedom of association. Resolving the First Amendment issue by restricting association only shifts the problem to a different constitutional right. (McNee, 2013, p. 1846)

Early policies were often created in response to a specific event. In Missouri, the Amy Hestir Davis Student Protection Act, or Missouri Facebook Law, was created as a result of an inappropriate relationship between Ms. Davis, a junior high student, and an art teacher that lasted over a year. The conduct happened outside of school and did not involve the use of social media, but social media was included in the legislation. The Act required school districts to create policies for communication between students and teachers. It prohibited the establishment of internet sites where teacher-student interactions were not visible to school administrators and parents (Baez & Caulfield, 2012). It allowed school districts to share employee information and "held school districts liable for damages if they failed to disclose any actions of sexual misconduct in a reference request from another school district" (Baez &

Caulfield, 2012, p. 3). The Missouri State Teachers Association (MTSA) sued, stating the law violated teachers' freedom of speech rights. MSTA also claimed the law was too broad and violated due process, violated constitutional liberty rights by prohibiting family contact, and violated freedom of association (Decker, 2014). When applied as written, it prevented parents who were teachers from communicating with their children, and teachers who take part in church and civic groups would be prohibited from contacting members who are students (Delgado, 2013). A judge granted a preliminary injunction. The bill was later revised, and some sections were repealed (Baez & Caulfield, 2012).

A brief overview of state policies shows a variety of laws across the nation. Most policies have focused on deterring employees from engaging in speech or displaying behaviors that would upset the school environment; however, policies fluctuate widely due to the variance of community standards (McNee, 2013). Ohio passed a policy similar to Missouri that prohibited teacher-student communication on non-district accounts, but the Ohio union supported it as a means to protect the teachers. Massachusetts passed legislation that prohibits friending between teachers and students and distributing personal phone numbers (Decker, 2014). An Idaho statute restricts the content of teacher-student communication on social media to school-related matters. Pennsylvania's policy restricts teachers from engaging in activities that "jeopardize the professional nature of the staff-student relationship" (Baez & Caulfield, 2012, p. 5). Such a vague policy may cause teachers to refrain from using social media for fear that they may unintentionally violate the policy.

Most current policies require all teacher-student communication to occur through the school email system. Elmbrook School District in Wisconsin became one of the first school districts to ban all teacher-student communication online unless it is done through a district-

approved site (Estrada, 2010). The district further forbids friending students on social media and restricts all electronic communication to school-related issues (Papandrea, 2012).

Most policies do not outline clear consequences for improper online behavior (Foulgar et al., 2009). “Districts should adopt permissive policies that do not attempt to extend the law, but instead clarify the existing legal limits surrounding employee social networking” (Decker, 2014, p. 12).

Louisiana Revised Statutes. No specific social media policy exists in the Louisiana Revised Statutes; however, there are several policies from which social media guidelines may be derived. La. R.S. 17:81 subset B, “General Powers of Local Public School Boards,” requires districts to adopt policies that define electronic communication and must include social networks. It specifies that communication must be educationally related, must be directed through a service provided by the school system, and prohibits all other forms of communication, including family members unless otherwise specified in the policy. It requires districts to adopt a protocol for reporting contact that is outside the permitted communication. It gives the school principal discretion to allow employees to contact individual students or groups of students through an alternative service method as long as the employee has written permission from the administrator to use that site. The required policy must include the following: consequences for employees guilty of breaking the policy, a means to inform parents of the policy, a procedure for informing employees of the policy, and a procedure for parents to opt out of communication that is private or not school-related. This went into effect July 1, 2009.

La. R.S. 17:100.7 (1999), titled “Internet and Online Sites; Access by Students and Employees; Exceptions,” acknowledges some academic freedoms for educators. The main

focus of this statute is to prohibit students from accessing sexually explicit material and other harmful material through an online source; however, the inclusion of subparagraph C recognizes that employees and students can have "unfiltered or unrestricted access to the Internet or an online service for legitimate scientific or educational purposes as determined and approved by the employing governing agency."

In accordance with La. R.S. 17:280 (2012), schools must provide students with yearly, age-appropriate internet and cell phone safety education beginning in the third grade. This policy could easily be extended to incorporate social media safety.

Rapides Parish School District Perspective. At the local level, a thorough review of the policies of the Rapides Parish School District reveals that social media policies are not explicitly stated. The district's electronic communication policy, labeled GAMHA, mirrors the requirements of R.S. 17:81 (Rapides Parish School Board, *Electronics*, 2012). Expectations are implied in other policies. Professional expectations concerning the use of electronic resources can be found in policy IFBGA, Internet Safety and Technology. It states that network users must use technology in ways that are "efficient, ethical, and legal" (Rapides Parish School Board, *Internet*, 2012). It also restricts the use of electronic technology to educational business. Ethics and professional conduct are addressed in other documents, such as employee conduct policies, contracts, and employees' job descriptions, but none of these documents specify the proper use of technology, expectations for social media communication with students, or penalties if these expectations are not followed. The teacher's job description includes the expectation for teachers "to observe standards of conduct inside and outside of school, demonstrating integrity and dependability, setting a

desirable example for pupils and avoiding any violation of school rules" (Rapides Parish School Board, *Elementary,* 2012).

Need for professional development

Preservice and inservice teachers need professional development to understand the limits and expectations of behavior on social media. Teachers must become aware of the potential professional pitfalls concerning their use of social media and the need to be responsible for the content and its impact on their professional lives. "By creating a social networking profile, a teacher assumes the risk of exposure to students due to hackers" (Estrada, 2010, p. 287). Teachers need to understand that it is important to utilize the privacy settings on social media sites and thereby limit the audience that views the comments, pictures, and postings (Decker, 2014; Delgado, 2013; McNee, 2013). "Even though individuals choose to make their accounts private with no intentions of making their information public, they need to assume that the information will be accessible to the rest of the world because the items have been posted on the internet" (Sluder & Andrews, 2010, p. 75). Employees must understand that personal speech may not be protected and may subject them to disciplinary action, and when joining social network sites, "users may have limited awareness of giving up these rights when joining these networks" (Foulgar et al., 2009, p. 17). "Even with the best privacy settings, someone may share a post with others which would make information public that the creator intended to be private" (McNee, 2013, p. 1836). When settings limit access to users' information, some courts have recognized certain levels of privacy restrictions on a social network site are the same as having a direct conversation with someone outside the workplace (McNee, 2013).

Policy guidelines

Specific information concerning the limitations of free speech and the possibility of discipline should be addressed in school district policies (Russo et al., 2010). When using social media, teachers find themselves in the perplexing situation of determining what speech is acceptable and what speech may result in disciplinary action. When teachers do not know the limits of their protected speech, they may decide not to comment on social media, thereby causing a chilling effect (McNee, 2013). The chilling effect doctrine is defined as:

> laws or practices that discourage the exercise of a constitutional right, often occurring when vague or overbroad legislation causes individuals to refrain from expression protected under the First Amendment because the individuals are unable to determine precisely what expression is permissible and what expression is proscribed. (Delgado, 2013, p. 6)

In the absence of proper teacher-student communication guidelines, teachers and school administrators have no guidance as to the specific professional expectations and limitations of off-campus communication, especially as it relates to the use of social media. Some teachers may choose to avoid it altogether; therefore, regulations and restrictions must be clearly defined to avoid the chilling effect (Delgado, 2013). As an unintended consequence, the chilling effect may discourage college students from pursuing a career in education, thereby lessening the pool of quality applicants (Baez & Caulfield, 2012).

Schools are not allowed to discipline a teacher who espouses an unpopular opinion outside the workplace for that reason alone. The school may, however, intervene "when a teacher, in connection with such ideologies which are unacceptable to the mainstream of the community, becomes involved in activities which are brought to the public's attention"

(Reynolds, 1981, p. 695). In an effort to distinguish between an employee's personal opinion and those reflective of the employer, some employers' social media policies require employees to include a statement on their personal social media accounts that states the employee's opinions are his own and are not reflective of the company (Liebler & Chaney, 2014).

The use of social media may be considered part of the curriculum, and curriculum choices are employment-related issues and not a matter of public concern (Papandrea, 2012). The 1971 case of *Ahern v. Board of Education* contributes to this discussion as it clarified the right of the employer to govern the content that the teacher addressed during instructional time. In this case, the teacher continued to discuss a situation at the school during instructional time that was not related to economics, the subject for which the teacher had been hired. A substitute had slapped a student, and Miss Ahern used profanity to describe the teacher and helped organize the students to take action. She was discharged on the grounds of insubordination for continuing to discuss the situation with students after explicitly being told to stop. "The asserted state interest which justified the curtailment of free speech was faculty harmony" (Reynolds, 1981, p. 13). This case contributes to the discussion of the use of social media as it established the limitation of free speech rights when the speech impacts faculty relations and includes subject matter outside the scope of the teacher's job.

Clarifying the boundaries and benefits for employers under *Pickering* will allow employers to know what, if any, discipline is appropriate for employees who express themselves on social media (McNee, 2013). Policies should clearly define the terms used. They must distinguish between work and non-work sites. Defining the standard for disruptions is critical. Disruption may be defined simply as "students refusing to take a

teacher's classes, parental complaints that overwhelm the school's administrative staff, and bad publicity" (Papandrea, 2012, p. 1623). It could be defined as receiving a specific number of student complaints. McNee (2013) suggests that the event should cause an actual disruption instead of just predicting the possibility of one.

Policies which originate from the state level must provide clear guidelines for schools concerning the application of social media communication laws (Delgado, 2013). Parents should have the right to give permission for the level of contact from teachers, and districts must determine consequences if policies are not followed (Baez & Caulfield, 2012). School districts should create policies with the objective of avoiding litigation over disciplinary actions against employees (Williamson, 2013).

Model legislation would clearly define appropriate guidelines for all teacher-student communications and would not ban its use. Too much oversight and regulation of the use of social media threaten to discourage teachers from utilizing it to enhance instruction. School systems should provide a means for electronic communication and a means for recording private communication. Model policies would only restrict as much teacher speech as necessary (Delgado, 2013). Consideration would be given to the reasons behind the speech in a "motive analysis" (Ryan, 1988). A person's reason for having a social media site may determine whether the information is protected as freedom of speech or freedom of association (Estrada, 2010). Social media policies should clearly explain "what is expected, what is prohibited, and what they will be accountable for through a social-media policy" (Rudolph, 2013, p. 1). Policies should contain separate sections which clearly describe online behavior expectations of students and employees (Reynolds, 2013). Reynolds (1981) suggests that "[a] teacher's criticism should only have sanctions applied against it when the

criticism is so malicious and untrue that his superiors are in a position of complete derogation and are unable to function in the community" (p. 689).

Policies should also specify the consequences of violating the institution's social media policy. Policies should include a section which states that employees should refrain from posting to social media networks during working hours (Smith, 2011). They should clearly outline due process procedures for those who are accused of inappropriate behavior. Districts should also require employees to state on their personal websites that the opinions expressed on the site belong to the employee and do not reflect the district (Howard, 2013).

Discussion

The court cases involving freedom of speech for teachers, public employees, and students give school districts a basic framework from which to draw when creating a social media policy and determining if employees have engaged in protected speech. The cases and situations addressed in the literature serve as a springboard from which states and districts may write their policies. Additionally, school and district administrators would benefit from reading the cases and the courts' rulings to determine when an employee's speech may be protected and when that employee may be disciplined for comments made on private social media.

Determining if Speech is Protected. An analysis of applicable United Stated Supreme Court cases yields a set of steps that administrators should follow to determine if the employee has engaged in protected speech. Although this research seeks to determine limits on social media, these guidelines are applicable in other communication situations as well.

When analyzing the Supreme Court cases that would serve as guides for school and district administrators considering discipline against an employee for speech on social media, Figure 2 is a guide that takes into consideration the leading Supreme Court decisions. Although *Pickering* is the seminal case for analyzing the free speech rights of public employees, many cases have refined and further defined its application and impact. Other cases have added additional layers that must be considered as well before determining if the speech is protected or not.

