

# PRIVACY EXPECTATIONS AND PROTECTIONS FOR TEACHERS IN THE INTERNET AGE

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## ABSTRACT

*Public school teachers have little opportunity for redress if they are dismissed for their activities on social networking websites. With the exception of inappropriate communication with students, a school district should not be able to consider a public educator's use of a social networking website for disciplinary or employment decisions. Insisting that the law conform to twenty-first century social norms, this iBrief argues that the law should protect teachers' speech on popular social networking websites like Facebook and MySpace.*

## INTRODUCTION

¶1 There have been many recent instances of teachers being disciplined or terminated for their online activities on social networking sites.<sup>2</sup> While many recent cases have considered whether public school districts can restrict students' activities on social networking websites,<sup>3</sup> few have considered whether teachers' activities on social networking websites may be similarly restricted. This iBrief will examine the current state of the law regarding the employment of public educators and their activities on social networking websites such as Facebook,<sup>4</sup> MySpace<sup>5</sup> and YouTube.<sup>6</sup> It concludes that the law is outdated and should adapt to changing technology and culture to allow teachers more

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<sup>2</sup> See Ian Shapira, *When Young Teachers Go Wild on the Web: Public Profiles Raise Questions of Propriety and Privacy*, WASH. POST, April 28, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/27/AR2008042702213.html>.

<sup>3</sup> See, e.g., Wendy Davis, *No More Pencils, No More Facebooks*, A.B.A. J., July 1, 2009, [http://www.abajournal.com/magazine/article/no\\_more\\_pencils\\_no\\_more\\_facebooks/](http://www.abajournal.com/magazine/article/no_more_pencils_no_more_facebooks/).

<sup>4</sup> Facebook Home Page, <http://www.facebook.com> (last visited Aug. 22, 2010).

<sup>5</sup> MySpace Home Page, <http://www.myspace.com> (last visited Aug. 22, 2010).

<sup>6</sup> YouTube Home Page, <http://www.youtube.com> (last visited Aug. 22, 2010).

freedom of expression on social networking websites without fear of professional discipline.

I. SOCIAL NETWORKING WEBSITES ARE  
PART OF MODERN AMERICAN CULTURE

A. *Social networking websites defined*

¶2 Social networking websites, such as MySpace, Facebook, LinkedIn, Twitter, and YouTube, “allow users to create profiles that include biographical information and pictures. After creating a profile, a user can network with other users by adding contacts listed in their e-mail address books or by searching for others by name or common interest.”<sup>7</sup>

¶3 Social networking websites serve a variety of audiences. For example, “MySpace is an informal site that attracts a younger audience. It allows users to post pictures, videos, and music to their profiles and focuses on helping friends and family stay in touch.”<sup>8</sup> One court described MySpace as:

[A] website that allows its users to create an online community where they can meet people. MySpace can be used to share photographs, journals, and ‘interests’ with mutual friends. People with MySpace accounts can create a ‘profile,’ to which they can link their friends, and the owner of the profile can either invite people to become friends, or other MySpace users can ask the owner of the profile to become friends with the owner of the profile. If the owner of a profile accepts another MySpace user as a friend, the friend’s profile picture is posted on the profile owner’s MySpace page, along with a link to the friend’s MySpace profile. The owner of a profile can kick friends off his profile, deleting that friend’s profile picture from the owner’s profile page. In addition, a profile owner can completely block other MySpace users from viewing his profile page. The owner of a profile can post blogs on his own profile page, allow other MySpace users to post comments on his profile page, or post comments on other users’ profile pages.<sup>9</sup>

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<sup>7</sup> James Cool & Thomas Young, *Do Well by Doing Good: Your Actions in the Community Speak Louder Than Words. When You Forge Connections with Community Members, They Will Think Well of You and Your Profession*, 45 TRIAL 32, 32–33 (2009).

<sup>8</sup> *Id.*

<sup>9</sup> *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 297–98 (D. Conn. 2008).

¶4 Facebook is similar to MySpace “but is more popular with college students,” while “LinkedIn is packaged as a professional-networking site.”<sup>10</sup>

¶5 YouTube describes itself as “the world’s most popular online video community, allowing millions of people to discover, watch and share originally-created videos. YouTube provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large and small.”<sup>11</sup>

#### *B. Prevalence of use by Americans*

¶6 Social networking websites are part of modern American culture.<sup>12</sup> A recent Nielsen study showed that two-thirds of people who use the internet visit social-networking or blogging websites, and ten percent of all time spent online is spent on such sites.<sup>13</sup> That same study also found that social networking websites and blogging have together become more popular than e-mail.<sup>14</sup> MySpace has approximately 125 million active users each month, including close to 65 million unique American users.<sup>15</sup> Facebook currently has over 300 million active users,

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<sup>10</sup> Cool & Young, *supra* note 7, at 36.

<sup>11</sup> YouTube Home Page, About, Press Room, [http://www.youtube.com/t/fact\\_sheet](http://www.youtube.com/t/fact_sheet) (last visited Nov. 1, 2009).

<sup>12</sup> See, e.g., Harry K. Wong, The Single Greatest Effect on Student Achievement Is The Effectiveness of The Teacher, Presented to the North Carolina Principal’s Executive Program (Mar. 16, 2007), available at [http://old.sandi.net/fridaynotes/2009/0227\\_wong.pdf](http://old.sandi.net/fridaynotes/2009/0227_wong.pdf) (“Unlike the baby boomers and Generation X, who were independent and entrepreneurial (They gave us Dell, Yahoo, and Google.), Gen Yers are socially adept at working in groups or teams and are avid users of online social networking, such as MySpace and Facebook. A learning community is their forte, thus to work collaboratively in a group is second nature to them.”); see also YouTube Home Page, About, Press Room, [http://www.youtube.com/t/fact\\_sheet](http://www.youtube.com/t/fact_sheet) (last visited Nov. 1, 2009) (“52 percent of 18-34 year-olds share videos often with friends and colleagues.”).

<sup>13</sup> NIELSON CO., GLOBAL FACES AND NETWORKED PLACES 1 (2009), available at [http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen\\_globalfaces\\_mar09.pdf](http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf).

<sup>14</sup> See *id.* (“‘Member Communities’ has [sic] overtaken personal Email to become the world’s fourth most popular online sector after search, portals and PC software applications.”).

<sup>15</sup> MySpace Home Page, Press Room, Fact Sheet <http://www.myspace.com/pressroom?url=/fact+sheet/> (last visited Nov. 1, 2009).

approximately 30% of whom are in the United States.<sup>16</sup> The general population is very engaged with social networking websites, and teachers are no exception. Indeed, a study of pre-service teachers found that 98% of pre-service teachers “were familiar with social networking sites such as MySpace or Facebook” and 88% of pre-service teachers had a social networking website account.<sup>17</sup>

### *1. Recognition of Social Networking Websites by the Legal Community*

¶7 Even the legal profession has recognized the prevalence and utility of social networking websites. One legal publication wrote, “[n]ow, even legal professionals are flocking to Twitter as a chance to socialize, promote and network.”<sup>18</sup> Some lawyers are now using social networking websites to “define [their] brand as . . . lawyer[s], an important concern in a competitive market.”<sup>19</sup> Another legal publication wrote that Facebook “has a more streamlined interface than MySpace and offers an intriguing option for attorneys—the ability to develop an independent profile page for your law practice. Other users can then link to your firm by becoming a ‘fan’ of the page.”<sup>20</sup> Indeed, the legal profession’s adoption of social networking may impact the legal development of social networking speech protections.

### *2. Educational Uses of Social Networking Websites*

¶8 One of the original functions of Facebook was for college students to share their class schedules with each other.<sup>21</sup> As Facebook has expanded from colleges and universities to the general public, it has been adopted by public schools, school teachers and even school districts.<sup>22</sup> Bernie Rhinerson, the Chief District Relations Officer for the San Diego Unified School District, stated that he created a Facebook page for his district in an effort to, among other things, reach out to

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<sup>16</sup> Facebook Home Page, About, Press, Latest Statistics <http://www.facebook.com/facebook?ref=pf#/press/info.php?statistics> (last visited Oct. 30, 2009).

<sup>17</sup> Teresa S. Foulger et al., *Moral Spaces in MySpace: Preservice Teachers’ Perspectives about Ethical Issues in Social Networking*, 42 J. RES. ON TECH. & EDUC. 1, 7 (2009).

<sup>18</sup> Kelly Phillips Erb, *Microblogging: Is Twitter the New Blog?*, 31 PA. LAW. 34, 34 (2009).

<sup>19</sup> *Id.* at 35.

