

THE UNIVERSITY CURRICULUM AND THE CONSTITUTION: PERSONAL BELIEFS AND PROFESSIONAL ETHICS IN GRADUATE SCHOOL COUNSELING PROGRAMS

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I. INTRODUCTION

What do professionals do that separates them from individuals in other

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occupations? William J. Goode, in his study of professions, asserts that there are two generating qualities that define professions. They are “(1) a basic body of abstract knowledge, and (2) the ideal of service.”¹ He asserts that professionals fashion solutions based on the needs of the client, “not necessarily [on] the best material interest or needs of the professional himself.”² Professional actions taken in pursuit of the best interest of clients involves “a high degree of self-control of behavior through codes of ethics.”³ Members of a profession are required to adhere to the code of ethics of their profession as a condition of membership.⁴ For example, the *American Counseling Association (ACA) Code of Ethics* serves five goals.⁵ Goal Three states that the *Code* “establishes the principles that define the ethical behavior and best practices” of its members.⁶ Goal Four states the purpose for the ethical behavior. It reads: “The *Code* serves as an ethical guide designed to assist members in constructing a professional course of action that best serves those utilizing counseling services and best promotes the values of the counseling profession.”⁷ Therefore, professionals must act in the best interests of their client, patient, or student. The *ACA Code of Ethics* further states that counselors, when faced with difficult-to-resolve ethical dilemmas, should base their decisions on that which “help[s] to expand the capacity of people to grow and develop.”⁸ The emphasis is

1. William J. Goode, *The Theoretical Limits of the Profession*, in *THE SEMI-PROFESSIONS AND THEIR ORGANIZATIONS: TEACHERS, NURSES, SOCIAL WORKERS* 277 (Amitai Etzioni ed., 1969).

2. *Id.* at 278.

3. Bernard Barber, *The Sociology of the Professions*, in *THE PROFESSIONS IN AMERICA* 18 (Kenneth S. Lynn ed., 1965).

4. See, e.g., AM. PSYCHOLOGICAL ASS'N, *Ethical Principles of Psychologists and Code of Conduct: 2010 Amendments*, available at <http://www.apa.org/ethics/code/index.aspx> (the *American Psychological Association's Ethical Principles of Psychologists and Code of Conduct* sets “forth enforceable rules for conduct as psychologists”); AM. MEDICAL ASS'N, *AMA Code of Medical Ethics*, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?> (American Medical Association's Preamble to its Principles of Medical Ethics states, “The following Principles adopted by the American Medical Association are not laws, but standards of conduct which define the essentials of honorable behavior for the physician”); Rule 8.4 Misconduct, *Model Rules of Professional Conduct Maintaining The Integrity Of The Profession*, available at http://www.abanet.org/cpr/mrpc/rule_8_4.html (according to the American Bar Association, “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another”).

5. AM. COUNSELING ASS'N, *ACA Code Of Ethics* (2005), available at <http://www.counseling.org/ethics/feedback/ACA2005Code.pdf>, at 3. Hereinafter, *ACA Code of Ethics*.

6. *Id.* at 3.

7. *Id.*

8. *Id.*

placed on the interests of the client, not on the interests of the professional counselor. As demonstrated by the *ACA Code*, ethical behavior and best practices are designed to help the client. The predicate of a profession is the best interests of the client, not the needs, interests, or desires of the professional.

But what happens when there is a conflict between the established code of ethics of a profession (being taught in graduate programs of school counseling) and the deeply held beliefs of an aspiring practitioner? What must give way? Can aspirants compel the profession through the preparation program, to make room for their deeply held position, or can the profession compel the aspirant to demonstrate acceptance of and willingness to follow the complete *Code of Ethics* regardless of their convictions? Specific to this article, the essential question is, must a graduate student in school counseling adhere to the American Counseling Association's *Code of Ethics* as part of the counseling program's requirements in order to complete a graduate degree and become a state credentialed school counselor, even if he or she disagrees with certain sections of the *Code of Ethics* based on deeply held beliefs?⁹