The first step is to determine if any adverse employment action will occur. If not, under *Doyle*, there is no problem or grounds for legal action by the employee. If an adverse employment is likely to occur, then one must apply *Garcetti* and determine if the speech was made pursuant to the public employee's official job duties. If the speech is outside the scope of the employee's normal job or if it is motivated by self-interest, a personnel gripe, or negatively impacts the work environment, then under *Garcetti* and *Connick*, the speech is not protected. If the speech is not part of the employee's normal employment, then one must apply *Pickering* and decide if the person has inside knowledge of the subject due to his employment. If insider knowledge exists, then the speech is not likely protected under *Pickering.* If the person does not have inside knowledge, then the speech will be analyzed further according to *Pickering.*

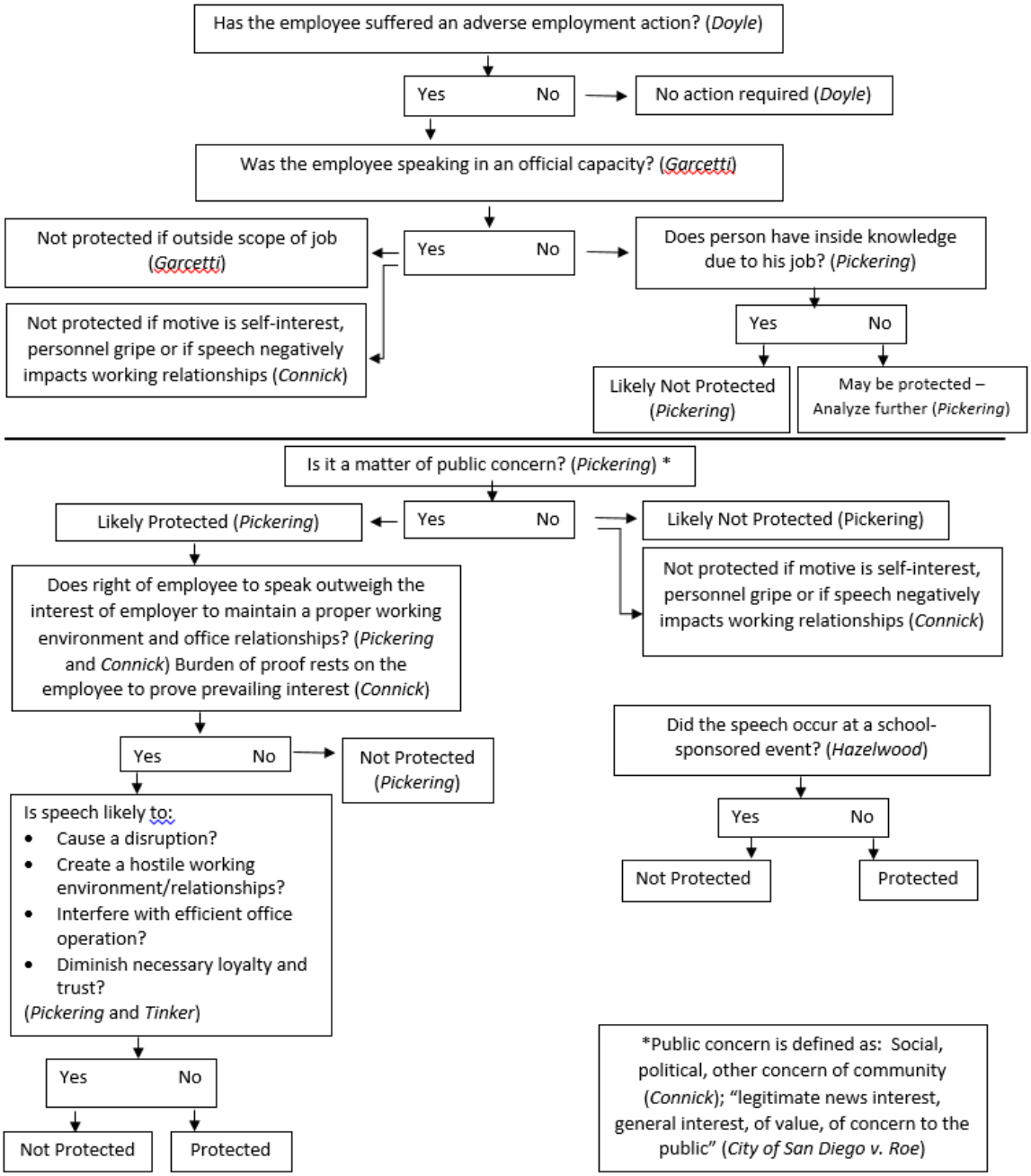

Figure 1. Flow chart for administrators to use when determining if an employee's speech on social media is protected.

The next big hurdle for school districts and administrators would be to determine if the speech is a matter of public concern as originally defined by *Pickering* and more clearly

defined by *Connick* and *Roe*. If the speech is not related to a public concern or is motivated by self-interest, a personal grievance, or has a negative impact on the working environment, then the speech is not likely protected when evaluated under *Pickering* and *Connick*. If the speech includes a topic of public concern, it may be protected but must be further analyzed. First, one would apply the *Pickering* and *Connick* standards to determine if the right of the employee to speak outweighs the interest of the employer to maintain a proper working environment. The burden of proof rests upon the shoulders of employee under *Connick*. If the employee does not prove that his interest outweighs that of his employer, then the speech is not protected according to *Pickering*; however, if he proves his right to speech outweighs the interest of the employer, then the speech is analyzed further, applying the standards of *Pickering* and *Tinker*. If the speech is likely to cause a disruption to the workplace, create a hostile working environment, strain necessary working relationships, interfere with office operations, or diminish the loyalty and trust necessary for the efficient functioning of the workplace, then the speech is not likely protected. If the speech does not cause any of these conditions, then the speech is likely protected.

There are a few additional considerations that are necessary before determining if an employee's speech is protected. Under *Hazelwood,* speech made by an employee at a school-sponsored event is not likely protected. Consideration should be given to the content, time, place, and manner of the speech according to the *Givhan* standards. The employee's position and level of influence should be considered. If the person's speech is likely to influence many employees, then the speech may not be protected under *Rankin*. If the employee mixes personal and professional matters on the social media site, then the speech is not likely protected under the *Spanierman* ruling. If the site's content is strictly personal, then the

speech is likely protected. Lastly, if the administrator is using the online speech as one of many reasons to terminate an employee, then the administrator should consider if the employee would still be eligible for termination if the speech had not occurred. If the administrator can prove a "same decision anyway" defense, then the administrator should determine if the resources necessary to prove the speech was not protected are worth the effort.

Summary and Interpretations

The use of social networking sites has the potential to "break down time and space barriers to interaction, expanding means of interacting with each other, with content, and with other communities" (Bartow, 2014, p. 59). It is important to engage students through avenues that are most accessible and engaging to them, and social media is a useful platform to reach many school stakeholders instantaneously. Schools cannot ignore the fact that its employees are using social media for personal use and to communicate with students; therefore, schools must provide a framework to which these interactions must adhere (Bartow, 2014). As school districts seek to balance the needs of the teachers to reach their students against the employees' First Amendment speech rights while respecting teachers' academic freedom, it is important that policies grant sufficient flexibility to allow communication that is appropriate and professional and to provide protection to all members of the school community. When creating a policy, it should contain specific restrictions so that it is not overly broad. When teachers use social networking for educational purposes, one can reasonably consider this an extension of the classroom giving schools and districts some authority to control their use. Teachers' views expressed on social media may easily be

mistaken as representing the views of the employer; therefore, employees should clearly define when they are speaking as professionals and when their speech is personal.

Currently, the literature concerning the rights of school employees to express themselves through social media is limited. This limitation exists due to the lack of court cases specifically addressing this issue. The Supreme Court has declined to hear several cases that would have given school districts and its employees more direction on this issue, but this lack of direction leaves both parties dependent upon a limited number of lower court rulings.

Historically, courts favored the right of the employer to discipline its employees for speech that the employer felt was inappropriate; however, that mood shifted to give greater consideration to the free speech rights of teachers. This favorable climate does not come without limits. Teachers enjoy great latitude in their speech when it involves matters that are of public concern and when they speak as private citizens; however, an interesting finding worth noting is when the subject matter involved intentional use of sexually suggestive or explicit material, the courts upheld the disciplinary actions of the districts without exception. Locally, current examples of public concern may include the debate over Common Core State Standards, the state teacher evaluation system, and curriculum choices of the district. The speech may be limited when it impacts the relationships in the workplace, causing the environment to be hostile or inefficient.

Conclusions

Although the United States Supreme Court has offered some guidance through *Pickering*, *Connick*, *Garcetti*, *Hazelwood*, and even *Tinker*, the issue of establishing clear boundaries for teachers' First Amendment speech will continue to be shaped by the courts as more challenges are made. Schroeder (2013) contends that districts' broad, sweeping bans on

student-teacher social media interaction after school hours will likely be found unconstitutional. O'Donovan (2012) explains that "a teacher would never be allowed to sit alone in a classroom with a single student, and shut the door and close the blinds so that nobody could see them" (p. 3). School districts must create policies that keep this from happening in a virtual environment, too.

Policies should require a clear nexus between the speech and a disruption to the school environment. The definition of disruption should also be clearly defined to include any action which disrupts the physical learning environment of students or causes a student to feel threatened or unwelcomed or inhibits the ability of a teacher to deliver instruction. Policies should also include language that states the foreseeability of these actions may also lead to disciplinary measures.

The regulation of the use of social media by teachers for teaching purposes can be a slippery slope for principals to navigate. "Most school leaders received their professional training well before the emergence of any level of insight and information related to these issues" (Willard, 2011, p. 125). Training for principals on their limitations to govern the speech of their teachers is critical to ensuring that teachers' rights are protected and principals' role are clearly understood. Principals must be able to distinguish between acceptable and unacceptable online teaching methods and appropriate and inappropriate content. Principals should make these expectations clear to all teachers and inform teachers of the principal's right to monitor these interactions when they are related to school matters or content for which the employee is hired to teach.

Recommendations

A substantial gap exists in the research at this time due to the lack of relevant cases pertaining to teacher's use of social media, and until the United States Supreme Court agrees to hear such cases, school districts and lower courts will continue to rely upon the major cases discussed in this review. School districts have not kept pace with the explosive growth of social media and are left with little guidance on how, when, and even if they can regulate teachers' speech. Districts struggle to make policies which seek to address current and anticipated challenges to employee speech rights and to create policies which fall within their legal limits for employee discipline. Districts and states must have guidance that analyzes historical cases to create a specific social media policy instead of the current segmented and implied policies spread over various other policies, contracts, and job descriptions. States should also provide more guidance to districts and give them the autonomy to create social media policies to address their individual issues within a legal framework. Future research should focus on the creation of guidelines for the consideration of states and districts.

CHAPTER 3: METHODOLOGY

Using the information from this dissertation, school and district administrators will have a framework by which to evaluate employees' conduct on social media and determine what steps, if any, they may take to discipline an employee for online speech that administrators believe is inappropriate. This framework will prevent districts from infringing upon the free speech rights of its employees and will help them avoid costly legal proceedings.

The framework will be created by analyzing and synthesizing the results of research conducted according to the legal research methodology of the University of Southern California's (USC) Gould School of Law. Dobinson and Johns (2007) stress the importance of well-constructed, concise research questions that will ultimately guide the research. This research will include a study of relevant court cases and their influences on the policies of states and districts across the country. The questions to be answered are:

1. What limitations can school and district administrators place upon the free speech rights of public school employees?
2. Which Louisiana laws could aid in the development of social media policy in public schools?
3. What might a social media policy framework look like that would aid school and district administrators when considering disciplinary action with regard to employee conduct?
4. What are the characteristics of current social media policies in Louisiana?

This dissertation will provide a framework upon which districts and states can build a sound social media policy that can withstand legal challenges based on current court rulings.

The framework will also guide policy makers to avoid problems found in school-district policies that have been overturned by the courts. Chui and McConville (2007) state, "Research may also be driven by the policy considerations promoted by bodies such as law enforcement commissions to investigate social, political and economic implications of current and proposed legislation" (p.vii).

The cases to be analyzed will be systematically divided and studied according to their significance as displayed in the conceptual framework. The Supreme Court cases will be extensively analyzed since these cases carry the greatest influence across the nation. These cases will be limited to cases directly involving teachers or other public employees and free speech. The next category of cases to be analyzed will be those of the lower courts. Those cases will include teachers or public employees and free speech. The last category to be studied will be cases involving the free speech of students. Student cases do not have as much influence in determining the free speech rights of teachers as the aforementioned cases, but, in the absence of relevant teacher or public employee rulings, they have been used to decide cases.

Research Design

There are several types of legal research methodologies to consider. First, there is black-letter law research. Chui and McConville (2007) describe black-letter law as traditional as it "focuses heavily, if not exclusively, upon the law itself as an internal self-sustaining set of principles which can be accessed through reading court judgments and statutes with little or no reference to the world outside the law" (p.1). There is also empirical research and socio-legal studies. This type of research is more interested in observation and its ability to define and shape social issues. Lastly, there is international and comparative legal research,

which includes the study and comparisons of laws on a global scale (Chui & McConville, 2007).

The research approach applied to this dissertation will rely upon the legal research methodology of the University of Southern California's (USC) Gould School of Law. The research will be conducted from an academic stance rather than as an advocate. This research does not seek to prove or disprove a particular point but to analyze current court cases to provide support for the development of a framework for application in future situations. This five-step approach begins with analyzing the facts to identify the most important aspect of the issue or issues under review. The second step directs the researcher to review secondary sources. This step provides essential background knowledge of the topic and guides the researcher to primary sources. Step 3 states that the researcher should read primary source documents. The background knowledge gained in step 2 helps the researcher read and comprehend the primary documents. The fourth step states that the researcher must continue to search for new rulings that are relevant to the topic, for more current rulings which overturn decisions that were in place when the research began, and for decisions that further clarify the current rulings. The final step calls for wrapping up the research. This methodology is similar in style to the approach referred to by Chui and McConville (2007) as a doctrinal approach.