<sup>20</sup> Cool & Young, *supra* note 7, at 33.

<sup>21</sup> Christian Luspa, *Facebook: A Campus Fad Becomes a Campus Fact*, CHRISTIAN SCI. MONITOR, Dec. 13, 2006, <http://www.csmonitor.com/2006/1213/p13s01-legn.html>.

<sup>22</sup> *See, e.g.*, San Diego Unified School District, <http://www.facebook.com/#/SanDiegoUnified?ref=search&sid=1210355.2194801827..1> (last visited Nov. 30, 2009).

employees between the ages of twenty-five and forty who are frequent users of social networking websites.<sup>23</sup> Mr. Rhinerson also noted the usefulness of Facebook and Twitter for communicating during an emergency.<sup>24</sup>

¶9 A search on Facebook for “elementary school PTA” reveals 385 Facebook groups and 86 Facebook pages established for the parent teacher associations of elementary schools to communicate.<sup>25</sup> In addition, at least one high school teacher has set up a Facebook group for his students’ student council, “because it was much easier to send out meeting reminders and such.”<sup>26</sup> Indeed, communicating with students through social networking websites “can sometimes be more time effective and resourceful than what previous generation[s’] teachers used for communication with students.”<sup>27</sup>

¶10 Furthermore, social networking websites also promote education through non-academic uses. For example, groups of students who have been inspired by their teacher may create a Facebook fan group. While this group may be made without the teacher’s knowledge or involvement, it is promoting education by promoting the teacher. Unfortunately, in some cases the content of these fan groups or websites may ultimately damage the teacher’s career.<sup>28</sup> Thus, regardless of the potential benefits of teachers connecting with their students through social networking sites, not all employers view this increased contact as a positive step.

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<sup>23</sup> Allen Young, *San Diego Unified Enters New Frontier with Facebook and Twitter*, *School Innovations and Advocacy*, Nov. 18, 2009 (on file with author).

<sup>24</sup> *Id.*

<sup>25</sup> Facebook.com,

<http://www.facebook.com/search/?q=elementary+school+pta&init=quick> (last visited Nov. 1, 2009).

<sup>26</sup> Askville.com by Amazon,

<http://askville.amazon.com/SimilarQuestions.do?req=give+Mobile+number+facebook> (last visited Nov. 2, 2009).

<sup>27</sup> Julie Mack, *Is It Okay for Teachers to Add Students as Facebook Friends?*, <http://hubpages.com/hub/Teachers-Add-Students-Facebook-Friends>.

<sup>28</sup> See, e.g., *Social Networking: The Good, the Bad and the Funky*, 94 AM. TCHR. 1 (Sept. 2009); Facebook.com, <http://www.facebook.com/search/?init=srp&sfxp=&q=Mr.+Lane#/group.php?gid=2223987941&ref=search&sid=1210355.240850809..1> (last visited Nov. 1, 2009).

## II. OTHER SETTINGS

### A. Student Discipline

¶11 Numerous lawsuits have been filed and decided in recent years throughout the country on the issue of whether public schools violate students' rights by punishing them for off-campus use of social networking websites.<sup>29</sup> Legislation has even been introduced in Connecticut that "would prohibit public schools from disciplining students for online posts, unless the remarks threatened others."<sup>30</sup> This legislation was introduced by Connecticut State Senator Gary LeBeau in response to *Doninger v. Niehoff*, in which a Connecticut high school student was disqualified from running for student council due to the student's post on a blog.<sup>31</sup> Also, a number of legal journals have published articles discussing public school students' First Amendment rights on social networking websites.<sup>32</sup>

### B. Private Sector Employment

¶12 Employers frequently use social networking websites to screen potential employees.<sup>33</sup> For all employees without protective contracts or collective bargaining agreements, "[i]n the absence of strong protections for employees, poorly chosen words or even a single photograph posted online in one's off-hours can have career-altering consequences."<sup>34</sup> A new term, dooced, has been coined to refer to being fired for speech

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<sup>29</sup> See, e.g., Wendy Davis, *No More Pencils, No More Facebooks*, A.B.A. J., July 1, 2009, [http://www.abajournal.com/magazine/article/no\\_more\\_pencils\\_no\\_more\\_facebooks/](http://www.abajournal.com/magazine/article/no_more_pencils_no_more_facebooks/).

<sup>30</sup> *Id.*

<sup>31</sup> See 527 F.3d 41 (2d Cir. 2008).

<sup>32</sup> See, e.g., Kathleen Conn, *Cyberbullying and Other Student Misuses of Technology Affecting K-12 Public Schools: Will Public School Administrators Be Held Responsible for the Consequence?*, 244 ED. LAW REP. 479 (2009); Kevin P. Brady, *Student-Created Fake Online Profiles Using Social Networking Websites: Protected Online Speech Parodies or Defamation?*, 244 ED. LAW REP. 907 (2009).

<sup>33</sup> See, e.g., Daniel Abasolo, *Fired for Facebook*, THE BATTALION, June 28, 2006, <http://media.www.thebatt.com/media/storage/paper657/news/2006/06/28/Opinion/Fired.For.Facebook-2118962.shtml>.

<sup>34</sup> Randall Stross, *How to Lose Your Job on Your Own Time*, N.Y. TIMES, Dec. 30, 2007, available at <http://www.nytimes.com/2007/12/30/business/30digi.html>.

online, especially writing on blogs.<sup>35</sup> The word dooced was first used after Heather Armstrong, the author of dooce.com, was fired for writing about her work on her personal website.<sup>36</sup> She gives the following advice to readers of her website: “BE YE NOT SO STUPID. Never write about work on the internet unless your boss knows and sanctions the fact that YOU ARE WRITING ABOUT WORK ON THE INTERNET.”<sup>37</sup> Another term, Facebook Fired, refers either to being fired due to use of a social networking website or to actually being fired via a social networking website.<sup>38</sup>

¶13 Unlike public-sector employees, private-sector employees have no First Amendment protection from discipline or termination resulting from their speech.<sup>39</sup> Private-sector employees do have some statutory protections though, such as anti-discrimination laws, whistleblower protections, and labor laws.<sup>40</sup> Also, private sector employees who have been terminated due to their activities on social networking websites can file lawsuits pursuant to the federal Wiretap Act<sup>41</sup> and the federal Stored Communications Act (SCA).<sup>42</sup>

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<sup>35</sup> Kerry Maxwell, *dooce*, MACMILLAN ENGLISH DICTIONARY (2d ed. 2005), <http://www.macmillandictionaries.com/wordoftheweek/archive/050131-dooce.htm>.

<sup>36</sup> *Id.*

<sup>37</sup> Posting of Heather B. Armstrong to <http://www.dooce.com/about>.

<sup>38</sup> Proofpoint: Email Security Blog, *Dooce*, *Twerminated*, *Facebook Fired: Lingo and Facts about Social Media and Employee Terminations*, Sep. 02, 2009, <http://blog.proofpoint.com/2009/09/dooce-twerminated-facebook-fired-lingo-and-facts-about-social-media-and-employee-terminations.html> (last visited Nov. 30, 2009).

<sup>39</sup> See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (“It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.”) (citation omitted); see also Philip L. Gordon & Kevin P. O’Neil, *The Legal Perils of Social Media & Social Networking: Questions & Answers*, WORKPLACE PRIVACY COUNS. (Oct. 5, 2009), <http://privacyblog.litfler.com/2009/10/articles/social-networking-1/the-legal-perils-of-social-media-social-networking-questions-answers/#more>.

<sup>40</sup> W. Va. Emp’t Law Letter, *Responding to Employee’s Personal Social Networking*, HRHERO.COM, <http://www.hrhero.com/hl/092509-social-networking.html?TOPIC>.

<sup>41</sup> 18 U.S.C. §§ 2510–22 (2006).

<sup>42</sup> *Id.* §§ 2701–11.