This clash between professional ethics and personal beliefs in graduate school counseling programs arose twice in 2010 with appellate decisions in 2011 and 2012. How have the courts threaded the needles of supporting individual rights, affirming the authority of the university to control its educational programs, and meeting the requirements of a profession? This article explores those two recent cases in which graduate students in school counseling programs essentially argued that they have the right to disregard the profession's *Code of Ethics* or to interpret that *Code* differently than their program faculty because of the student's religious beliefs, despite the fact that the *Code* is a part of their graduate program to which they voluntarily applied and enrolled.¹⁰ Two recent federal cases, one from the Eleventh Circuit Court of Appeals¹¹ and the other from the Sixth Circuit Court of Appeals,¹² are discussed to assist in the exploration of the issue of whether the role of the *Code of Ethics* of a profession can be selectively

9. See William E. Thro & Charles J. Russo, *Preserving Orthodoxy on Secular Campuses: The Right of Student Religious Organizations to Exclude Non-Believers*, 250 EDUC. L. REP. 497, 515 (2010) ("If freedom of religion means anything, it means that individuals can have whatever belief they choose, can associate with those who share their beliefs, and can exclude those that disagree").

10. See James T. Wolf, *Teach, But Don't Preach: Practical Guidelines for Addressing Spiritual Concerns of Students*, 7 ACSA PROF. SCH. COUNSELING 363, 363 (2004) (offering an interesting discussion for school counselors on this topic by parsing spirituality from religious beliefs. He states that they are not interchangeable. He concludes: "When spiritual issues do present themselves in a counseling session, it is unethical for school counselors to advocate for their personal spiritual beliefs").

11. Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011).

12. Ward v. Polite, 667 F.3d 727 (6th Cir. 2012).

followed according to the beliefs of the aspirant counselor or whether the *Code of Ethics* is meant as a cohesive, binding statement of professional conduct for all members of the profession, including its aspirants. This is one of the classic dilemmas of a profession—the standards of conduct required by the profession at times conflict with the personal beliefs of its members. Specifically, this conflict manifests with a refusal to give counseling to gay, lesbian, or transgender students.

The discussion of the intersection of personal beliefs on gays and lesbians as counseling clients and professional ethics starts with a review of higher education sexual orientation cases. Next, Part III lays the foundation of the role and the substance of professional codes of ethics. Part IV explores the role of the Constitution in the development and delivery of the higher education curriculum. It explicitly reviews who controls the curriculum. Part V analyzes the two court cases brought by graduate counseling students. And finally, Part VI brings the controversy into focus and draws a conclusion about the conflict of deeply held beliefs and rendering professional service in the public square of the public school.

II. HIGHER EDUCATION CASES ON SEXUAL ORIENTATION

While sexual orientation issues occur with regularity in the public primary, middle, and secondary schools,¹³ “there seems to be a disproportionately low amount of litigation on the subject arising out of college campuses.”¹⁴ Higher education has largely avoided the legal and social issues that have characterized sexual orientation in other organizational settings. For example, college and university campuses have rallied in response to attacks on a person’s sexual orientation and identity,¹⁵ and have integrated lesbian, gay, bi-sexual, transsexual, and/or queer lifestyle (GLBTQ) content in courses and developed degree programs such as minors in queer studies.¹⁶

In a closely watched case, a deeply divided Supreme Court upheld via a

13. See generally, Todd A. DeMitchell, Suzanne Eckes, & Richard Fossey, *Sexual Orientation and the Public School Teacher*, 19 B. U. PUB. INT. L. J. 65 (2009); See also RICHARD FOSSEY, TODD A. DEMITCHELL, & SUZANNE E. ECKES, *SEXUAL ORIENTATION, PUBLIC SCHOOLS, AND THE LAW* (2007).

14. Todd A. DeMitchell & Suzanne Eckes, *Sexual Orientation and the College Campus*, 254 EDUC. L. REP. 19 (2010).

15. *Gilles v. Davis*, 427 F.3d 197, 202 (3rd Cir. 2005). (Gilles exhorted a crowd of college students, warning them to “‘watch out [because] the homosexuals are after you on this campus’ and pronounced that ‘nothing is lower than a lesbian.’” He also proclaimed that homosexuals were headed for hell and that “‘there was no such thing as a Christian lesbian . . . [or] Christian homosexual”).