The methodology will utilize the principle of inductive reasoning. "Judges reason inductively, analyzing a range of authorities relevant to the facts, deriving a general principle of law from these authorities and applying it to the facts in front of them" (Dobinson & Johns, 2007, p. 21). This practice is further described as "an application of the inductive reasoning where the principle is gleaned from a detailed analysis of all relevant precedent"

(Dobinson & Johns, 2007, p. 21). This research seeks to clearly present the facts and applicable rulings to inform administrators of their limitations to discipline employees for their conduct on social media.

There are no ethical considerations related to human subjects since this research is devoted to the study and analysis of policies and court cases related to the use of social media by school employees, public employees, and students. No actual human subjects will be studied.

Step 1. During the preliminary analysis conducted in step 1, common themes and topics among cases will be identified and prioritized and will guide the research in step 2. The major themes will be used as research topics and search engine queries. Research will be conducted utilizing Google, Google Scholar, LexisNexis Academic, and various law journals. Searches will focus on court precedents, applicable state law, and current policies being used across the country.

From the literature review, trends will emerge concerning the free speech rights of public employees that will guide the research. First, one must determine if the speaker is speaking on a matter of public concern. This concept originated with the *Pickering* case and was clarified with subsequent rulings. A public concern means that the topic is of interest to the community at the time the speech is made. Second, the courts must determine if the interest of the employer to protect its reputation and ability to maintain a proper working environment outweighs the employee's right to free speech. Another consideration is whether the speech was made while the employee was acting in an official capacity. It should be noted that there are more student cases that directly involve the use of social media while

most cases involving teachers and public and school employees involve printed media; therefore, limiting the search to only social media would likely overlook relevant cases.

Step 2. The second step of the process requires the analysis of secondary sources. Secondary sources that discuss such landmark cases as *Pickering, Garcetti, Connick, Tinker, Hazelwood,* and *Fraser* will be searched to locate commentaries that may lead to other relevant cases and considerations for a policy framework. Phrases to be used in search engines include "social media and teachers," "teacher and free speech," "student free speech," "first amendment and teachers," "school employees' and free speech," and "free speech and teacher discipline." The electronic search for district policies will be a general Google search using the terms "school social media policy" and "district social media policy." Law journals to be used during step 2 include *Hofstra Labor and Employment Law Journal*, *Widener Law Review*, *Thomas Jefferson Law Review*, *North Carolina Law Review*, and *Journal of Law & Education.* Additional information will be gathered from educational journals and newspaper articles.

Based on information gathered during the literature review, the researcher will also search the websites of the national teachers' unions to see if they offer any guidelines to their members concerning their use of social media. The literature review suggested that unions do have some influence in social media policy development, though it is limited. The unions' points of view may assist the framework development by anticipating objections they have raised when other states and districts proposed policies.

Step 3. The third step of legal research methodology calls for the examination of primary legal documents. Research Guide for Law Students and Attorneys (2010) explains that this step assists the researcher in determining "which authorities are mandatory for your

research question and which are merely persuasive" (p. 3). This is important to the research to limit the influence and possible biases of the secondary source authors by examining the original language of the courts' decisions. These primary documents will be located in online databases and law textbooks.

In addition to the search engines listed in step 2, school district websites in Louisiana will be accessed to review policies relative to the topics uncovered in step 1. Additional topics may be found in the primary documents that were not initially discovered during the topic analysis step and secondary source review due to authors' bias or limitations of case analysis and may necessitate additional research.

Steps 4 and 5. Prior to the conclusion of the research, a final search will be conducted to determine if any relevant cases have been decided since the research began. If so, those cases will be analyzed according to the legal methodology outlined above. If not, the research will be concluded, and the dissertation will move into its final phase to analyze the information that was collected and to present possible areas for future study. The policy framework for districts will also be constructed and explained in this step.

Summary of Research Methodology

The research will utilize an academic approach to research methodology and will follow the five-step process of the University of Southern California's Gould School of Law. This process will locate relevant Supreme Court cases involving school employees and public employees and landmark cases concerning the constitutional rights of students. The searches will utilize predetermined key words that will be entered into search engines such as LexisNexis Academic, Google, and law journals. Primary source documents will be read,

new cases and rulings will be sought, and the final analysis will produce a framework for schools and districts to use as they create a social media policy for their employees.

Chapter Summary

Few guidelines exist to assist school and district administrators when they seek to discipline their employees for their speech or conduct on social media. This research will produce a framework that will guide them in making sound disciplinary decisions. The legal research behind the framework will be conducted using the University of Southern California's Gould School of Law methodology. The research will be limited to relevant United States Supreme Court cases involving K-12 school employees, public employee cases, and landmark student speech cases. Additional cases from Louisiana will be included.

> Ultimately law may be knowable but it is not necessarily predictable. Doctrinal research is not simply a case of finding the correct legislation and the relevant cases and making a statement of the law which is objectively verifiable. It is a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation. (Dobinson & Johns, 2007, p. 21-22)

CHAPTER 4: DATA ANALYSIS AND DISCUSSION

A thorough review of the literature and relevant cases suggests that states and districts have generally overlooked the importance of a social media policy for school employees. Administrators are operating under vague statutes and outdated policies that make employee discipline for social media conduct difficult, and employees do not fully understand the ability of the school's administration to reach into their personal social media use. This chapter seeks to analyze the relevant lower court cases and decisions to provide the framework for administrators to determine the characteristics a sound school employee social media policy may possess.

Teacher social media use decisions of lower courts.

There are other cases involving teacher speech across the country that offer some precedent for future litigation. Each unique case addresses a different aspect or approach to the application of the precedents set by previous court rulings as discussed in the literature review.

School-related communication with students through social networks is typically protected; however, if there is a mixture of personal and professional communication, that speech is not likely protected and can result in disciplinary actions (Williamson, 2013).

Spanierman v. Hughes (2008). *Spanierman v. Hughes* (2008) is an example of the application of several U.S. Supreme Court rulings by the United States District Court in Connecticut. Spanierman was a non-tenured English teacher who was encouraging his students to visit his page on the social media site MySpace in a purported attempt to be able to better relate to his students (McNee, 2013; Papandrea, 2012). He stated he used the site to discuss school matters with his students, but his posts were a mixture of school and personal

communication with students. Michaud, the school's guidance counselor, received complaints from students about Spanierman's social media page. After reviewing it, she believed the page was inappropriate in terms of content and conversations with students. The counselor confronted Spanierman and told him that it was inappropriate, as the site contained pictures of naked men near pictures of the students and jokes of a sexual nature and was disruptive to the school environment (Decker, 2014). After the guidance counselor suggested he use only the school's electronic communication system, Spanierman deleted the existing MySpace page and set up another page under a new name with the same people as friends, where he again communicated with his students. Michaud stated the school received complaints about the new site as well. At the end of the year, his contract was not renewed.

Spanierman sued the district, claiming it violated his right to due process and right to free speech. The district was granted summary judgment on both issues. No evidence of the lack of due process was presented, and the district court determined that the speech was not a matter of public concern under *Pickering-Connick*. The court determined that although there was a mixture of personal and public speech topics on his site, the majority of the speech was personal, and Spanierman failed to link his dismissal to the protected speech. The court stated that the online conversations between the teacher and his students "show a potentially unprofessional rapport with students, and the court can see how a school's administration would disapprove of, and find disruptive, a teacher's discussion with a student about 'getting any' (presumably sex)" (*Spanierman v. Hughes*, 2008, p. 312). This tipped the balance of the *Pickering* scale in favor of the district. Additionally, the use of social media was not essential to his job (Williamson, 2013). "There is no indication in the record that the Plaintiff, as a teacher, was under any obligation to make the statements he made on MySpace"

(*Spanierman v. Hughes*, 2008, p. 309). Ultimately, Spanierman lost his case because he made comments of a sexual nature to a student, which would likely disrupt the school environment. *Garcetti* was found not applicable because Spanierman's comments were made outside the scope of his teaching duties (*Spanierman v. Hughes*, 2008, p. 309; Schroeder, 2013). It is interesting to note that in the cases of *Spanierman* and *Snyder*, which will be discussed later, "Neither plaintiff seemed to consider that the content, including certain photos and images, was inappropriate" (Russo et al., 2010, p. 4).

The *Spanierman* decision acts as a warning to educators to carefully consider the content of their online actions, especially when they choose not to restrict student access to their page and accept them as social media peers. The court emphasizes the importance of maintaining proper student-teacher relationships. Of special note is the fact that the court specified that Spanierman was not required to use social media for his class. This establishes a precedent that districts may exercise greater control over personal social media sites of teachers that include students as friends.

Tenure Hearing of Jennifer O'Brien (2013). Jennifer O'Brien was a kindergarten teacher in New Jersey with a classroom composed of Latino and African-American students. She wrote on her personal Facebook page, "I'm not a teacher—I'm a warden for future criminals!" and "They had a scared straight program in school—why couldn't [I] bring [first] graders?" (O'Brien, 2013, p. *1). The principal received a complaint from another principal in the district. Her principal spoke to her about the post and placed her on administrative suspension while conducting an investigation. The principal received many calls from upset parents, parents protested outside the school, and news organizations set up outside the school.

The deputy superintendent filed charges against her for her conduct and suspended O'Brien without pay. The case went before an Administrative Law Judge (ALJ). During the hearing, O'Brien stated that she was referencing her students' behaviors and not their ethnicity. She had many behavior problems in her classroom, including being hit by a student and having some of her things stolen. She stated that her comments were not racially motivated but were a direct reflection of her frustrations about her students' behavior.

On appeal, a New Jersey appellate court affirmed the ALJ's decision. The court determined that O'Brien's speech was not protected since it was not a public concern but a venting of personal frustration. The court further ruled that even if the speech had been protected, the district's need to protect the school environment would have outweighed the employee's right to speak.

Interestingly, the appellate court quoted the ALJ's observation that O'Brien appeared unrepentant regarding behavior the ALJ found was inappropriate:

> If this was an aberrational lapse in judgment, a reaction to an unusually bad day, I would have expected to have heard more genuine and passionate contrition in O'Brien's testimony. I needed to hear that she was terribly sorry she had insulted her young students; that she loved being their teacher; and that she wanted desperately to return to the classroom. I heard nothing of the sort. Rather, I came away with the impression that O'Brien remained somewhat befuddled by the commotion she had created, and that while she continued to maintain that her conduct was not inappropriate, she was sorry others thought differently. (*O'Brien*, 2013, p. *3).

In the end, then, the appellate court ruled against O'Brien not only on constitutional grounds but also based on a conclusion that O'Brien's behavior fell below a minimum level of professionalism. As the court noted:

> The ALJ found that, by posting her comments on Facebook, O'Brien "showed a disturbing lack of self-restraint, violated any notion of good behavior, and [acted in a manner that was] inimical to her role as a professional educator." The Acting Commissioner said that O'Brien's actions constituted unbecoming conduct, noting that the posting of such derogatory and demeaning comments about first-grade students showed a lack of self-control, insensitivity and a lack of professionalism.

In the court's view, there was "sufficient credible evidence in the record to support those findings" (*O'Brien,* 2013, p. *5).

Craig v. Rich Township High School District (2013). Bryan Craig was a high school guidance counselor who published an adult relationship book titled "It's Her Fault." The book contained advice for women that Craig believed he had uncovered as a result of his years of counseling to "thousands of students, parents, clients, and friends" (*Craig,* 2013, p. 1114). Portions of the book were sexually graphic and objectified women. Indeed, the Seventh Circuit Court of Appeals described the book as an "adult" book in "every sense of the word" (p. 1113).

Some of Craig's advice was fairly mundane. For example, he advised women to be discrete, to be good listeners, and to "'[p]ay very close attention to content when having serious conversations with your man'" (Craig, p. 1114, quoting from Craig's book). On the other hand, the book contained comments about women that were highly offensive to

women. He urged women to use their sexuality to win in their relationships, to be sexually active before marriage, and to be submissive to their men. As the Seventh Circuit noted, at one point in his book, Craig "delve[d] into a comparative analysis of the female genitalia of various races" (p. 1114).

Moreover, Craig made repeated references to Rich Central High School, his place of employment, thus linking his workplace with his book. "For example, he cited his experience with women when coaching girls' basketball and when counseling female students." In addition, "he thanked the students he counseled in the acknowledgment section of his book, and another school counselor wrote the book's forward" (Fossey, Eckes, & DeMitchell, 2014, p. 2).