¶14 One example of such a lawsuit is that of Brian Pietrylo and Doreen Marino who together filed a lawsuit against their former employer, Hillstone Restaurant Group, alleging violations of the federal Wiretap Act, the SCA, New Jersey state laws, wrongful termination in violation of public policy, and common law invasion of privacy.<sup>43</sup> The allegations of wiretapping were dropped and the other allegations were heard by a jury.<sup>44</sup> Mr. Pietrylo and Ms. Marino were employed as servers at Houston's, a restaurant owned by the Hillstone Restaurant Group.<sup>45</sup> They were fired for comments they posted in an invitation-only chat group on MySpace, which was accessed by their managers at Houston's without authorization.<sup>46</sup> The managers of the restaurant accessed the MySpace chat room after receiving the MySpace login information from Ms. St. Jean, another employee at Houston's.<sup>47</sup> Ms. St. Jean testified that she had felt pressured to turn over her login information to her boss.<sup>48</sup> On appeal, the court held that the jury "could reasonably infer from such testimony that Ms. St. Jean's purported 'authorization' was coerced or provided under pressure," and that the Houston's managers' accessing of the chat room was not authorized.<sup>49</sup> The jury found the defendant not guilty of violating Mr. Pietrylo's and Ms. Marino's common law rights to privacy, and the jury therefore did not reach a verdict on the allegations of wrongful termination in violation of public policy.<sup>50</sup> However, the jury did find the defendant guilty of violating the state and federal Stored Communications Acts and awarded damages to Mr. Pietrylo and Ms. Marino.<sup>51</sup> Accordingly, in certain circumstances, it is possible for private sector employees to succeed in lawsuits against former employers who terminated them for their use of social networking.

¶15 Indeed, the monitoring of employee's social networking website use is a contentious issue over which employees and employers hold very different views. A recent study by Deloitte analyzed this issue and produced interesting, although not startling results.<sup>52</sup> Of the more than

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<sup>43</sup> Pietrylo v. Hillstone Rest. Group, No. 06-5754, 2009 WL 3128420, at \*1, (D.N.J. Sept. 25, 2009).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at \*3.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at \*3.

<sup>50</sup> *Id.* at \*1.

<sup>51</sup> *Id.*

<sup>52</sup> Deloitte LLP 2009 Ethics & Workplace Survey Results, *Social networking and reputational risk in the workplace* (2009), available at

two thousand working adults and five hundred business executives surveyed, 60% of the executives said that “they have the ‘right to know’ how employees portray themselves and their organizations online,” while 53% of the employees said that “social networking pages are none of an employer’s business.”<sup>53</sup> Almost one third of the employees surveyed responded that they “never consider what their boss would think before posting materials online,”<sup>54</sup> and 61% of employees surveyed responded that they would not alter their social networking profiles or activities even if their boss was monitoring their profiles or activities.<sup>55</sup>

### III. SOCIAL NETWORKING WEBSITES AND PUBLIC SECTOR EMPLOYEES

#### A. Public Sector Employment Generally

¶16 Public sector employees are limited in terms of judicial recourse following termination or discipline by employers in response to statements made by the employee on social networking sites.

##### 1. Under Color of State Law

¶17 As public employers are state officials, public employees may pursue claims pursuant to 42 U.S.C. § 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¶18 To win on a § 1983 claim, the “plaintiff must establish that a person acting under color of state law deprived him of a federal right.”<sup>56</sup>

¶19 A plaintiff who makes a First Amendment or due process claim under § 1983 “may seek related injunctive relief—such as reinstatement

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[http://www.deloitte.com/view/en\\_US/us/About/Ethics-Independence/article/8aa3cb51ed812210VgnVCM100000ba42f00aRCRD.htm](http://www.deloitte.com/view/en_US/us/About/Ethics-Independence/article/8aa3cb51ed812210VgnVCM100000ba42f00aRCRD.htm)

(last visited Nov. 19, 2009).

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir. 1999).

to remedy past violations—against state actors in their official capacities.”<sup>57</sup>

## 2. Fourteenth Amendment

¶20 If terminated unfairly for content posted on a social networking site, public employees, such as public school teachers, likely cannot bring a claim under the Equal Protection Clause of the Fourteenth Amendment. In *Engquist v. Oregon Department of Agriculture*, the Supreme Court held that “the class-of-one theory of equal protection does not apply in the public employment context.”<sup>58</sup> The Court stated that:

There are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be “treated alike, under like circumstances and conditions” is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise . . . This principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. . . . [T]reating seemingly similarly situated individuals differently in the employment context is par for the course.<sup>59</sup>

## 3. Limitations on First Amendment Free Speech

¶21 Until the 1960s, it was assumed that a person relinquished some of his or her First Amendment rights by becoming a public employee.<sup>60</sup> Indeed, Supreme Court Justice Oliver Wendell Holmes once said, “[t]he policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>61</sup>

¶22 This assumption began to change when, in *Pickering v. Board of Education*, the Court held that a public employee could not be summarily fired for uttering constitutionally protected free speech.<sup>62</sup> In *Pickering*,

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<sup>57</sup> *Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943, at \*30 (E.D. Pa. Dec. 3, 2008) (citing *Melo v. Hafer*, 912 F.2d 628, 630 (3d Cir. 1990)).

<sup>58</sup> 128 S. Ct. 2146, 2151 (2008).

<sup>59</sup> *Id.* at 2154–55.

<sup>60</sup> See *Connick v. Meyers*, 461 U.S. 138, 143–44 (1983).

<sup>61</sup> *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

<sup>62</sup> 391 U.S. 563, 570 (1968).

the Court formulated a balancing test to weigh a teacher's speech as a public employee against the interests of the employer.<sup>63</sup> The Court stated that courts need to "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>64</sup>

¶23 In *Tinker v. Des Moines Independent Community School District*, the Court further recognized the rights of free speech held by public employees, holding that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."<sup>65</sup> As in *Pickering*, the Court emphasized the need to balance interests and noted "the need for affirming the comprehensive authority of . . . school officials, consistent with fundamental constitutional safeguards, to . . . control conduct in the schools."<sup>66</sup>

¶24 Refinement was made to the *Pickering* balancing test in *Connick v. Meyers* when the Court introduced the "public concern" test.<sup>67</sup> The Court noted that "[f]or at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."<sup>68</sup> However, the Court also acknowledged the "evolution of the rights of public employees, and the commonsense realization that government offices could not function if every employment decision became a constitutional matter."<sup>69</sup> The Court held that in order to trigger *Pickering* balancing, the speech in question must be made by the public employee as a private citizen on a matter of public concern, as opposed to as an employee on a matter of private interest.<sup>70</sup> Indeed, according to the Court, a public employee's speech on matters of private concern does not receive First Amendment protection, and the "federal court is not the

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<sup>63</sup> *Id.* at 568.

<sup>64</sup> *Id.*

<sup>65</sup> 393 U.S. 503, 506 (1969).

<sup>66</sup> *Id.* at 507.

<sup>67</sup> 461 U.S. 138, 147–48 (1983).

<sup>68</sup> *Id.* at 142.

<sup>69</sup> *Id.* at 143.

<sup>70</sup> *Id.* at 147. Until recently, public employees in California were thought to have broader protections of free speech under California's Constitution. *Kaye v. Board of Trustees of the San Diego County Public Law Library*, 101 Cal.Rptr.3d 456, at 458 (Cal. Ct. App. 2009) considered the case of a publicly employed librarian who was terminated after sending his colleagues emails critical of his employer. The librarian unsuccessfully argued that the emails were protected under the free speech clause of the California Constitution. *Id.* at 464. The court held that the public concern test used by the Supreme Court applies to public employees' speech in California. *Id.*

appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."<sup>71</sup> The Court stated:

When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.<sup>72</sup>

¶25 Even if an employee's speech is on a matter of public concern, their constitutional right may nonetheless be trumped by the interests of efficiency in public service.<sup>73</sup> Courts consider the content, form, and context of the speech to determine if it on a matter of public concern.<sup>74</sup> Importantly, Mr. Meyers spoke at the office, but the Court acknowledged in a footnote that "[e]mployee speech which transpires entirely on the employee's own time, and in nonwork areas of the office, bring different factors into the *Pickering* calculus, and might lead to a different conclusion."<sup>75</sup>

¶26 If a public employee is fired and wishes to pursue a claim that his or her termination was the result of his or her exercise of constitutionally protected speech, he or she must show probable cause.<sup>76</sup> In *Mandell v. County of Suffolk*, the Second Circuit stated that prior to applying the *Pickering* balance test, a plaintiff must establish that: "(1) his speech addressed a matter of public concern, (2) he suffered an adverse employment action, and (3) a causal connection existed between the speech and the adverse employment action, 'so that it can be said that his speech was a motivating factor in the determination.'"<sup>77</sup> If a plaintiff succeeds in providing evidence of these three elements, a public employer may still avoid liability either by "demonstrating by a

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<sup>71</sup> *Connick*, 461 U.S. at 147.

<sup>72</sup> *Id.* at 146.

<sup>73</sup> *See id.* at 150.

<sup>74</sup> *Id.* at 147-48.

<sup>75</sup> *Id.* at 153 n.13.