16. See, e.g., Columbia University, Graduate School of Arts and Sciences, Teaching Center, *Inclusive Teaching: Resources for Incorporating Sexual Orientation into Your Teaching*, available at http://www.columbia.edu/cu/tat/pdfs/sexual_orientation.pdf.

five-to-four decision the right of the University of California, Hastings College of Law to refuse to grant the Christian Legal Society (CLS) the status of a “Registered Student Organization.”¹⁷ The CLS denies voting membership to anyone who does not affirm the Statement of Faith, which is interpreted to exclude “unrepentant homosexual conduct.”¹⁸ Hastings College of Law considers this a violation of its nondiscrimination policy.¹⁹ The CLS brought suit for violations of the First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion.²⁰

The Court found that the Hastings Law School’s all-comers policy was viewpoint neutral, rejecting CLS’s arguments that the policy was merely a pretext for discrimination against the group.²¹ Justice Alito wrote a lengthy dissent in which he charged the majority with abandoning the Supreme Court’s long-established precedents of First Amendment jurisprudence in order to endorse a rule that allows public colleges and universities to suppress student speech that is politically incorrect.²² In Justice Alito’s view, the majority opinion had provided a “misleading portrayal of the case” and had ignored strong evidence that Hastings Law School’s all-comers policy was merely a pretext to justify viewpoint discrimination against CLS.²³

The CLS tried to carve out a safe harbor from the nondiscrimination policy of the law school. Had CLS prevailed, would all student groups, or possibly all students, have been able to assert an exemption from the nondiscrimination policy based on religious, or perhaps, personal beliefs? If the answer is yes, it is likely that Hastings’ commitment to nondiscrimination would have been eviscerated.²⁴

17. *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010); Christian Legal Society, *Vision, Mission Statement & Core Value*, available at <http://www.clsnet.org/society/about-csl/purpose>. (the CLS is a nationwide association founded in 1961, of legal professionals who share a common Christian faith, which guides their associational activities. The mission of the CSL is “to inspire, encourage, and equip lawyers and law students, both individually and in community, to proclaim, love and serve Jesus Christ through the study and practice of law, the provision of legal assistance to the poor, and the defense of religious freedom & the sanctity of human life”).

18. *Christian Legal Society*, 130 S. Ct. at 2980.

19. *Id.* at 2980–81. “[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, or sexual orientation. This nondiscrimination policy covers admission, access, and treatment in Hastings-sponsored programs and activities.” *Id.* at 2979.

20. *Id.* at 2981.

21. *Id.* at 2989–90.

22. *Id.* at 3000–20 (Alito, J., dissenting).

23. *Id.* at 3009 (Alito, J., dissenting).

24. *Id.* at 2998 (Stevens, J., concurring) (“The expressive association argument of [CLS] presses, however, is hardly limited to these facts. Other groups may exclude or

The time around when *Christian Legal Society* was decided appears to signal a shift with a marked increase in litigation on issues of sexual orientation in higher education. Legal commentators noted that six federal courts, including the United States Supreme Court, decided cases about whether a public institution of higher education violated the rights of students and faculty who expressed negative views of gays and lesbians and in some cases acted upon those beliefs.²⁵ Professors, students, and student organizations citing their right to free speech and right to assembly, asserted their right to hold, voice, and act on beliefs, most religiously based, against the acceptance of a gay, lesbian, bi-sexual, transsexual, and/or queer lifestyle.²⁶ This pushes against the seemingly rising tide of acceptance of GLBTQ lifestyles²⁷ as more individuals assert the right to be out of the closet.²⁸

Two of those cases, *Keeton v. Anderson-Wiley*²⁹ and *Ward v. Polite*,³⁰ as

mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women. A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.”).

25. Richard Fossey, Suzanne Eckes, & Todd A. DeMitchell, *Sexual Orientation, Higher Education and the First Amendment: Several Courts Consider Whether Public Universities Must Accept Groups or Individuals Who Oppose Homosexual Conduct*, 267 EDUC. L. REP. 425, 427 (2011) (“There was a prolonged period with few cases in higher education being litigated over sexual orientation. However, the tension around sexual orientation has recently resurfaced in the courts.”).