The school board became aware of the book, and the superintendent sent Craig a letter stating that she was charging him with creating an intimidating, hostile working environment, conduct unbecoming a public school teacher, and disrupting the school community. Subsequently, Craig was dismissed. Craig sued the district for allegedly violating his First Amendment rights.

A trial court dismissed Craig's suit, and the Seventh Circuit of Appeals affirmed the trial court's ruling. The Seventh Circuit acknowledged that Craig's book related at least somewhat to matters of public concern. As the court pointed out, "Craig's book, though provocative, does address the structure of adult relations, an issue with which some segment of the public would be interested" (*Craig*, p. 1117).

Nevertheless, in the Seventh Court's view, the *Pickering-Connick* balancing test should be applied to determine whether Craig's free speech rights were outweighed by the school district's interest "in promoting efficient and effective public service" (p.1118). The

court determined that Craig had directly linked his work at the high school to his book. Because he made this connection, it was logical to expect that his relationship with parents, students, and coworkers would be impacted. It was also logical to expect that female students might be cautious about approaching him with their problems, an essential job function for a guidance counselor, "given his professed inability to refrain from sexualizing females" (Craig, 2013, p. 1120). This factor caused the court to determine that the school district's interest in creating a proper school environment outweighed Craig's right to free speech.

This case follows the pattern of every other case that involved school employees and sexually explicit content. When the subject matter deals with sexually explicit material, the courts will side with school districts for the sake of protecting students and the learning environment. Like Spanierman and Munroe, Craig took no steps to restrict the audience for his book. The book was openly available for anyone to view; therefore, it is reasonable to assume that students and parents would be able to access the material that, in the district's opinion, would create a hostile learning environment. The court pointed out that there were no age restrictions on the book. The *Craig* decision reinforces the need for school employees to carefully consider the content they post and publish online and the ability of students to access the content.

San Diego Unified School District v. Commission on Professional Competence, Frank Lampedusa (2011). Frank Lampedusa was the dean of students at a middle school in San Diego. The police received an anonymous call alerting them of a Craigslist ad by Lampedusa soliciting sex from men. Although he did not post his name or any affiliation with his school district, Lampedusa did post a picture of his face and other sexually explicit pictures of himself. A detective contacted the principal, Cansdale, who requested Lampedusa

remove the post. Lampedusa immediately removed the post. About five months later, he was placed on suspension and given notice to dismiss on charges of "evident unfitness for service," "immoral conduct," and "persistent refusal to follow Board guidelines or the law" (*San Diego Unified School District*, 2011, p. 1457). During his hearing before the Commission, Lampedusa testified that he thought the post would remain private and was not intended for his students to access. He acknowledged that Craigslist post might make his coworkers uncomfortable but stated he would continue to solicit sex on the internet and did not believe that students would be impacted at all by his behavior. The Commission reversed the decision of the district, stating lack of evidence and the fact that "there was no notoriety associated with the incident" (p. 1460).

The district appealed the Commission's ruling to the Superior Court of San Diego County, which upheld the Commission's decision. Upon further appeal, the California appellate court reversed the decision of the Superior Court, finding that sufficient grounds for termination existed. The appellate court believed that Lampedusa's behavior "interfered with his ability to serve as a role model" and "the nexus between Lampedusa's conduct and his fitness to teach has been established" (p. 1465).

The appellate court explicitly rejected Lampedusa's argument that firing him for his Craigslist posting would have a chilling effect on the constitutional rights of teachers. In *City of San Diego v. Roe* (2004), the court pointed out that the city of San Diego had fired a police officer "for his off-duty selling of sexually explicit videos of himself on eBay," even though "[t]he videos and video ads did not identify the officer by name, the city, or his employment by the city." Not only did the Supreme Court rule that the police officer's constitutional rights were not violated, the California court noted, it also found that his conduct was

"detrimental to the mission and functions of the [city] employer." (p. 1465, quoting the U.S. Supreme Court). Thus, the California appellate court ruled, "it is established that disciplining *Lampedusa* for publicly posting his ad does not infringe on his constitutional rights or the rights of other teachers" (p. 1465).

In the court's opinion, it was evident that Lampedusa's conduct was detrimental to the mission of the school district and demonstrated poor judgment. "The posting on a public Web site of his genitals and anus, accompanied by sexually explicit text, was, in the words of the Commission itself, vulgar, inappropriate and demonstrated a serious lapse in good judgment." Moreover, Lampedusa "failed to recognize the seriousness of his misconduct, and attempted to shift blame to parents and students who might access his ad." Noteworthy in the court's view was "the fact he testified that he did not think it would have any impact on his ability to teach his students if any of them had viewed the ad and that he did not view his posting of the ad as immoral." In short, Lampedusa's behavior, together with his "failure to accept responsibility or recognize the seriousness of his misconduct given his position as a teacher and role model, demonstrates evident unfitness to teach" (pp. 1465-1466)

Interestingly, Lampedusa required every individual who accessed his site to click a button indicating that the user was at least eighteen years of age. This fact did not alter the California court's conclusion that the school district was justified in terminating Lampedusa for his conduct.

Snyder v. Millersville University (2008). Even preservice teachers have been disciplined for their comments on social media. The most famous case is *Snyder v. Millersville* (2008). Snyder was in her last semester of college and was completing her student teaching assignment at Millersville University, during which she was expected to

obtain a minimum number of hours in a classroom. Prior to student teaching, the university informed student teachers that they were expected to "maintain the same professional standards expected of the teaching employees of the cooperating school" (Snyder, 2008, p. *3). Her supervising teacher stated that Snyder struggled with classroom management, knowledge and application of grammar skills, and proper student relationships during her practicum experience.

During her student teaching, Snyder encouraged her students to view her MySpace social media page against the advice of her supervising teacher and university personnel. On that page, she posted "a photograph that showed her wearing a pirate hat and holding a plastic cup with a caption that read 'drunken pirate'" (p. *6). She also criticized the school and her supervising teacher. As a result of this online behavior, the school requested that the university remove her from the classroom, causing Snyder to be unable to obtain the required classroom hours for student teaching and a satisfactory final evaluation. The university did work with Snyder and helped her obtain her degree in English.

As the court noted, Snyder "conceded at trial...that her posting raised only personal matters," and accordingly, "the First Amendment does not protect [her] MySpace posting" (p. *16). Therefore, the University's response to Snyder's posting did not violate her First Amendment rights. Moreover, the court determined that she could be disciplined as a teacher since she was functioning in that capacity (Decker, 2014; McNee, 2013; Russo et al., 2010).

The *Snyder* case highlights the importance of providing preservice teachers with professional development concerning their obligation to conform to the code of conduct for teachers in the district in which they complete their student teaching experience. It also

provides a precedent for districts to dismiss preservice teachers who do not follow established codes of conduct on social media or even in other areas.

Zellner v. Herrick (2011). Zellner was a high school biology teacher and union president who was terminated for viewing pornographic material on his school computer. The district had an electronic use policy that prohibited "accessing, sending or displaying offensive messages, pictures, or child pornography" (Zellner, 2011, p. 375). Zellner had issues with his computer, and the district's technology department personnel expressed concern that his computer may have been infected with spyware due to him accessing inappropriate material. Software was placed on his computer to track his online behavior.

One Sunday, Zellner disabled his district's filter software and searched "blonde," which located twenty pornographic images. He searched this same topic two more times, which produced sixty pornographic images. The whole search lasted only sixty-seven seconds. When confronted, Zellner admitted his activity and admitted to previously accessing similar pornographic material numerous times. He further stated he knew he was violating district policy. The board held a hearing and terminated Zellner. Zellner filed a grievance, and the "arbitrators found that Zellner violated the District's policy, but rescinded the termination" (Zellner, 2011, p. 377). When the district refused to honor the decision, Zellner filed suit in a Wisconsin state court, where he lost at both the trial court and appellate level.

Zeller then filed suit in federal court, and his case was ultimately reviewed by the Seventh Circuit Court of Appeals. There, the federal appellate court rejected Zellner's argument that he had been fired in retaliation for his union activities in violation of his First Amendment rights. "Zellner violated the District's Policy by viewing pornographic images on his school computer," the court ruled. "[T]he violation had nothing to do with his union

activities, and the School Board found that this violation should result in termination" (p. 379). Moreover, the court continued, even if Zellner could show that his firing was motivated in part by animus to his union activities, the district could still argue that it would have reached the same decision to fire him even if he had not been a union activist. "Here," the court reasoned, "Zellner runs into the same problem—he directly and knowingly violated a School Board Policy." In fact, the court pointed out that Zellner "admitted as much in front of the Board at his hearing and apologized for his actions" (p. 379). Thus, in the court's view, Zellner "failed to establish proof that the Google Image search was a pretext for firing him." Unless he could produce evidence "that some other teacher violated the Policy in a similar way and received a milder sanction," Zellner's retaliation argument rested on mere conjecture. In short, Zellner could not rebut "the District's legitimate, non-discriminatory reason for his termination" (p. 379).

The significance of this case rests in the fact that the district had a clear policy for online behavior using school computers. Zellner admitted he was aware of the policy and admitted he violated it; therefore, he had knowledge that his behavior was subject to discipline as outlined in the policy. Schools that create and communicate clear policies can expect courts to support their fair, consistent application.

Rubino v. City of New York (2012). One case that breaks the patterns of the aforementioned cases is *Rubino v. City of New York* (2012). Christine Rubino was a tenured fifth grade teacher in New York City who posted on Facebook "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!" (Rubino, 2012, p. *1). This comment was offered the day after another student in the area drowned during a field trip to the beach. A colleague brought the

comments to the school's administration, and an investigation by the Special Commission of Investigation for the New York City School District began. Initially, Rubino denied creating the post and stated a friend, who had access to her account, must have posted it. The friend admitted to creating the post but later recanted her story and said Rubino asked her to lie about her actions. The investigator determined that Rubino should be terminated for unprofessional conduct and interfering with the investigation by asking a friend to commit perjury.

During the hearing, Rubino admitted creating the post after a frustrating day at work and apologized for its offensive nature. She stated that she had changed her online behavior and offered her assurance that it would not happen again. The hearing officer issued a decision recommending termination. The officer rendered no decision concerning whether or not there was an issue of protected speech; however, the officer did state that her comments were made in her capacity as a teacher and not a private citizen. In reference to her conspiracy with a friend to impede the investigation, the officer noted that Rubino "did not apologize for doing so and only apologized 'begrudgingly' for the postings" (Rubino, 2012, p. *4).

Rubino appealed her termination to the Supreme Court of New York County. The judge determined that Rubino's First Amendment claim was without merit. Regarding Rubio's second claim, that the decision was arbitrary and capricious, the judge was more sympathetic.

The judge referred to Rubino's fifteen-year career without any other incident. When communicating on Facebook, the judge stated:

> One may express oneself as freely and rapidly as when conversing on the telephone with a friend. Thus, even though petitioner should have known that her postings could become public more easily than if she had uttered them during a telephone call or over dinner, given the illusion that Facebook postings reach only Facebook friends and the fleeting nature of social media, her expectation that only her friends, all of whom are adults, would see the postings is not only apparent, but reasonable. While her reference to a child's death is repulsive, there is no evidence that her postings are part of a pattern of conduct or anything other than an isolated incident of intemperance. (Rubino, 2012, p. *7)

Under the circumstances of the case, the court determined that a penalty of termination was overly harsh. In the court's view, there was no reason to suspect that Rubino would post inappropriate comments online again. Moreover, the court noted, she had apologized.

Compassion, the court pointed out, is a quality that is valued in our society, and "[e]nding [Rubio's] long-term employment on the basis of a single isolated lapse of judgment teaches otherwise" (p. *8). Given the facts before it, the court concluded that firing Rubio was "so disproportionate to her offense as to shock one's sense of fairness" (p. *8). Therefore, the court remanded the case back to the administrative level with instructions to lessen the severity of the penalty. In the end, a two-year unpaid suspension was instituted (Decker, 2014).

This case emphasizes the importance of restricting access to one's personal social media accounts. The judge noted that all of the people in Rubino's online friends circle were adults. No students had been allowed to view the page, nor had any been accepted as friends.

Rubino's privacy settings were set to ensure that only adult friends would view the post, thereby creating an online environment that is similar to speaking to a group of friends over dinner, which would have a certain expectation of privacy (Schroeder, 2013). It is interesting to also note the level of remorse or lack of remorse was noted by both the judge and the investigator.

Munroe v. Central Bucks School District (2015). Natalie Munroe was a tenured Pennsylvania high school English teacher at Central Bucks School District who made derogatory comments about her students on her personal blog space. She received negative evaluations over the course of the 2011-2012 schoolyear; in June of 2012, the district notified her that she would be terminated "based on charges of failure to meet requirements set forth in performance evaluation plans, incompetency, unsatisfactory classroom management, unsatisfactory delivery of instruction, and unsatisfactory lesson planning" (p. 464). On June 26, 2012, the district formally terminated Munroe's employment.