<sup>76</sup> D. Duff Mckee, *Termination or Demotion of a Public Employee in Retaliation For Speaking Out As a Violation of Right of Free Speech*, 22 AM. JUR. PROOF OF FACTS 3D 203, § 19.

<sup>77</sup> 316 F.3d 368, 382 (2d Cir. 2003) (quoting *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999)).

preponderance of the evidence that it would have taken the same adverse action in the absence of the protected speech,” or by showing that the “plaintiff’s speech was likely to disrupt the government’s activities, and the likely disruption was ‘sufficient to outweigh the First Amendment value of plaintiff’s speech.’”<sup>78</sup>

¶27 Indeed, although public employees no longer must forgo all First Amendment rights for employment, public employers may still restrict employees’ speech in ways that would be unconstitutional if they were private employers.<sup>79</sup>

## B. Public Education

### 1. What Makes Public Education Unique?

¶28 Although public school teachers are protected under the First Amendment, they are often held to a high moral standard by their surrounding communities. Holding teachers to a high moral standard is nothing new. A 1915 set of rules for unmarried female teachers includes prohibitions on smoking cigarettes, dressing in bright colors, keeping company with men, loitering in front of ice cream stores, and wearing fewer than two petticoats.<sup>80</sup> Similarly, an 1872 set of school rules states that “[a]ny teacher who smokes, uses liquor in any form, frequents pool or public halls, or gets shaved in a barber shop will give good reason to suspect his worth, intention, integrity and honesty.”<sup>81</sup> Today, state certification procedures reflect this antiquated notion with prohibitions from “[e]ngag[ing] in conduct which would discredit the teaching profession.”<sup>82</sup> The majority of state teaching licenses contain moral codes that teachers must follow.<sup>83</sup>

¶29 Across the United States, teachers have been suspended and fired for their postings on social networking websites.<sup>84</sup> One example is Ms. Tamara Hoover, who was fired from her job as an art teacher at an

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<sup>78</sup> *Id.* at 382–83 (quoting *Locurto v. Safir*, 264 F.3d 154, 166 (2d Cir. 2001)).

<sup>79</sup> *See, e.g., City of San Diego v. Roe*, 543 U.S. 77 (2004).

<sup>80</sup> *Rules for Teachers—1915*, New Hampshire Historical Society, <http://www.nhhistory.org/edu/support/nhrowingup/teacherrules.pdf> (last visited Nov. 22, 2009).

<sup>81</sup> *School Rules—1872*, New Hampshire Historical Society, <http://www.nhhistory.org/edu/support/nhrowingup/teacherrules.pdf> (last visited Nov. 22, 2009).

<sup>82</sup> Unprofessional and Immoral Conduct, ARIZ. ADMIN. CODE § R7-2-1308 (2008), available at [http://azsos.gov/public\\_services/Title\\_07/7-02.pdf](http://azsos.gov/public_services/Title_07/7-02.pdf).

<sup>83</sup> Kellie Hayden, *Teachers & Social Networking Sites*, SUITE101.COM, May 18, 2008, <http://www.suite101.com/content/teachers-social-networking-sites-a54245>.

<sup>84</sup> *See Shapira, supra* note 2, at A1.

Austin, Texas high school after school officials viewed artistic pictures of Ms. Hoover, which her female partner had posted on Flickr.com.<sup>85</sup> The school characterized the photos, some of which showed Ms. Hoover's breasts, as pornographic, although the Houston Chronicle described them as "no more erotic than the statue of David."<sup>86</sup> The school district claimed that they terminated Ms. Hoover "because the photos were inappropriate and violat[ed] the 'high moral standard' expected of public school teachers."<sup>87</sup> The district further argued that Ms. Hoover ceased to be an effective teacher because the photos were accessible to students. Former colleagues of Ms. Hoover disagreed sharply with the district on this point.<sup>88</sup> The questions that arise from stories like Ms. Hoover's are whether we, the public, should care about what teachers do in their personal lives; and if so, how do teachers' personal lives really affect their classroom behavior?<sup>89</sup>

¶30 A *Washington Post* article commented on "the crudeness of some Facebook or MySpace teacher profiles" and asked: "Do the risqué pages matter if teacher performance is not hindered and if students, parents and school officials don't see them? At what point are these young teachers judged by the standards for public officials?"<sup>90</sup> As that article pointed out, "these are adults, many in their twenties, who are behaving, for the most part, like young adults."<sup>91</sup>

¶31 One school district in particular, Charlotte-Mecklenburg Schools, has been particularly intolerant of its employees' postings on social networking websites.<sup>92</sup> At least four teachers, of Charlotte-Mecklenburg Schools have faced disciplinary action due to their social networking website activity.<sup>93</sup> One of these teachers was fired after

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<sup>85</sup> Stephen Rothberg, *Texas Teacher Fired for Posting Topless Photos On-line*, COLLEGERECRUITER.COM (June 19, 2006, 7:08 AM), <http://blog.collegerecruiter.com/blog/2006/06/19/texas-teacher-fired-for-posting-topless-photos-on-line/>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Ana Kasparian, *Should Teachers get Fired Based on the Content of their Facebook?*, POL.EDUC. EXAMINER, June 24, 2009, <http://www.examiner.com/x-5445-Politics-in-Education-Examiner~y2009m6d24-Should-teachers-get-fired-based-on-the-content-of-their-facebook>.

<sup>90</sup> Shapira, *supra* note 84.

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., Mario Roldan, *Another CMS Teacher Faces Termination Over Facebook Post*, WCNC.COM, Nov. 1, 2009, <http://www.wcnc.com/news/local/68701507.html>.

<sup>93</sup> *Id.*

describing her workplace on her Facebook profile as “the most ghetto school in Charlotte.”<sup>94</sup> However, as a spokesperson for the teacher explained, the teacher did not intend to cause offense, and the school in question actually fits the definition of “ghetto,” as “it is in a part of the city in which members of a minority group live, especially because of social, legal or economic pressure.”<sup>95</sup> A spokesperson for the school district articulated the position that “if an employee can’t be seen as a role model, they shouldn’t be teaching.”<sup>96</sup> In the district’s view, “[i]t’s really not a matter of free speech. It’s a matter of professional judgment or the lack thereof.”<sup>97</sup> Although it certainly is a matter of professional judgment, it most certainly is also a matter of free speech.

#### IV. RECENT CASES

¶32 Few teachers have filed lawsuits protesting professional discipline or termination resulting from their use of social networking websites. The parties in each of the few cases on the subject advanced similar arguments and achieved similar results.

##### *A. Spanierman v. Hughes*

¶33 Jeffrey Spanierman was employed by the State of Connecticut, Department of Education as an English teacher at Emmett O’Brien High School in Ansonia, Connecticut.<sup>98</sup> The principal of the school learned that Mr. Spanierman communicated with students through his MySpace page about “homework, to learn more about the students so he could relate to them better, and to conduct casual, non-school related discussions.”<sup>99</sup> The principal conveyed to Mr. Spanierman that “he had exercised poor judgment as a teacher” by connecting with students through MySpace.<sup>100</sup> Because of his use of MySpace, Mr. Spanierman’s contract for employment was not renewed.<sup>101</sup>

¶34 Mr. Spanierman sued the school officials under 42 U.S.C. § 1983, alleging violations of his First Amendment freedoms of speech and association, as well as his Fourteenth Amendment rights to procedural

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<sup>94</sup> *Id.*

<sup>95</sup> *Worker Fired Over Facebook Posting*, ASSOCIATED PRESS, Nov. 26, 2008, available at [http://www.postandcourier.com/news/2008/nov/26/worker\\_fired\\_over\\_facebook\\_posting63089/](http://www.postandcourier.com/news/2008/nov/26/worker_fired_over_facebook_posting63089/).

<sup>96</sup> Roldan, *supra* note 92.

<sup>97</sup> *Id.*

<sup>98</sup> *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 297 (D. Conn. 2008).

<sup>99</sup> *Id.* at 298–99.

<sup>100</sup> *Id.* at 299.