Munroe had received satisfactory evaluations in previous years, and when she was fired in 2012, Munroe believed it was really in retaliation for her online comments. Munroe had begun a personal blog in August of 2009. She stated that she only intended for it to be viewed by her friends, but she did not restrict its access. She did not link herself specifically to the students, school, or district where she worked. One blog in particular became a focus for the case. She admitted typing parts of the blog while at school. She stated that the preselected comments on report cards were not always adequate to convey her thoughts about students. She suggested that comments, such as "complete and utter jerk in all ways," "rat-like," "lazy asshole," "unrealistically high perception of own ability level," "There's no other way to say this: I hate your kid" (*Munroe,* 2015, p. 459). In other blogs, she complained

that the district controlled the temperature of classrooms, resulting in hot classrooms, that students presented poor work, and that one student had been absent for a trip to Puerto Rico and the Masters golf tournament. She refers to teenagers as "complete asses" and "the devil's spawn" (p. 461).

The blog came to the attention of the administration through contact with a local newspaper reporter. Principal Lucabaugh met with Munroe and placed her on paid suspension. He testified that he received numerous complaints from students and parents and had Munroe escorted off the property due to concerns about her personal safety. Lucabaugh stated he had received over 100 requests from parents asking that their students not have Munroe for English. The district hired an additional teacher to follow Munroe's schedule to accommodate parents' requests. In June, Lucabaugh presented Munroe with an unsatisfactory evaluation, stating ineffective instructional practices, use of nanny cam during class, and violation of the Professional Code of Conduct. She returned to work in August 2011. During that schoolyear, Munroe received unsatisfactory evaluations, and she was notified in June of 2012 that she had been terminated.

Munroe sued, claiming a violation of her First Amendment rights, but a federal trial court granted the school district's motion for summary judgment and dismissed her case. In the trial court's opinion, Munroe's speech was not protected according to the *Pickering* balancing test because of the disruption that occurred and the content of her remarks. Munroe's speech, the trial court wrote, "in both effect and tone, was sufficiently disruptive so as to diminish any legitimate interest in its expression, and thus her expression is not protected" (p. 465, as quoted by the Seventh Circuit Court of Appeals).

On appeal, the Seventh Circuit affirmed the lower court's ruling. In essence, the appellate court applied the *Pickering* standard in ruling for the school district. "We assume," the court summarized, "that Munroe's speech satisfied the 'public concern' requirement." Nevertheless, the court continued, "we conclude that her speech was likely to cause—and, in fact, did cause—disruption and that, under the circumstances, the School District's interest outweighed Munroe's interest, as well as the interest of the public, in her speech" (p. 466).

The Seventh Circuit then went on to explain how Munroe's blog postings might be disruptive in her work environment. "We find that Munroe's various expressions of hostility and disgust against her students would disrupt her duties as a high school teacher and the function of the School District." Listing several of Munroe's more offensive blog comments about her students, the court labeled them "despicable" (p. 476).

Interestingly, the Seventh Circuit compared Munroe's blog activities to Craig's misogynistic book in *Craig v. Rich Township High School District* (2013). Although Munroe did not publish a book "confessing her inability to sexualize her students," the court pointed out, "she still expressed hostility and disgust against her own students" (p. 480). Was it unreasonable, the court asked, "to think a . . . student who learned that, to give just one example, Munroe referred to her students as 'the devil's spawn' may decide against asking her advice?" Likewise, the court asked, "how could students be expected to participate in a class when a teacher indicted that she wished she could use the term 'Rat-like' on their own report cards...'" (p. 480). In sum, the Seventh Circuit concluded, "pursuant to the *Pickering* balancing test, Munroe's speech did not constitute speech protected by the First Amendment" (p. 480).

There are several implications for consideration in future cases. Like the opinion in *Spanierman*, the court acknowledged that Munroe's decision not to limit access to the site with passwords or other means suggests that she should have expected her comments to be read by parents and students. If school employees limit public access to their sites, they may enjoy greater expectation of privacy and enjoy greater freedom of speech. Secondly, in his dissenting opinion, Judge Ambro states that the time between the discovery of the speech and the termination, which was, in part, associated with that speech, was too great to establish a real connection; therefore, in Judge Ambro's opinion, a district's attempt to discipline employees for their speech should not wait a long period of time to issue discipline that is related to social media speech.

Richerson v. Beckon (2009). Richerson believed she was the target of retaliation after she posted derogatory comments about her coworkers on her personal blog. She was transferred from a curriculum specialist to an instructional coaching position. In her blog, which the court noted was "publicly available," she made damaging comments about her employer, union representative, and other teachers. The school district received complaints, and some employees refused to work with her. Beckon, the district's Director of Human Resources, initiated Richerson's transfer "on the ground that her blog fatally undermined her ability to enter into trusting relationships as an instructional coach" (*Richerson*, 2009, p. 638).

The district court ruled against Richerson, stating that the *Pickering-Connick* balancing test favored the district asserting "the legitimate administrative interests of the School District outweighed Richerson's First Amendment interests in not being transferred because of her speech" (*Richerson*, 2009, p. 639). Richerson appealed to the Ninth Circuit,

which affirmed the decision of the lower court, stating, "Common sense indicates that few teachers would expect that they could enter into a confidential and trusting relationship with Richerson after reading her blog" (*Richerson,* 2009, p. 638).

This case is important for two reasons. First, it reiterates the *Connick* standard, which allows employers to take action against an employee when that employee's conduct impedes the formation of relationships necessary for a particular job. Richerson could no longer perform her job due to her conduct on her social media blog, which was written outside of school on her own time; therefore, the district had the ability to move her to another position. Second, it gave some definition to the idea of a disruption. This is an area where the courts have offered little guidance. In this case, the district received "several complaints," and one person refused to work with Richerson after learning of the blog. Future court decisions may rely on this standard when deciding what may constitute a disruption in the workplace. This also reinforces the need to create policies and notify employees that their speech on social media can have a negative impact on their professional lives when it affects their ability to perform essential job functions.

Land v. L'Anse Creuse Public School Board of Education (2010). Anna Land was terminated after a friend posted pictures of her pretending to perform oral sex on a mannequin without her knowledge or permission. Members of the school community, including students, were able to view the pictures, which were quickly removed at her request. The school board terminated her for "engaging in lewd behavior contrary to the moral values of the educational and school community" (*Land,* 2010, p. *3). The dismissal was upheld by an administrative law judge but was reversed by the State Tenure Commission. The school board appealed the decision to the Court of Appeals of Michigan,

which ruled Land should not be dismissed because the acts were off campus, legal, did not include students, and had occurred two years before she was terminated. Her actions were not associated with her work. It was also noted that the website where the pictures were posted was intended for an adults-only audience. The court stated that she had an excellent professional reputation and "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" (*Land v. L'Anse Creuse Public School Board of Education*, 2010).

This case provides some protection for teachers who may find themselves in a similar situation when questionable material is posted without their permission. Land's excellent professional reputation prior to this incident seemed to play a role in the court's decisions. Furthermore, the two-year span between the time the pictures were posted and when they were discovered, seems significant when considering disciplinary action. Long spans of time between the employee's questionable action and the employer's disciplinary action do not seem to favor the employer when the employee has demonstrated competent professional practices. This is aligned with the decision of the dissenting judge in the *Munroe* case.

State of Wisconsin v. Ebersold (2007). The significance of the location of speech was clarified under *State v. Ebersold* (2007). In 2004, Ebersold, a high school teacher, sent sexually explicit messages to a student over the internet in a private chat room. The state charged him with violating a Wisconsin statute that prohibited him from "verbally" communicating with the student. Ebersold appealed to the circuit court, which dismissed the charges, stating that the statute only applied to oral communication. The state appealed. The Court of Appeals in Wisconsin determined that use of an internet chat room for such

conversations fell under the same provision as verbal communication. The court examined the "context, history and purpose of the statute" and determined that verbal is best defined in the statute as "proscribing communication to children of harmful matter in words, whether oral or written" (*State v. Ebersold*, 2007, p. 381). The court stated "Ebersold has failed to demonstrate beyond a reasonable doubt that the statute does not give persons of ordinary intelligence fair notice that it prohibits written communication to children of harmful descriptions or narratives" (*State v. Ebersold*, 2007, p. 383). The Court of Appeals reversed the lower court's decision and remanded it for further consideration.

Ebersold is significant because the court ruled there is no difference between private internet speech and face-to-face communication with students. The court acknowledged that the same standard may not apply to material that is published for a larger audience, but cases such as *Spanierman* may indicate that any communication that is sexually explicit and is knowingly viewed by students is not protected speech.

Additional clarifying court cases

Ashley Payne was a 24-year-old high school English teacher in Georgia who was suspended after she posted a picture of herself on Facebook holding a glass of wine and a mug of beer. She also stated she was playing Crazy Bitch Bingo at a local drinking establishment. Although she had used privacy settings, a parent sent an anonymous email to the district stating that a student had seen the post. She was called into the principal's office and given the chance to resign or face disciplinary proceedings by the school board. Payne resigned. After further consideration, she sued to get her job back, but the court ruled in favor of the district. To date, she has not been allowed to return to the classroom (Papandrea, 2012).

In the 1986 case of *Cox v. Dardanelle Public School*, a teacher was dismissed for making negative comments about the school's administration. It was determined that the matter was of public concern, but it did not create a substantial disruption since many teachers agreed (Ryan, 1988). This case seems to follow the reasoning behind the *Givhan* case because the teacher criticized the administrator, but in *Cox*, the comments were made openly. This differs from previous rulings in that the employee spoke against her supervisor, but the lack of a disruption protected her from discipline.

Other incidents of social media misuse by teachers

Other less famous or severe incidents or cases of employee discipline over the use of social media have occurred across the country. A South Carolina middle school teacher was suspended for one day when she remarked on her Facebook page "Congrats Obama. As one of my students sang down the hallway, 'We get to keep our food stamps'…which I pay for because they can't budget money…and really, neither can you" (Zhao, 2012, para. 3). A kindergarten teacher in Memphis, Tennessee, Tameka Gatewood, received an unpaid suspension after commenting that a student's hair was "nappy almost every day and the boy wears dirty clothes, nasty face, and can't even read" (Zhao, 2013, para. 3). Other employee suspensions have occurred for comments such as referring to a student as the "evolutionary link between orangutans and humans" (Zhao, 2013, para 8). A music teacher in Florida was suspended in 2010 for "friending more than 100 students on Facebook and for allegedly posting sexually suggestive images and acronyms for profane words" (Matthews, 2012, para. 21). His lawyer opposed the action by arguing that coaches often use profanity in front of students, and this is no different.

Other cases involving public employees' First Amendment rights have influenced subsequent outcomes in teachers' cases. *United States v. National Treasury Employees Union* involved the application of *Pickering* standards. This case dealt with the compensation of employees for activities that were considered citizen speech. The Court determined that employees could express themselves off-duty and granted broad protection to government workers for "off-duty, non-work-related expressive activities" (Papandrea, 2012, p. 1616).

Union Influence

The National Education Association (NEA) is the nation's largest union for school employees. Their influence was felt during the Missouri Facebook Law debate. A search of the NEA's website did not yield any specific guidelines, but a few suggestions were found within social media related articles. Michael Simpson with NEA's Office of General Counsel suggests that school employees address concerns publicly in the newspaper or other similar public venue to "avoid the *Garcetti* pitfall" because "writing a letter-to-the-editor is rarely an employee's official duty" (Simpson, 2009). This response was triggered by a paraprofessional who alleged his position was eliminated because of a letter he wrote to the superintendent concerning safety issues at his school. Such guidance appears to be misplaced since the employee would have learned about these conditions as a result of his employment as a school safety monitor. That would likely trigger *Pickering* because the employee had inside knowledge of the situation due to his position; therefore, his speech would not likely be protected (Simpson, 2009).

The American Federation of Teachers (AFT) is the second largest teacher union in the nation. A search of their website using the terms "social media," "free speech," "speech,"

and “First Amendment” yielded no related content. No action on behalf of this organization or its locally affiliated chapters was found in the literature review.

Policies Across the Nation

The policy referenced in multiple sources was the New York City Department of Education Social Media Guidelines. These were some of the first comprehensive guidelines in the nation. Published in the spring of 2013, the document contains seven pages of guidelines followed by an additional seven pages of frequently asked questions. The document is not only comprehensive but also overwhelming and cumbersome. It links to and references multiple other policies, including the school district’s Discipline Code, Internet Acceptable Use and Safety Policy, Chancellor’s Regulations, Conflicts of Interest Law, FERPA. COPPA, and Section 3020-1 of the Education Law. The guidelines clearly define social media and employees. In terms of expectations for online employee conduct, it states

> DOE employees should treat professional social media space and communication like a classroom and/or a professional workplace. The same standards expected in DOE professional settings are expected on professional social media site. If a particular type of behavior is inappropriate in the classroom or a professional workplace, then that behavior is also inappropriate on the professional social media site. (NYC, Spring 2013, p.2)

The policy encourages the use of privacy settings that are appropriate to restrict access to the professional site. It requires employees to obtain written permission from their immediate supervisor prior to creating a professional site and when possible, to grant their supervisor administrative rights for access. The DOE states that professional sites will be

monitored and reserves the right to remove content that is not aligned with the district's policies.

The policy addresses personal use of social media. It includes an exemption clause for communication with relatives and communication in emergencies. The emergency exemption is unique and would protect employees from possible discipline when used correctly. The guidelines suggest the use of privacy settings to limit access to teachers' personal information. It states "Personal social media use, including off-hours use, has the potential to result in disruption at school and/or the workplace, and can be in violation of DOE policies, Chancellor's Regulations, and law" (NYC, Spring 2013, p.6). Though not expressly stated, this references the *Pickering* and *Tinker* standards. The policy prohibits the use of the district logo. One important statement near the end of the document reminds employees that their role of mandatory reporter also applies on social media. This seems like an important statement to include as some employees may not realize that their responsibility in this area extends to information discovered on social media. It states that DOE will provide training to employees who use social media for professional purposes.

The guidelines seem clear until page 6. "These Guidelines are not designed to serve as a code of conduct for social media use and do not constitute separate bases for potential discipline" (NYC, Spring 2013, p. 6). It reminds employees that all other applicable policies are in effect. It is unclear to the reader as to what the purpose of the guidelines is in light of these statements. It appears that the guidelines are merely suggestions, and, if broken, they cannot be used as a basis for disciplinary action. It leaves the reader wondering why the guidelines exist if there is no expectation or requirement to follow them.

Case Analysis

When analyzed, several clear commonalities seem to emerge from these cases. First, the need for a specific policy was clear in the case of *Zellner v. Herrick*. In this case, Zellner used the school's computer to access pornographic material three times for a total of sixty-seven seconds. He was terminated. In its decision, the court said "he directly and knowingly violated a school board policy" and that he admitted this in front of the Board at his hearing and apologized for his actions" (*Zellner,* 2011). Consequences were clearly specified in that policy. When districts have a policy and apply it fairly and consistently, districts can expect the courts to support their actions.

The next thing the analysis revealed was the need for employees to maintain separate professional and personal accounts. In both *Spanierman* and *Snyder*, the employees mixed their personal and professional lives on MySpace and even invited students to view their social media sites. Spanierman accepted students as online friends, posted sexually explicit content, and had inappropriate sexual conversations with students. Snyder also invited students to visit her MySpace page, where she posted pictures of herself holding alcohol and calling herself a "drunken pirate." She posted comments that were critical of her school and supervising teacher. Both were warned against developing this type of personal rapport with the students, but both ignored the warnings of their supervisors. Both failed the *Pickering* test of "public concern." Spanierman tried to argue that his page was strictly personal, but the court determined that it contained both personal and professional content and that the district's decision not to renew his contract was based on his personal speech and not linked to speech on his site that may have been protected. In Snyder, she admitted that her page was strictly personal; therefore, the court determined that her speech was not protected.

Craig linked his online work directly to his job as a counselor at the school. When employees link their personal work to their professional lives, their speech rights become much more restricted and run a far greater risk of experiencing disciplinary actions for speech that the employer believes is inappropriate.

Mixing personal and professional speech on a single account exposes the employee to greater speech scrutiny by the employer. Maintaining separate personal and professional accounts would help the employer determine the intent of the employee's speech and the capacity in which the employee is speaking.

Many cases were lost, in part, because the employees failed to restrict access to their personal social media pages that contained inappropriate material. In the decisions of *Spanierman, Craig, Snyder, Munroe,* and *Richerson*, the courts pointed out that the employee had no restrictions on public access to their online posts. The courts reasoned that the employees should have recognized that these posts would be viewed by students and other members of the school community because there were no restrictions; subsequently, the courts ruled in favor of the employer in each case.

The *Lampedusa* case reinforces this concept in a slightly different way. Lampedusa posted his profile and pictures on a site where users had to click a button stating they were eighteen years of age before entering. Although he did not intend for students to access the site, he had no way to guarantee students could not access it. The court reasoned that he should have expected student to access the site, and his actions demonstrated a serious lapse in judgment.

The court ruled differently in the case of *Rubino*. The judge acknowledged that she had restricted access to her page and had not accepted students as friends. Rubino's termination was reversed, and she was reinstated but received a two-year suspension.

The need for professional development was obvious. The need to educate employees that other policies apply to their interactions with students was evident. Spanierman and Snyder accepted students as friends and developed inappropriate relationships with them, which would violate employee conduct policies. Employees need to know that, as a result of the *Ebersold* case, the same standards of speech that apply in face-to-face communication also apply to private online speech.

Professional development should also inform employees of the ability of the district to discipline employees when their online behavior impacts the school environment. If their online behavior damages necessary relationships or disrupts the school environment, they can be appropriately disciplined. Employees should also understand the difference between a public concern and a personal gripe. O'Brien's online comments received numerous parent complaints but were expressions of personal frustration; therefore, the comments were not protected speech. Craig was no longer able to perform his duties as a counselor because female students may not come to him "given his professed inability to refrain from sexualizing females" (*Craig*, 2013). He was no longer able to form the relationships necessary to function as a guidance counselor. Lampedusa did not think his online solicitation ad on Craigslist would impact his relationships with students, but he did say that it might make some coworkers uncomfortable. The appellate court stated his online behavior "interfered with his ability to serve as a role model," and there was a nexus between his online conduct and his fitness to teach. Snyder's posts against her supervising teacher caused

irreparable damage to the relationship, which caused the supervising teacher to request Snyder's removal from her class. Richerson received a transfer because the district said her comments "fatally undermined her ability to enter into trusting relationships as an instructional coach." (*Richerson*, 2009). The Ninth Circuit affirmed the ruling of the lower court, stating "Common sense indicates that few teachers would expect that they could enter into a confidential and trusting relationship with Richerson after reading her blog" (*Richerson*, 2009). Munroe's comments resulted in many complaints from parents and students. Over 100 students had requested not to have her as a teacher. Her presence on campus was, at one point, so disruptive that the administrator had her escorted off campus because he feared for her safety. These cases illustrate the need to inform employees that when their personal gripes and personnel issues that they share online impact the school, the district has the ability to impose discipline.

Another theme that emerged was the way in which the courts treated single lapse in judgment versus multiple offenses. Rubino made a single entry, was remorseful, and vowed not to repeat her actions. The decision to terminate her was reversed. Snyder and Spanierman had repeatedly ignore the warnings of their supervisors and continued to develop inappropriate online relationships with students. Lampedusa stated he would continue to post the pictures and solicit sex online. The districts prevailed in all three of these cases.

A definition of disruption to the school environment emerges. There were multiple parent complaints in the cases of O'Brien, Craig, Lampedusa, Rubino, and Munroe. Complaints from coworkers were found in the cases of Snyder and Richerson.

Not as significant but worth mentioning is the time span between the online behavior and the imposition of discipline. In *Land* (2010), pictures were posted, unbeknownst to the

teacher, for two years before they were noticed by the school community. She had been a highly effective teacher during that time span. Her online actions were not associated with her work. The Michigan Court of Appeals state "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" (*Land*, 2010). Land was reinstated. In contrast, Munroe's termination was linked in part to her online speech that occurred eighteen months before. The court upheld her dismissal, though a dissenting judge stated he felt the timespan between the time the speech occurred and the time the district terminated her was too great to establish a nexus. Districts that intend to tie an employee's online speech to discipline should not wait to act.

Characteristics of a Strong Social Media Policy

A strong social media policy is necessary to clearly communicate a district's expectations of its employees on social media; however, it cannot be overly broad. After reviewing the literature, current court cases, and other relevant materials, a clear set of characteristics seems to emerge.

Based upon the research, twelve characteristics of a strong social media policy were determined. These characteristics and rationale are listed below:

1. Well-written policies clearly communicate the intent of the policy in the title and do not exist as fragmented expectations within other district policies and documents. Explicitly naming the policy "Social Media Use for Employees" or something very similar would ensure that employees understand the intent and extent of the policy. Expectations for employee conduct with students are found in employee conduct policies and as stipulations in contracts and job descriptions. They are also included

in policies such as acceptable use policies. Without specifying these expectations apply to employees on social media, even on their personal time and on their personal devices, employees may not understand the reach of the school administration in this area and unknowingly violate these policies. The rationale behind the ruling *Zellner* further emphasizes the need for a clear policy.

2. Strong policies allow for unrestricted communication with family members. Some policies, when interpreted literally, could restrict parent/child communication. Good policies recognize this and make appropriate allowances for such communication. This was one of the first objections to the Missouri Facebook Law, and policy developers would be strongly encouraged to avoid this pitfall. In Louisiana, this would require a clarification under Louisiana Revised Statute § 17:81 to exempt family members. The statute, Powers and Duties of School Boards and Parish Superintendents, outlines the requirements for districts' electronic communications policies and prohibits electronic communication "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."
3. Well-developed policies allow for appropriate communication between employees and students when employees have relationships with students outside the school. When school employees associate with students outside the school in community roles, such as coaches or civic and religious leaders, some communication of information not related to education may be shared. Some allowance for this is appropriate. This would prevent employees from avoiding contact with students for

fear that their relationship might be viewed as inappropriate. Language would need to specifically state this exception to avoid violating Louisiana Revised Statute § 17:81.

4. Strong policies provide parents with the option to opt out of employee-student communication or, at a minimum, to place limits on it. Parents should have the option to limit an adult's ability to interact with their child in cyberspace. This is consistent with Louisiana Revised Statute § 17:81.
5. Clear policies define social media and provide examples. To avoid the possibility of any ambiguity, social media should be clearly defined and explained. Employees who do not reside in the digital world may not comprehend the policy without clear definitions. This definition is already required under Louisiana Revised Statute § 17:81.
6. A strong policy would require separate school and personal accounts. Some cases, such as *Spanierman v. Hughes* (2008) and *Snyder v. Millersville* (2008), were lost by employees who mixed personal and professional lives online. A different outcome may have occurred if they clearly had separate personal and professional accounts. Requiring school employees to maintain separate accounts would help employees maintain appropriate boundaries in their personal and professional lives. It may also benefit school districts by more easily identifying when the employee is speaking as a citizen and when the employee is speaking in an official capacity.
7. A strong policy would require employees to include a statement on their personal accounts that the opinions on this page are personal and not reflective of the school district. This statement would seek to define the purpose of the employee's social

media page as one for personal opinions and comments. It would inform the reader that the individual is speaking as a citizen and not an employee.

8. A strong policy would encourage employees to adjust privacy settings in such a way that it limits students' access to the information on their personal page. If students have unfettered access to an employee's page and find offensive material, the discovery may lead to a disruption in the school environment if the employee is engaged in activities that are not acceptable by community standards, as found in the case of Frank Lampedusa, if the employee makes derogatory comments against the students or coworkers, as in the cases of *Munroe* and *Richerson*, or if comments made by the employee are offensive to members of the school community, as was the case in *Rubino* and *Lampedusa*. Restricting access would lessen the possibility of such a disruption.
9. Concise policies reference applicable policies, such as Rapides Parish School Districts' GAMIA-Electronic Communications Between Employees and Students and GBRA-Employee Conduct, and do not restate those expectations in the new policy. Acceptable employee-student communication is already described in these policies and should not be reiterated; however, referencing these policies as applicable in social media interactions is necessary so that employees may refer to them if necessary. The *Ebersold* case is important here because it established a precedent that verbal communication extends to personal online communication. This would cause other communication policies to come into play. It's necessary to specify these policies, which would include Employee Conduct, Electronic Communication, Child Abuse, and FERPA. This characteristic is desirable to avoid the cumbersome nature

of policies such as the New York City Department of Education Social Media Guidelines.

10. Clear policies specify consequences if policy violations occur. One of the problems recurrent in the literature was the lack of clearly established consequences for violations. It was not clear in *Rubino* if the district had a clear consequence for her actions; however, the judge's reversal of the district's imposition of termination states that the district's actions were too harsh. In contrast, Zellner was aware of the policy that stated he could be terminated for violating it, the district followed the policy, and the court upheld the district's termination. A statement of possible disciplinary action, up to and including termination, is necessary. This mirrors the required statement of consequences listed in under Louisiana Revised Statute § 17:81.
11. A strong policy requires yearly reminders and updates for all employees. In addition to required yearly updates on child abuse, safe and drug free schools, and other policies, it is desirable to remind employees of the policy governing their conduct on social media. Louisiana Revised Statute § 17:81 requires employee notification of the policy, and it is desirable to treat this policy in the same manner.
12. A strong policy would remind employees that their status as mandatory reporters of suspected child abuse and neglect extends to information uncovered during the use of social media. Though no specific instance of child abuse discovery was found in the literature, the possibility of discovering it during online interactions with students is very possible; therefore, it seems desirable to include such a statement in policy that is also found in the New York City Department of Education Social Media Guidelines.