<sup>101</sup> *Id.* at 311.

and substantive due process and equal protection under the law.<sup>102</sup> The court found that Mr. Spanierman's First Amendment claims failed as a matter of law<sup>103</sup> and granted summary judgment in favor of the Defendants on all of Mr. Spanierman's claims.<sup>104</sup>

¶35 Mr. Spanierman claimed that his interest in the renewal of his teaching contract was a property interest within the meaning of the Fourteenth Amendment,<sup>105</sup> but the court found that it was not.<sup>106</sup> The court held that "[i]n the employment context, a property interest arises only where the state is barred, whether by statute or contract, from terminating (or not renewing) the employment relationship without cause."<sup>107</sup> Mr. Spanierman did not have tenure, but argued that Connecticut's Teacher Tenure Act<sup>108</sup> nonetheless provided him with a protected property interest.<sup>109</sup>

¶36 Rejecting Mr. Spanierman's argument, the court found that his employment was governed by a union agreement, and not the Teacher Tenure Act.<sup>110</sup> Nothing in the union agreement indicated "that the non-renewal of a non-tenured teacher's contract [could] be done only for just cause."<sup>111</sup> Furthermore, the Connecticut Department of Education had fully complied with the agreement by giving Mr. Spanierman proper notice and granting his request for a hearing.<sup>112</sup> Therefore, the court held that Mr. Spanierman had been afforded procedural due process.<sup>113</sup> Also, as he failed to establish a protected property right in the renewal of his employment contract, his substantive due process claim failed as a matter of law.<sup>114</sup>

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<sup>102</sup> *Id.* at 297.

<sup>103</sup> *Id.* at 314.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 301; U.S. CONST. amend. XIV § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>106</sup> *Spanierman*, 576 F. Supp. 2d at 303.

<sup>107</sup> *Id.* at 301 (quoting *S & D Maint. Co.*, 844 F.2d at 967).

<sup>108</sup> CONN. GEN. STAT. § 10-151 (2010).

<sup>109</sup> *Spanierman*, 576 F. Supp. 2d at 301.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 301–02 (noting that the result would have been the same if the Teacher Tenure Act had applied to Mr. Spanierman).

<sup>112</sup> *Id.* at 302.

<sup>113</sup> *Id.* at 303.

<sup>114</sup> *Id.* at 304; *see id.* at 303 ("In order to prevail on a substantive due process claim, the plaintiff must first establish the existence of a 'federally protected property right,' which requires a demonstration of a clear entitlement to a benefit under state law.").

¶37 Also under the Fourteenth Amendment, Mr. Spanierman claimed that he had been denied equal protection of the laws, as he was the only teacher in his school system to have “suffered adverse employment action because of his or her choice of a particular website for lawful electronic communications.”<sup>115</sup> The court noted that his equal protection claim was based on the theories of a “class-of-one” and “malicious prosecution.”<sup>116</sup> Thus, the court held that this claim failed, because the class-of-one theory “does not apply in the public employment context,”<sup>117</sup> and it is doubtful whether the malicious prosecution theory still applies in the public employment context.<sup>118</sup> Even if the malicious prosecution theory remains viable, Mr. Spanierman failed to “compare himself to a similarly situated employee for the purposes of his . . . claim,” which is necessary to succeed on such a claim.<sup>119</sup> Mr. Spanierman compared himself to two teachers at Emmett O’Brien who also have MySpace profiles; however, the court found this comparison insufficient, as Mr. Spanierman did not present any evidence as to whether the teachers in question interacted with students via MySpace.<sup>120</sup>

¶38 The court held that Mr. Spanierman’s speech on his MySpace profile, except for a political poem, was not protected by the First Amendment, as it was not on matters of public concern.<sup>121</sup> The court also found that action was taken against Mr. Spanierman by his former employers because his “conduct on MySpace, as a whole, was disruptive to school activities.”<sup>122</sup> Mr. Spanierman’s exchanges with students over MySpace “show[ed] a potentially unprofessional rapport with students, and the court [could] see how a school’s administration would disapprove of, and find disruptive, a teacher’s discussion with a student about ‘getting any’ (presumably sex), or a threat made to a student (albeit a facetious one) about detention.”<sup>123</sup> The court further held that:

It is reasonable for the Defendants to expect the Plaintiff, a teacher with supervisory authority over students, to maintain a professional, respectful association with those students. . . . Plaintiff would communicate with students as if he were their peer, not their

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<sup>115</sup> *Id.* at 304 (internal citations omitted).

<sup>116</sup> *Id.* at 305.

<sup>117</sup> *Id.* at 306 (quoting *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2151 (2008)).

<sup>118</sup> *Id.* at 307.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 310–11.

<sup>122</sup> *Id.* at 312.

<sup>123</sup> *Id.*

teacher. Such conduct could very well disrupt the learning atmosphere of a school, which sufficiently outweighs the value of Plaintiff's MySpace speech.<sup>124</sup>

¶39 Additionally, the court held that Mr. Spanierman had “failed to establish a causal connection between his poem and the decision to not renew his employment contract.”<sup>125</sup> Even if he had established a causal connection between his protected speech and the non-renewal of his contract, Defendants would have nonetheless prevailed, according to the court, because “the Defendants would have taken the same adverse action even in the absence of the poem, and . . . Plaintiff's speech was likely to disrupt school activities.”<sup>126</sup>

¶40 Regarding Mr. Spanierman's First Amendment freedom of association claim, the court stated that it was “unsure as to whether MySpace can properly be considered an ‘organization’ for the purposes of this analysis.”<sup>127</sup> The court found that even if MySpace “could be considered an organization for First Amendment purposes, there [was] no evidence . . . that MySpace, as an organization, purports to speak out on matters of public concern.”<sup>128</sup> The court further stated that even if Mr. Spanierman had established that “his association with MySpace involved a matter of public concern[, he] would still need to show that a causal connection existed between the expressive association and the adverse employment action.”<sup>129</sup>

#### *B. Snyder v. Millersville University*

¶41 Ms. Stacey Snyder was assigned to complete a student-teacher program at Conestoga Valley High School in January 2006.<sup>130</sup> Prior to the program, she had received the Millersville University Guide to Student Teaching, which states that Millersville University student teachers are required to “‘maintain the same professional standards expected of the teaching employees of the cooperating school’ and to ‘fulfill as effectively as possible every role of the classroom teacher.’”<sup>131</sup> Also, during her student teaching orientation in January, Ms. Snyder was cautioned “not to refer to any students or teachers on [her] personal

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<sup>124</sup> *Id.* at 313.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 314.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943, at \*7 (E.D. Penn. Dec. 3, 2008).

<sup>131</sup> *Id.* at \*6–7.

webpages.”<sup>132</sup> By spring of 2006, Ms. Snyder was teaching a full load of courses at Conestoga Valley High School.<sup>133</sup> Ms. Snyder received mid-placement evaluations from her University advisor and Mrs. Reinking, her “cooperating teacher” at Conestoga Valley, which indicated a concern for “proper teacher-student boundaries” and “unprofessionalism.”<sup>134</sup>

¶42 Ms. Snyder did inform her students that she had a MySpace webpage, and she was aware that many of her students also had MySpace webpages.<sup>135</sup> In May of 2006, Ms. Snyder became aware that one of her students had viewed her MySpace page.<sup>136</sup> She confronted this student and testified that it was “‘inappropriate’ for her student to look at a teacher’s MySpace account because ‘there’s a boundary line and there’s personal information on there that the student should know not to look at as a student.’”<sup>137</sup> Ms. Snyder then posted the following statement on her MySpace page:

First, Bree said that one of my students was on here looking at my page, which is fine. I have nothing to hide. I am over 21, and I don’t say anything that will hurt me (in the long run). Plus, I don’t think that they would stoop that low as to mess with my future. So, bring on the love! I figure a couple of students will actually send me a message when I am no longer their official teacher. They keep asking me why I won’t apply there. Do you think it would hurt me to tell them the real reason (or who the problem was)?<sup>138</sup>

¶43 The post also included a picture of Ms. Snyder “wearing a pirate hat and holding a plastic cup with a caption that read ‘drunken pirate.’”<sup>139</sup> Ms. Snyder testified at trial that the “photograph and caption had an entirely personal meaning” and that the “posting was not directed at any CV administrators or anyone that she had ‘professional contact with . . .’ but was ‘really directed to her best friends.’”<sup>140</sup>

¶44 This post proved controversial for a number of reasons. For one thing, another Conestoga Valley teacher accessed Ms. Snyder’s MySpace page, saw the posting and showed the posting to Mrs. Reinking.<sup>141</sup> Mrs.

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<sup>132</sup> *Id.* at \*12.

<sup>133</sup> *Id.* at \*8.

<sup>134</sup> *Id.* at \*7–11.

<sup>135</sup> *Id.* at \*13.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at \*13–14 (internal citations omitted).

<sup>138</sup> *Id.* at \*14–15.

<sup>139</sup> *Id.* at \*15.

<sup>140</sup> *Id.* at \*15–16.

<sup>141</sup> *Id.* at \*16.

Reinking read the post and interpreted the last two sentences of the post to be about her,<sup>142</sup> as she was aware that Ms. Snyder did not have a high opinion of her.<sup>143</sup> Furthermore, Mrs. Reinking “thought that it was inappropriate for a student teacher to invite her students to view a photograph of herself drinking alcohol.”<sup>144</sup> Mrs. Reinking proceeded to report the posting and her interpretation of the posting to her supervisor who subsequently instructed Ms. Snyder not return to the school until her final evaluation.<sup>145</sup>

¶45 At her final evaluation, Ms. Snyder was shown and questioned about her MySpace posting, which was described as “unprofessional.”<sup>146</sup> The evaluators, including Ms. Snyder’s Millersville University student-teaching advisor, were concerned about both the “drunken pirate” photograph and the text of the posting.<sup>147</sup> Millersville University “backed the school authorities’ contentions that her posting was ‘unprofessional’ and might ‘promote under-age drinking.’”<sup>148</sup> In her final evaluation, Ms. Snyder received an unsatisfactory rating in the area of professionalism, and the evaluation noted that she had “evidenced some aspects of poor judgment during the Semester, especially in regard to one specific instance.”<sup>149</sup> As a result of Ms. Snyder’s unsatisfactory completion of the student-teaching program, Millersville University awarded her a Bachelor of Arts degree in English instead of in Education.<sup>150</sup>

¶46 Ms. Snyder filed suit against five Millersville University administrators individually and in their official capacities, alleging that the school administrators violated her First Amendment right to freedom of expression and her Fifth and Fourteenth Amendment rights to due process under color of state law pursuant to 42 U.S.C. § 1983.<sup>151</sup> She alleged that the administrators of Millersville University “violated her rights because the MySpace posting ‘played a substantial part’ in both their decision to deny her the BSE and their ‘refusal to take the necessary

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<sup>142</sup> *Id.*

<sup>143</sup> *See id.* at \*12.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at \*16–17.

<sup>146</sup> *Id.* at \*19–20.

<sup>147</sup> *Id.* at \*20.

<sup>148</sup> Randall Stross, *How to Lose Your Job on Your Own Time*, N.Y. TIMES, Dec. 30, 2007,

[http://www.nytimes.com/2007/12/30/business/30digi.html?\\_r=1&scp=1&sq=How%20to%20Lose%20Your%20Job%20on%20Your%20Own%20Time&st=cse](http://www.nytimes.com/2007/12/30/business/30digi.html?_r=1&scp=1&sq=How%20to%20Lose%20Your%20Job%20on%20Your%20Own%20Time&st=cse).

<sup>149</sup> *Snyder*, 2008 U.S. Dist. LEXIS 97943, at \*20.

<sup>150</sup> *Id.* at \*23–24.

<sup>151</sup> *Id.* at \*3.

steps' to ensure that she received PDE teacher certification."<sup>152</sup> Ms. Snyder "sought monetary damages from Defendants in their individual capacities and injunctive relief from Defendants in their official capacities."<sup>153</sup>

¶47 On a motion for summary judgment, the judge ruled that the claims against the defendants in their individual capacities were barred by qualified immunity.<sup>154</sup> A non-jury trial was conducted on Ms. Snyder's claim for mandatory injunctive relief against the administrators in their official capacities.<sup>155</sup>

¶48 Ms. Snyder asked the court to compel the defendants to award her a Bachelor of Science degree in Education as well as the teaching credits necessary for her to pursue teaching certification from the Pennsylvania Department of Education.<sup>156</sup> The court found that the defendants lacked the legal authority under Pennsylvania law to give her a BSE degree, because she had not fulfilled the student-teaching requirement.<sup>157</sup> Therefore, the court held that Ms. Snyder's request for injunctive relief necessarily failed, because "[a] claim for injunctive relief can stand only against someone who has the authority to grant it."<sup>158</sup> Her failure to satisfactorily complete student teaching also made her ineligible for teaching certification by the Pennsylvania Department of Education.<sup>159</sup>

¶49 The court treated Ms. Snyder as a teacher, rather than a student, and held that the defendants did not violate her First Amendment right to freedom of expression, because her expression on her MySpace page was on matters of private concern.<sup>160</sup> As a public school teacher, in order to succeed on a First Amendment claim of freedom of expression, Ms. Snyder had the burden of proving that her expression was on a matter of public concern.<sup>161</sup> By her own admission, Ms. Snyder's expression on MySpace was on purely personal matters, and therefore is not afforded protection by the First Amendment.<sup>162</sup> The court held that the

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<sup>152</sup> *Id.* at \*28 (internal citations omitted).

<sup>153</sup> *Id.* at \*3.

<sup>154</sup> *Id.* at \*4.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 30–31 (citing 22 PA. CODE §§ 49.82(b)(2), 354.25(f) (2010)).

<sup>158</sup> *Id.* at \*32 (quoting *Williams v. Doyle*, 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007)).

<sup>159</sup> *Id.* at \*35.

<sup>160</sup> *Id.* at \*42–43.

<sup>161</sup> *Id.* at \*39 (citing *Connick v. Myers*, 461 U.S. 138, at 147 (1983)).

<sup>162</sup> *Id.* at \*42.

“[d]efendants’ response to the posting thus did not violate Plaintiff’s First Amendment rights.”<sup>163</sup>

*C. Murmer v. Chesterfield County School Board.*

¶50 Mr. Stephen Murmer was employed as an art teacher at Monacan High School in Chesterfield County, Virginia. Mr. Murmer was terminated after school administrators became aware of a YouTube video in which he appeared. With the assistance of the American Civil Liberties Union he brought legal action under 42 U.S.C. § 1983 and the First Amendment against the school board, the principal of the school and the Associate Superintendent for Human Resources of Chesterfield County Public Schools.<sup>164</sup>

¶51 The YouTube video in question showed a clip of Mr. Murmer’s October 2003 appearance on a cable television show called “Unscrewed With Martin Sargent,” in which Mr. Murmer discussed and demonstrated his artistic technique of painting with his buttocks while wearing a swimsuit.<sup>165</sup> He never discussed his artistic technique at school or with his students and even appeared on the show in disguise and under the name Stan Murmur.<sup>166</sup> Also, Mr. Murmer did not personally post the video to YouTube. Mr. Murmer was “terminated solely because of the YouTube video and students’ and teachers’ alleged reaction to it, and not for any reasons relating to his performance as a teacher.”<sup>167</sup> The school administrators who fired Mr. Murmer contended that the YouTube video caused disruptions at Monacan High School.<sup>168</sup> The defendants also admitted that “one of the reasons for terminating the Plaintiff’s employment was that the Plaintiff’s conduct in the video, including the inappropriate display of his body in a video that was intended for public viewing, constituted conduct unbecoming of a teacher, who necessarily is a role model for his students.”<sup>169</sup>

¶52 Mr. Murmer eventually settled with the Chesterfield County School Board for \$65,000, which was approximately two years’ salary

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<sup>163</sup> *Id.* at \*43.

<sup>164</sup> Complaint, *Murmer v. Chesterfield Cnty. Sch. Bd.*, 2007 WL 2914769 (E.D. Va. Oct. 4, 2007) (No. 3:07-CV-608).

<sup>165</sup> Joint Pretrial Statement at \*16, *Murmer v. Chesterfield Cnty. Sch. Bd.*, 2008 WL 638210 (E.D. Va. Mar. 4, 2008) (No. 3:07-CV-608).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at \*18.

<sup>168</sup> *Id.*

<sup>169</sup> Answer at \*5, *Murmer v. Chesterfield Cnty. Sch. Bd.*, 2007 WL 3248913 (E.D. Va. Oct. 29, 2007) (No. 3:07cv608).

for the position from which Mr. Murmer was fired.<sup>170</sup> ACLU of Virginia Legal Director Rebecca Glenberg stated, “Our founders recognized that even controversial speech should be protected in a democracy. The fact that some administrators were offended by Stephen Murmer’s speech did not give them the right to fire him.”<sup>171</sup>

*D. Payne v. Barrow County School District*

¶53 In a case currently being litigated,<sup>172</sup> twenty-four year old Ashley Payne claims that she was coerced by school administrators into resigning from her teaching position after they questioned a photograph and other content posted by Miss Payne on her Facebook page.<sup>173</sup> She maintains that there was nothing inappropriate, illegal, unethical, or immoral about the material posted on her Facebook page.<sup>174</sup> The pictures in question on Ms. Payne’s Facebook page were taken on a European vacation and depicted her with alcoholic beverages.<sup>175</sup> Of the pictures, Ms. Payne has stated,

“I visited the Guinness Brewery, I went to Italy and had wine. I went to the Temple Bar District of Dublin and drank some alcohol there like any normal adult would. . . . They’re not even of me drinking the drinks and I don’t look like I’m intoxicated in any way or doing anything provocative or inappropriate.”<sup>176</sup>

¶54 Ms. Payne further stated that her Facebook page was set to private, she was not Facebook friends with any students or parents, and she did not know how a parent accessed the photo that led to the loss of her job.<sup>177</sup>

¶55 Ms. Payne had been employed for two years as an English teacher at Apalachee High School in Barrow County School District

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<sup>170</sup> American Civil Liberties Union, *Fine Art Teacher Wins \$65,000 Settlement from Chesterfield County School Board* (March 7, 2008), <http://www.aclu.org/freespeech/gen/34407prs20080307.html>.