During the literature review, some suggestions were made which stated that defining the term "disruption" in policy would be desirable. Upon further consideration, the courts have not created a clear definition for this; therefore, defining it in policy may or may not hold any legal standing. A good policy may state that actions on social media should not disrupt the academic environment, but creating a definition in policy without sufficient legal backing seems premature.

Analysis of Louisiana School Districts' Current Social Media Policies

A review of district policies revealed that only five of sixty-nine Louisiana public school districts had adopted specific Employee Use of Social Media policies. These policies were labeled as EFAA or KBGA and titled Employee Use of Social Media. Other potentially applicable policies were reviewed, but the final policy analysis was restricted to those documents that were specifically targeting employee use of social media. Some districts, such as Ascension Parish School Board, had a policy, labeled EFA-Electronic Mail and Internet Policy-Employees, but social media was not addressed in it; therefore, its policy was excluded from analysis.

The policies of the Bogalusa City School Board, Orleans Parish School Board, and Plaquemines Parish School Board are identical. All even contain the same grammatical error. Based on the notes, it appears that Bogalusa's policy was approved first on January 30, 2014, Plaquemines adopted its policy February 9, 2015, and Orleans adopted its policy on June 14, 2016. When analyzed according to the twelve characteristics of a strong policy, each of these three school districts' policies received a 7. Table 1 provides the specific breakdown for each. There were some commendable inclusions. The policies expressly included student teachers. All the Louisiana policies established social media communication as "an extension

District	BCSB	PPSB	OPSB	IPSB	JPSB
Policy manual location	EFAA	EFAA	EFAA	EFAA	KBGA
Policy title explicitly reflects employee use of social media	Y	Y	Y	Y	Y
Allows exception for family contact	Y	Y	Y	N	N
Allows exception for relationships outside the school setting, such as student and youth minister or community coach	Y	Y	Y	N	N
Provides parents with the option to opt-out of exclusive employee-student communication	N	N	N	N	N
Defines social media and provides examples	Y	Y	Y	Y	N
Requires separate school and personal accounts	N	N	N	N	N
Requires employees to include a statement on personal accounts stating that the opinions on this page are personal and not reflective of the district	N	N	N	N	N
Encourages employees to adjust privacy settings to limit students' access to the information on their personal page	Y	Y	Y	N	N
References policy GAMIA-Electronic Communications Between Employees and Students and policy GBRA-Employee Conduct	Y	Y	Y	Y	N
Specifies consequences for violations	Y	Y	Y	Y	N
Requires yearly employee reminder	N	N	N	N	N
Reminds employee that mandatory reporter requirement extends to social media	N	N	N	N	N

Table 1. Characteristics of a strong social media policy.

of the employee's workplace responsibilities" (Bogalusa, 2014). They reminded employees not to divulge any student's personally identifiable information.

The main problem with the policies of Bogaloosa and Plaquemines rests in the last section, titled "Consequences." It states

> School Board personnel shall monitor online activities of employees who access the Internet using school technological resources. Additionally, the Superintendent or designee may periodically conduct public Internet searches to determine if an employee has engaged in conduct that violates this policy. Any employee who has been found by the Superintendent to have violated this policy may be subject to disciplinary action, up to and including dismissal. [Bogalusa (2014) and Plaquemines (2015)]

This paragraph could have a chilling effect on employees' speech if they believe that the district administration will periodically search the internet to see if employees are doing something inappropriate even if they are not. This message could convey a feeling that district personnel are scouring social media to see who is misbehaving. The paragraph should be revised to state that a search may be conducted if the Superintendent receives information that improper usage has occurred. This seems to express trust in the employee to do the right thing without undue threat of oversight by administrators. In contrast, Orleans' policy states that personnel "may monitor online activity," thereby lessening the potential for a chilling effect (Orleans, 2016).

Another notable contrast in the Orleans policy as compared to the policies of Bogalusa and Plaquemines is additional language stating that the employee may face disciplinary action if an employee's social media use "causes a substantial disruption"

(Orleans, 2016). This is important in light of the cases that were previously analyzed; however, the district must be cautious when defining disruption due to the lack of definition by the courts.

The Iberville Parish School Board adopted its social media policy on July 14, 2014. The policy is not as extensive as the previously-discussed policies. It cautions employees about their presence online and encourages them to act as "ambassadors to the general community" (Iberville, 2014, p. 1). It cautions employees about the risk of using social media. "The decision to use social media tools brings a certain level of risk both personally and professionally, especially if social media is used without the appropriate level of discretion and intent" (Iberville, 2014, p. 2). It does not expressly require separate personal and professional accounts, but it does refer separately to personal accounts and professional accounts. When rated based on the 12 desirable characteristics, Iberville's policy earns a 4. Many key components were missing as described in Table 1. The policy alludes to some of the characteristics, such as separate personal and professional accounts, but the policy does not explicitly state this.

Like Bogalusa, Orleans, and Plaquemines, Iberville included a statement asserting the right of the administration to monitor the online activities of its employees. The policy is ambiguous as to whether this search applies exclusively to online activities using school resources or if it extends to personal social media use outside the school setting. This may have a chilling effect if employees are unsure of the policy's application. Another guideline states that employees "shall" follow all the guidelines of the social media sites that they utilize for personal reasons. This requirement seems difficult to enforce and would be a waste of district resources to determine if an employee has broken it.

The final policy analyzed is from Jefferson Parish School Board. This policy was adopted on January 17, 2013. This policy is significantly different from the four previously reviewed policies. The other policies are 3-4 pages in length, but this policy is only half a page. Its location in Jefferson Parish's policy manual, section K, "General Public Relations," is different from the others which are all found in policy section G, "Personnel." As rated according to the characteristics of a strong policy, Jefferson Parish's policy received a score of 1 only because of its title. The policy is ambiguous in its intent. It is unclear whether this policy relates employees' personal use of social media or only to instructional use of social media. The other policies clearly differentiate expectations when employees are using social media for instructional purposes and when they are speaking personally on social media. It is missing every other essential characteristic identified in the research. In fact, the score of 1 seems generous since the title of the policy does not adequately describe the contents of the policy.

Overall findings were surprising. The fact that 94% of districts across the state had no social media policy for its employees and the lack of a specific revised statute were unexpected findings. With the multitude of news stories concerning employee use of social media, the researcher expected to find a more pro-active district stance relative to expectations and discipline for employees who act inappropriately on their personal social media.

There were a few highlights. All policies included a statement reminding the employees not to divulge personal student information. With the exception of Jefferson, all other policies clearly defined social media and provided relevant examples. They referenced

employee conduct and electronic communication policies that were already in place. They also specified consequences for policy violators.

As a result of these findings, the researcher contacted Forethought Consulting, Inc., Louisiana's leading policy developing body, to see if they have a policy or anticipate creating one in the near future. Forethought serves 68 of Louisiana's 69 school districts. The researcher expected that a policy would be forthcoming. On June 8, 2016, the researcher called Forethought Consulting, Inc. and spoke with Noelle Prescott, vice president. She stated that Forethought has not created a model social media policy at this time. She explained they typically create policies that are aligned with state statutes; however, they do create policies for other situations when many districts request them, but at this time, there were few requests for a social media policy. Ms. Prescott stated that creating a policy that is not based on statutes is difficult because districts have different ideas about what they want and what they are trying to accomplish when they request a policy. She also stated that since social media use of employees does not seem to be a major problem for districts at this time, there is no need to create a policy. She referenced policies for Iberville, Plaquemines, and Bogalusa school districts. Additionally, she mentioned a policy for Catahoula but was unsure if it had been adopted. A call to Catahoula's central office revealed that the policy had never been presented to the board for approval. The researcher expected districts to be more proactive by having policies governing employees' social media use given the prevalence of social media use in today's society.

CHAPTER 5: SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

This research sought to analyze the current legal landscape to determine if and when school administrators may discipline their employees for their use of social media. With few policies at the national, state, and local levels, administrators are operating in an area where little guidance exists. The study sought to answer the following questions:

1. What limitations can school and district administrators place upon the free speech rights of public school employees?
2. Which Louisiana laws could aid in the development of social media policy in public schools?
3. What might a social media policy framework look like that would aid school and district administrators when considering disciplinary action with regard to employee conduct?
4. What are the characteristics of current social media policies in Louisiana?

The research utilized the research methodology of the University of Southern California's Gould School of Law. This qualitative study's ultimate goal is to create a framework for a social media policy for state and district administrators.

Summary of Findings

Question 1. *What limitations can school and district administrators place upon the free speech rights of public school employees?* Schools may regulate the speech of its employees on social media but in a limited number of ways. School employees have no guarantee of free speech protection when they are speaking in their official capacity unless they are giving testimony under oath. Social media sites set up exclusively for teacher and student interactions are subject to the same regulations as speech that would occur inside a

brick-and-mortar classroom. Even employees' personal social media pages may contain unprotected speech when employees mix personal and professional speech topics. Administrators may wish to use the flowchart in Figure 2 to determine if an employee's speech is protected. It is important to reiterate the finding that, without exception, when a school employee was disciplined for social media use that included items of a sexual nature, courts ruled against the employee. This is in stark contrast to the broad freedoms that are afforded to students' speech. Employees' speech may also be unprotected when its content degrades or undermines the authority of their superiors, impedes necessary office relationships, or presents a true threat.

The *Pickering* case was the genesis for most of the subsequent free speech cases involving the speech rights of public employees. While many cases after it further defined its application, *Pickering* created the concept of matters of public concern and the balancing test to determine if the interest of the employee to speak is greater than the interest of the employer to maintain a proper working environment. *Connick* and *Garcetti* were the next cases to add further consideration to employee free speech. These cases added the consideration of the employee's official job duties and the motivation of the speech. The *Tinker* case brought the student free speech concept of substantial disruption into the employee arena. Based on the research, these cases seem to be the origin of most subsequent rulings.

Question 2. *Which Louisiana laws could aid in the development of social media policy in public schools?* No Louisiana law specifically addresses employee use of social media, but a few statutes would be useful in drafting a policy. Louisiana Revised Statute § 17:81 is the general electronics communication policy that the state requires for all districts.

This statute sets forth expectations for student-teacher communication, parental notification, and consequences for violating the policy. R.S. § 17:100.7 deals with internet use and prohibiting access to sexually explicit material but only contributes to this research with its assertion of limited academic freedom for educators. R.S. § 17:280 requires that schools provide internet and cell phone safety education to students on a yearly basis. This may be a place where students can be educated about the proper social media boundaries between students and teachers and what to do if those lines are crossed.

Question 3. *What might a social media policy framework look like that would aid school and district administrators when considering disciplinary action with regard to employee conduct?* The twelve characteristics described in Table 1 should be the backbone of social media policies in the state of Louisiana. In fact, all of the characteristics are applicable to policy development in states across the nation. Policies created under these guidelines would be clear, specific, and easily understood by employees and not overly broad. Employees would be operating in cyberspace with full knowledge of their limits and rights relative to the First Amendment and district expectations.

Question 4. *What are the characteristics of current social media policies in Louisiana?* Five districts in Louisiana have adopted social media policies. Only 3 of the 5 social media policies contained 7 of the 12 desirable characteristics identified in this research. Current policies should be revised and future policies should be created to reflect these characteristics.

Conclusion

The powerful influence of social media is undeniable. Its impact on the school environment is changing the ways schools do business. When used properly, social media is

an excellent way for teachers and students to communicate and build relationships that enhance the educational process; however, when teachers and other school employees fail to maintain proper boundaries, the results can be personally and professionally disastrous. In a time where people are encouraged to describe their personal lives in detail on social media, the lines between school employees' personal and private lives are distorted, which leaves some employees crossing boundaries that they should not.

The limited number of court cases dealing directly with school employees' use of social media leaves administrators and employees at a disadvantage when trying to determine when an employee's speech is protected. It seems from the cases discussed herein that many school employees, with the exceptions of the *Snyder* and *Spanierman* cases, in which employees consistently ignored the warnings of their supervisors, simply did not recognize the ability of the school to regulate their speech and mete out professional discipline for speech which occurred during their personal time on social media. This emphasizes the need for well-written policies that are initially explained to all employees and then revisited annually. With this information, employees can then decide what actions they wish take in cyberspace and whether or not they are likely to experience any professional repercussions from it. Employees must understand that they will have to prove that their right to speak on an issue of public concern outweighs the interest of the employer to maintain proper working conditions.

Administrators need to understand that they can discipline school employees for off-campus social media speech when that speech impacts the school environment either through a disruption of the school and work environment or when the speech impacts the relationships necessary for the school to carry out its mission. Without exception, courts

support administrators and districts who discipline employees for sexual content when minors are involved either directly through a private online conversation or indirectly as a casual observer of a teacher's social media page where explicit content can be accessed.