<sup>171</sup> *Id.*

<sup>172</sup> Deidra Dukes, *Teacher Fired Over Facebook Posts* (Nov. 11, 2009), [http://www.myfoxphoenix.com/dpp/news/national/teacher-fired\\_facebook\\_111109](http://www.myfoxphoenix.com/dpp/news/national/teacher-fired_facebook_111109).

<sup>173</sup> *See id.*

<sup>174</sup> *Id.*

<sup>175</sup> WSBTV, *Former Teacher Sues For Being Fired For Facebook Pics* (Nov. 11, 2009), <http://www.wsbtv.com/news/21586641/detail.html>.

<sup>176</sup> *Id.*

<sup>177</sup> Dukes, *supra* note 175.

when she resigned in August of 2009.<sup>178</sup> Ms. Payne claims that she was “wrongfully coerced” by the principal of Apalachee High School to resign from her teaching position without “being properly informed of her legal rights.”<sup>179</sup> Ms. Payne’s employment contract with the Barrow County School District was for a term, and the contract states that Ms. Payne can only be terminated for cause.<sup>180</sup> On August 27, 2009, Ms. Payne had a meeting with Mr. McGee, the principal at Apalachee High School, and according to Ms. Payne, she was not told beforehand what was to be discussed in the meeting.<sup>181</sup> During that meeting, Mr. McGee told Ms. Payne that the school district “strongly disapproved of Ms. Payne’s online activity on the website Facebook. Specifically, Mr. McGee objected to photos depicting Ms. Payne holding alcoholic beverages while on vacation, and a status update which used the word ‘bitch’ in a playful manner.”<sup>182</sup> According to Ms. Payne, Mr. McGee then told her that if she did not resign, her employment would be suspended, that “any suspension would adversely affect her ability to teach in the future,” that she “could not win this,” that resignation was her best option, and that “she had to make her decision before leaving” the office.<sup>183</sup> Following this conversation, Ms. Payne agreed to resign, and Mr. McGee’s assistant aided Ms. Payne in drafting her resignation, “so as to exclude any mention of the true reason Ms. Payne was forced to resign.”<sup>184</sup>

<sup>¶56</sup> Ms. Payne asserts that Mr. McGee did not disclose to her information that would have been crucial to her in making a decision about resigning. Ms. Payne claims that Mr. McGee did not explain that a suspension could not last for more than ten days and that during a suspension the school district would continue to pay a suspended teacher’s salary.<sup>185</sup> Moreover, Ms. Payne asserts that Mr. McGee did not explain to Ms. Payne that she was “entitled to a statutorily-mandated hearing specifically designed to protect teachers from being unjustly suspended without cause.”<sup>186</sup> The Georgia Fair Dismissal Act, O.C.G.A.

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<sup>178</sup> Heather Darenberg, *Barrow County Schools denies forcing teacher to resign*, GWINNETT DAILY POST, Nov. 11, 2009, <http://www.gwinnettdaily.com/localnews/headlines/69817722.html>.

<sup>179</sup> Petition for a Writ of Mandamus at 4, *Payne v. Barrow Cnty. Sch. Dist.*, Civ. No. 09CV-3083-X (Super. Ct. Barrow Cnty. Ga. Oct. 15, 2009).

<sup>180</sup> *Id.* at 2.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 3.

<sup>184</sup> *Id.*

<sup>185</sup> Petition for a Writ of Mandamus, *supra* note 182, at 3.

<sup>186</sup> *Id.*

§ 20-2-940, provides that “before the discharge or suspension of a teacher having a contract of employment for a definite term, a school district must provide the teacher with written notice of the charges alleged and a hearing before the local school board to enable the teacher to contest the charges.”<sup>187</sup>

¶57 After resigning her position, Ms. Payne became informed of her legal rights, and her attorney contacted the school district’s attorney on September 17, 2009 requesting that Ms. Payne be afforded a hearing as required by the Georgia Fair Dismissal Act, O.C.A. § 20-2-940.<sup>188</sup> The school district’s counsel responded on September 21, 2009, “stating that Ms. Payne would not be permitted to rescind her resignation,” and the district refused to provide Ms. Payne with a hearing.<sup>189</sup> On October 15, 2009, Ms. Payne filed a Petition for a Writ of Mandamus pursuant to O.C.G.A. § 9-6-20 with the Superior Court of Barrow County, Georgia, seeking a Writ of Mandamus directing the Barrow County School District to provide her “with written notice of the charges” that the school district “has alleged against her and a hearing to contest these charges pursuant to the Georgia Fair Dismissal Act, O.C.G.A. § 20-2-940.”<sup>190</sup> In the Petition, Ms. Payne also seeks a Writ of Mandamus directing the school district to provide her with “full compensation under the terms of Ms. Payne’s contract, starting from the date of her constructive termination on August 27, 2009 and continuing until the date that the Barrow County School District provides Ms. Payne with the hearing she is legally entitled to under O.C.G.A. §20-2-940.”<sup>191</sup>

¶58 Barrow County School District denies that Ms. Payne was forced to resign, claiming that she asked to resign after being informed that she would be suspended from teaching and reported to the Professional Standards Committee due to unacceptable content on her Facebook page.<sup>192</sup> The response the school district filed in Barrow County Superior Court states that Ms. Payne was “informed that the district disapproved of her Facebook activity which promoted alcohol use and contained profanity and which was viewed by a student.”<sup>193</sup> Barrow

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<sup>187</sup> *Id.* at 5.

<sup>188</sup> *Id.* at 4.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 7.

<sup>191</sup> Petition for a Writ of Mandamus, *supra* note 182, at 7.

<sup>192</sup> Carman Peterson, *School system responds to lawsuit by teacher*, BARROW CNTY. NEWS, Nov. 13, 2009, <http://www.barrowcountynews.com/news/article/4980>.

<sup>193</sup> Heather Darenberg, *Barrow County Schools denies forcing teacher to resign*, GWINETT DAILY POST, Nov. 11, 2009, <http://www.gwinnettdailypost.com/localnews/headlines/69817722.html>.

County School District maintains that Ms. Payne's "resignation was freely and voluntarily submitted."<sup>194</sup> The school district has denied any wrongdoing and has filed a demand for dismissal of the case and a counterclaim for attorney's fees.<sup>195</sup>

¶59 Following the news stories published about Ms. Payne's lawsuit, Mr. McGee, the principal of the school where Ms. Payne worked, received threatening emails.<sup>196</sup> One of these emails read in part

What the f---? Firing a teacher because she had a beer in her hand OUT OF SCHOOL is f---d up dude. I mean, it wasn't even during school hours. It was summer. You should think about killing the parent who complained for they are a raging [expletive]. Then kill yourself. Or should I?<sup>197</sup>

¶60 This case illustrates the continuing divide in opinion on this issue. While there are parents and school officials who believe that teachers should be disciplined or terminated for appearing in photographs with alcohol on social networking websites, other members of the community hold starkly contrasting views.<sup>198</sup>

¶61 Unlike the previous cases in which the teachers had arguably engaged in inappropriate behavior, Ms. Payne does not seem to have acted inappropriately.<sup>199</sup> Unlike Mr. Spanierman and Ms. Snyder, Ms. Payne made clear, unequivocal efforts to maintain a separation between her professional and personal life by using the privacy settings on Facebook and by not friending or communicating with students or their parents over social networking websites. Also, unlike Ms. Snyder and Mr. Murmer, Ms. Payne did not engage in arguably controversial or provocative behavior.<sup>200</sup> The photographs at issue from Ms. Payne's Facebook page show an adult of legal drinking age with an alcoholic beverage.<sup>201</sup> Ms. Payne is not visibly drunk in the photographs and is

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<sup>194</sup> Peterson, *supra* note 195.

<sup>195</sup> *Id.*

<sup>196</sup> Carman Peterson, *Principal receives threats after news coverage of former teacher's lawsuit*, BARROW CNTY. NEWS, Nov. 18, 2009, <http://www.barrowcountynews.com/news/article/5020/>.

<sup>197</sup> *Id.*

<sup>198</sup> *See id.*

<sup>199</sup> *See id.*; *see also, e.g.*, Spanierman v. Hughes, 576 F. Supp. 2d 292, 299 (D. Conn. 2008).

<sup>200</sup> *See Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 at \*5 (E.D. Pa. Dec. 3, 2008); *see also* Answer at \*5, *Murmer v. Chesterfield Cnty. Sch. Bd.*, 2007 WL 3248913 (E.D. Va. Oct. 29, 2007) (No. 3:07cv608).

<sup>201</sup> *See Former Teacher Sues For Being Fired For Facebook Pics*, *supra* note 178.

not wearing provocative clothing.<sup>202</sup> While it is somewhat easier to see some fault with the teachers in the other cases, it is nearly impossible to reasonably conclude that Ms. Payne in any way deserved to suffer professionally for her use of Facebook. Indeed, the case of Ms. Payne may be interpreted as a warning to all public school teachers that in order to ensure that social networking pages do not jeopardize their employment they should refrain from using them entirely.

## V. DISCUSSION AND PROPOSAL FOR LEGISLATION

### A. Discussion

¶62 No one has a right to work for the government.<sup>203</sup> By taking a public sector job, an individual relinquishes some of his or her freedom of speech. Admittedly, “the First Amendment’s primary aim is the full protection of speech upon issues of public concern.”<sup>204</sup> However, it is unrealistic to expect newly qualified teachers in their early twenties to abandon social networking websites when they accept their first teaching position. One would be hard pressed to find a single recent American college graduate who has not used MySpace, Facebook, YouTube, or Twitter. Social networking websites are a part of twenty-first century American culture, and the law should recognize this. Granted, some of the teachers in the cases discussed in this iBrief have engaged in questionable conduct, and schools have an interest in providing positive role models for students. Teachers are in a position to influence their students’ behavior, and it is understandable for school boards and parents to desire teachers to refrain from exhibiting behaviors to students that their parents do not wish them to emulate. Some of the teachers discussed in this iBrief could have been more discrete or tactful in their use of social networking websites; however, punishing teachers for how they choose to communicate on social networking sites outside of the workplace allows the morals and values of their community to dictate their personal lives.

¶63 As the court noted in *Spanierman*, not every teacher with a social networking account is disciplined for their social networking activities.<sup>205</sup> However, the standards for acceptable use of social networking sites by teachers are unclear (if existent at all). Indeed, in *Spanierman*, the school district focused on Mr. Spanierman’s interaction with students and ignored the MySpace pages of teachers who were not

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<sup>202</sup> See *id.*

<sup>203</sup> See *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1982).

<sup>204</sup> *Connick v. Myers*, 461 U.S. 138, 154 (1983).

<sup>205</sup> See 576 F. Supp. 2d 292, 307 (D. Conn. 2008).

known to communicate with students through online social networks.<sup>206</sup> Conversely, in the case of Mr. Murmer, his appearance on the social network website YouTube had no direct connection to his students, and he was terminated because his appearance on the social networking site was offensive to school administrators.<sup>207</sup>

¶64 A number of teachers use Facebook, and many of them regularly write status updates or wall comments about their work and students. Given the present state of the law, and the apparent lack of protection for teacher communications, currently, when public school teachers choose to write unfavorable comments they risk retribution from their employers. Although there are risks involved with permitting teachers and students to communicate using social networking sites, such interactions should not be entirely forbidden given the benefits associated with such communications and the social realities of the time.<sup>208</sup> While communications should not be entirely prohibited, there should be consequences for inappropriate communications between teachers and students, as was true in the case with Mr. Spanierman.<sup>209</sup> Teachers do not necessarily harm students by communicating with them on social networking websites. Furthermore, there is no evidence that a photograph of a teacher in a pirate hat holding a plastic cup harms kids.<sup>210</sup> As long as teachers keep their social networking website use personal rather than professional, their employers should take no disciplinary steps. As a federal district judge in Pennsylvania stated, “[t]he mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public Schools are vital institutions, but their reach is not unlimited.”<sup>211</sup> Public school teachers should be permitted to act within the parameters set for employees in the public sector to the extent that employees in the public sector can post the photographs they choose, list their employer, and make comments about their work if they feel so inclined. They should be allowed to appropriately communicate with their students through social networking sites and other new technologies.

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<sup>206</sup> *Id.*

<sup>207</sup> See Joint Pretrial Statement, *supra* note 168, at 16.

<sup>208</sup> See, e.g., Mack, *supra* note 27.

<sup>209</sup> See *Spanierman*, 576 F. Supp. 2d at 312.

<sup>210</sup> See, e.g., *Snyder v. Millersville Univ.*, 2008 U.S. Dist. LEXIS 97943, at \*5 (E.D. Pa. Dec. 3, 2008).

<sup>211</sup> *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007).

## B. PROPOSAL FOR LEGISLATION

¶65 Courts have not had much opportunity to reshape the protections for public educators to include Internet speech. This iBrief proposes that school districts not be allowed to consider a public educator's social networking website use for disciplinary or employment decisions at all, unless teachers are inappropriately and directly communicating with their students.

¶66 This proposal could take effect in a variety of ways, but state legislation might prove the most effective. State legislation has been introduced to address students' off-campus use of social networking media, and similar legislation could be introduced to provide protection for public school teachers' use of social networking media, off-campus and on their own time.<sup>212</sup> In addition or as an alternative to state legislation, courts could read the suggested protection into these lawsuits, or school districts could adopt sensible policies on teacher use of social networking sites. Such sensible policies would be in contrast to the policies of school districts that currently have broad, subjective policies containing language such as "conduct unbecoming of a teacher."<sup>213</sup>

¶67 State legislation will likely be the most effective implementation of these proposed teacher protections, as it would provide teachers a uniform protection throughout each state. Asking the courts to keep this proposal in mind while deciding cases would likely be less effective. The decision to apply this proposed protection would have to be made in each jurisdiction. Furthermore, as evidenced by the sparse case law on this topic, many teachers do not file charges against their school districts when disciplined or terminated for their use of social networking media, and therefore a protection only given by courts handling lawsuits would not help all affected teachers. For the aforementioned reasons, state legislation will likely be the best means of providing teachers with protection for their social networking media use. Indeed, state legislation has been proposed to address the speech of students on social networking websites, and similar legislation could be used to address the speech of teachers on social networking websites.<sup>214</sup>

¶68 Until state legislatures address this area of law, school districts should at least write clear policies advising teachers on whether they will view teachers' social networking website activities, what they would not

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<sup>212</sup> See Davis, *supra* note 29, at 1.

<sup>213</sup> See, e.g., Murmer, 2007 WL 3248913 at 5.

<sup>214</sup> See OLR Bill Analysis sSB 1056, Reg. Sess. (Conn. 2009), available at [http://www.cga.ct.gov/asp/CGABillStatus/CGABillstatus.asp?selBillType=Bill&bill\\_num=sSB1056#](http://www.cga.ct.gov/asp/CGABillStatus/CGABillstatus.asp?selBillType=Bill&bill_num=sSB1056#) (last visited Nov. 20, 2009).

want to see on teachers' social networking profiles, and whether they would take disciplinary or employment action based upon a teacher's social networking website activities.

#### CONCLUSION

¶69 According to existing law, teachers receive the same speech protections as other public employees.<sup>215</sup> However, because of their interaction with parents and students, public school teachers are singled out from among public employees and held to arbitrary standards of conduct.<sup>216</sup> Recognizing that teachers are sometimes held to arbitrary standards of conduct that are not imposed upon other public employees, the law should provide teachers with special protection. Although it is reasonable to expect teachers to behave in a professional manner when they interact with students, it is unreasonable for teachers to be subject to professional discipline for their private behavior when the conduct for which they are disciplined is in conformance with all applicable laws.<sup>217</sup>

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<sup>215</sup> See *Pickering v. Board of Education*, 391 U.S. 563, 568–74 (1968) (evaluating a public school teacher's speech like any other public employee).

<sup>216</sup> See, e.g., Mario Roldan, *Another CMS teacher faces termination over Facebook post*, WCNC.com, Nov. 1, 2009, available at <http://www.wcnc.com/news/local/68701507.html> (last visited Nov. 30, 2009) (“[W]hen you are taking care of other people's children . . . [i]t's really not a matter of free speech.”).

<sup>217</sup> See, e.g., *Dukes*, *supra* note 175.