Recommendations

Due to the overall lack of social media rulings by the United States Supreme Courts relative to school employees' use of social media, school administrators should continue to review the rulings of their respective circuit courts. District should develop comprehensive policies based on the twelve identified characteristics and ensure that these policies are clearly communicated on an annual basis to all employees. Administrators should use the guide provided in this research to determine when employees' speech may be protected; however, the document is not intended to take the place of the legal advice of the district's counsel. Administrators need to be familiar with the situations where they may exercise some form of control over the speech of their employees and where they may not to avoid the possibility of litigation for themselves and their districts.

Districts should work with teacher preparation programs to ensure that preservice teachers are aware that they can be disciplined for their actions on social media during their student teaching experience. This should be a part of all teacher preparation programs.

Future research should consist of reviewing the most current cases involving the free speech rights of school employees, public employees, and students. Nationally, states and districts would benefit from being familiar with the implications of the United States Supreme Court cases described in this research. Additionally, states seeking to create social media policies and frameworks should research the rulings of their respective Courts of Appeal.

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APPENDIX A: LIST OF COURT CASES

A.B. v. State of Indiana, 885 N.E.2d 1223 (Ind. 2008).

Adler v. Board of Education of the City of New York, 33 Misc.2d 789 (1961).

Ahren v. Board of Education of School District of Grand Isle, 456 F.2d. 399 (8 Ca., 1972).

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)

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Draker v. Schreiber, 271 S.W.3d 318 (Tx. Ct. App. 2008).

Garcetti v. Ceballos, 547 U.S. 410 (2006).

Givhan v. Western Consolidated School District, 439 U.S. 410 (1979).

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

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Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011).

Land v. L'Anse Creuse Public School Board of Education, 789 N.W. 2d 458 (Mich. Ct. App. 2010).

Lane v. Franks, 134 U.S. 2369 (2014).

Layshock v. Hermitage School District, 650 F.3d 205 (3d Cir. 2011).

Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).

Morse v. Frederick, 551, U.S. 393 (2007).

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1976).

Munroe v. Central Bucks School District, 34 F. Supp. 3d 532 (E.D. Pa. 2014), *aff'd*, 805 F.3d 454 (3d Cir. 2015).

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Rubino v. City of New York, 950 N.Y.2d 494 (N.Y. Sup. 2012*), aff'd*, 106 A.D.3d 439, 965 N.Y.S.2d 47 (S. Ct. App. Div., 1st Dep't 2013).

San Diego Unified School District v. Commission on Professional Competence, 124 Cal. Rptr. 3d 320 (Cal. App. Ct. 2011).

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

Snyder v. Millersville University, No. 07-1660, 2008 WL 5095140 (E.D. Pa. Dec. 3, 2008).

State v. Ebersold, 742 N.W.2d 876 (Wis. Ct. App. 2007).

Thomas v. Board of Education v. Granville Central School District, 607 F.2d 1043 (2d Cir. 1979).

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Wisniewski v. Board of Education of the Weedsport Central School District, 494 F.3d 34 (2d Cir. 2007).

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

APPENDIX B: LIST OF STATUTES

La. Rev. Stat. Ann. § 14:40.3 (2001)

La. Rev. Stat. Ann. § 17:100.7 (1999)

La. Rev. Stat. Ann. § 17:280 (2012)

La. Rev. Stat. Ann. § 17:416.13 (2011)

La. Rev. Stat. Ann. § 17:81 (2014)

Title 28. Bulletin 104 – Louisiana PreK-12 Educational Technology Standards

APPENDIX C: LIST OF DISTRICT POLICIES

Bogalusa City School Board (2014). Employee Use of Social Media.

Iberville Parish School Board (2014). Employee Use of Social Media.

Jefferson Parish School Board (2013). Employee Use of Social Media.

Orleans Parish School Board (2016). Employee Use of Social Media.

Plaquemines Parish School Board (2015). Employee Use of Social Media.

APPENDIX D: LIST OF FIGURES

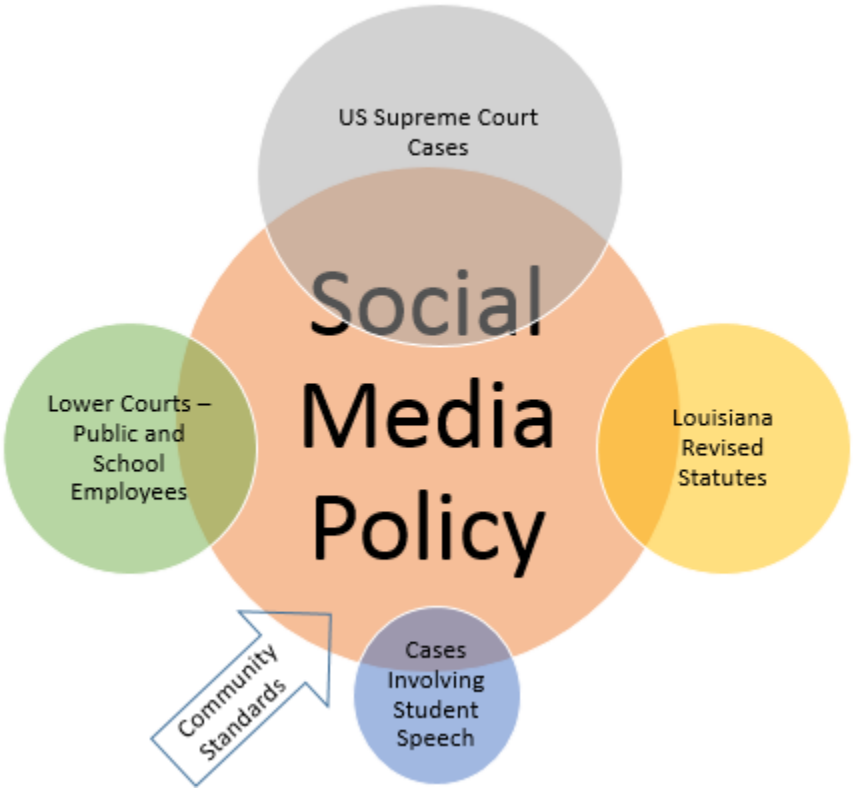

Figure 1. Conceptual framework demonstrating the multiple influences on the development of social media policies.

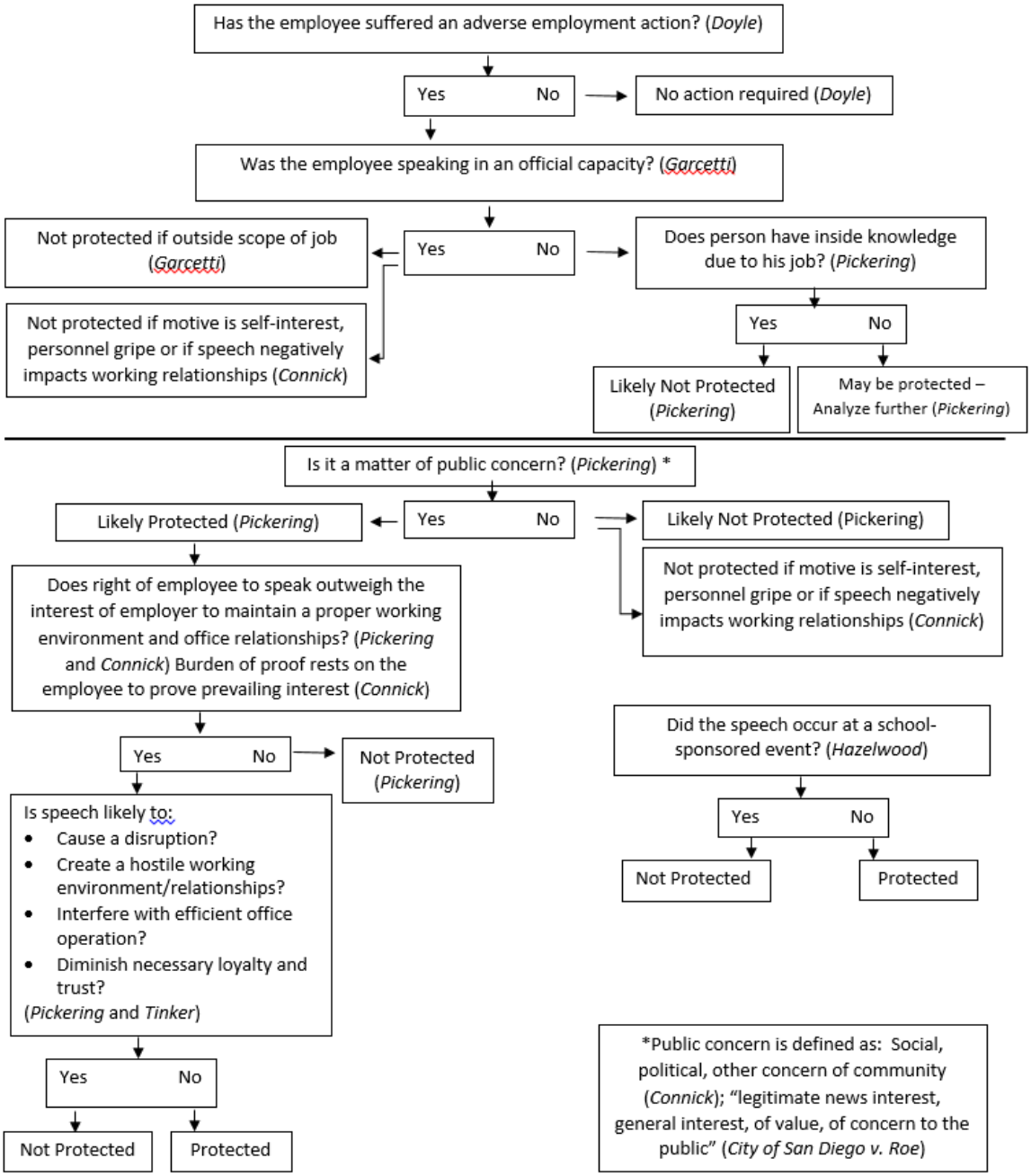

Figure 2. Flow chart for administrators to use when determining if an employee's speech on social media is protected.

APPENDIX E: LIST OF TABLES

Table 1. Analysis of Louisiana social media policy.

District	BCSB	PPSB	OPSB	IPSB	JPSB
Policy manual location	EFAA	EFAA	EFAA	EFAA	KBGA
Policy title explicitly reflects employee use of social media	Y	Y	Y	Y	Y
Allows exception for family contact	Y	Y	Y	N	N
Allows exception for relationships outside the school setting, such as student and youth minister or community coach	Y	Y	Y	N	N
Provides parents with the option to opt-out of exclusive employee-student communication	N	N	N	N	N
Defines social media and provides examples	Y	Y	Y	Y	N
Requires separate school and personal accounts	N	N	N	N	N
Requires employees to include a statement on personal accounts stating that the opinions on this page are personal and not reflective of the district	N	N	N	N	N
Encourages employees to adjust privacy settings to limit students' access to the information on their personal page	Y	Y	Y	N	N
References policy GAMIA-Electronic Communications Between Employees and Students and policy GBRA-Employee Conduct	Y	Y	Y	Y	N
Specifies consequences for violations	Y	Y	Y	Y	N
Requires yearly employee reminder	N	N	N	N	N
Reminds employee that mandatory reporter requirement extends to social media	N	N	N	N	N

Younger, Vicki. Bachelor of Science in Elementary Education, Louisiana State University, 1994, Master of Education, Northwestern State University, 1998; Doctor of Education, University of Louisiana at Lafayette, 2016
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ABSTRACT

Social media has permeated nearly every facet of our modern society. The influence on our culture has been beneficial but challenging. The impact of social media upon the school environment has been tremendous, yet few school districts have created policies describing its acceptable use by employees. Teachers are left feeling uncertain as to where the boundaries exist for their personal and professional use of social media and what can happen when they cross that undefined line. This dissertation examines the court cases that have influenced employment decisions for school employees and defined employees' First Amendment right to free speech as it relates to the use of social media. The cases related to students' free speech limitations that have influenced teachers' cases will be reviewed, as well as current policies as they exist at the national, state, and local levels. The primary purpose of this research is to look for trends among the cases, create guidelines for administrators to use to determine if their employees have engaged in protected speech, and provide a framework for districts to use when creating their own social media policies.

BIOGRAPHICAL SKETCH

Vicki Younger was born in Alexandria, Louisiana in 1973. She is a lifelong resident of Rapides Parish, where she attended public school. Vicki is married to Glenn Younger, and they have three beautiful children. She is the daughter of George and Freida Hollis.

Vicki earned a Bachelor of Science in Elementary Education in 1994 from Louisiana State University and a Master of Education in 1998 from Northwestern State University. She has served as an assistant principal and a principal and currently serves as the Director of Human Resources for the Rapides Parish School Board.

The Doctor of Education degree was conferred during Fall Commencement in December of 2016.