26. However, it should be noted that a religious response to gays and lesbians is not monolithic in nature. While some faiths and denominations actively and officially oppose gays and lesbians, others officially welcome and even ordain GLBTQ persons. Many GLBTQ individuals are members of organized religions. The fact that religions universally do not hold an anti-gay position does not diminish the deeply held belief of those who do.

27. See, e.g., Maura Dolan & Carol J. Williams, *Ban on Gay Marriage Overturned*, L. A. TIMES (August 5, 2010), available at <http://articles.latimes.com/2010/aug/05/local/la-me-gay-marriage-california-20100805> (a federal district court judge declared that California’s ban on same-sex marriages was unconstitutional asserting that “no legitimate state interest justified treating gay and lesbian couples differently from others and that ‘moral disapproval’ was not enough” to save the voter approved proposition. Northern District of California Chief Judge Vaughn Walker’s decision was upheld by the Ninth Circuit Court of Appeals on Feb. 7, 2012); See also *Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012) (focusing on whether Proposition 8’s singling out “same-sex couples for unequal treatment by *taking away* from them alone the right to marry” amounts to a constitutional violation of the Equal Protection Clause) (emphasis in original). The Supreme Court granted certiorari in *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) and heard oral arguments March 26, 2013.

28. STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA’S PUBLIC SCHOOLS* 3 (2010) (“The right to be out has emerged today as a strong and multifaceted legal imperative.”).

29. 664 F.3d 865 (11th Cir. 2011).

30. 667 F.3d 727 (6th Cir. 2012).

indicated above, concerned school counseling students who held, espoused, and, in at least one situation, acted on religious beliefs that are non-accepting of gays and lesbians. In both cases, the graduate students brought suit against their university for its academic response to their decision to not conform to the requirements of the graduate program, which was held by the graduate program to be a breach of the *ACA Code of Ethics*, a code that had been incorporated into the curriculum of their graduate program.³¹

III. THE PROFESSIONAL CODE OF ETHICS

Professionalism is built around expert knowledge, usually gained through extensive education and training.³² A profession is distinguished from an occupation.³³ Professional work is complex and non-routine.³⁴ It involves a standard of practice recognized and adhered to by the practitioners.³⁵ Torts of negligence, including malpractice,³⁶ assist in defining the duty that a professional owes to those who receive his or her services. Professionals are expected to utilize a standard of care recognized by their profession as appropriate, based on the training received and consistent with the commonly held set of practices associated with the service rendered.³⁷ The higher level of training associated with professionals defines the duty owed to the recipient of professional services. Where common knowledge may apply in negligence cases not involving professionals, negligence cases involving professionals often require expert witness testimony to establish what is required of the reasonably competent professional.³⁸ The reasonable person standard applied to the analysis of the duty owed in negligence cases is transformed into the reasonable professional with the requisite training of the profession.

The standards are also enforced by the professional organization, typically through an internal code of ethics.³⁹ For example, the Preamble

31. *Ward*, 667 F.3d at 732; *Keeton*, 664 F.3d at 869.

32. *See generally* ELIOT FRIEDSON, *PROFESSION OF MEDICINE* 71–75 (1970).

33. *Id.* at 3–4.

34. *Id.*

35. *Id.*

36. Torts for educational malpractice have not been successful to date. *See* Todd A. DeMitchell, Terri A. DeMitchell, & Douglas Gagnon, *Teacher Effectiveness and Value-Added Modeling: Building a Pathway to Educational Malpractice*, 2012 BYU EDUC. & L.J. 257 (2012). *But see* *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115 (Iowa 2001) (for a successful malpractice suit involving a school counselor).

37. 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 189 (2011).

38. *See, e.g.*, James O. Pearson, *Modern Status of "Locality Rule" in Malpractice Against Physician Who is Not a Specialist*, 99 A.L.R.3d 1133, 1139 (1980).

39. Bernard Barber, *Some Problems in the Sociology of Professions*, 92

to the *Code of Ethics for Pharmacists* states that the *Code* is “intended to state publicly the principles that form the fundamental basis of the roles and responsibilities of pharmacists. These principles, based on moral obligations and virtues, are established to guide pharmacists in relationships with patients, health professionals, and society.”⁴⁰ Professionals exercise judgment within the accepted standards in the best interest of their client, patient, or student. The American School Counselor Association’s Preamble to its Ethical Standards for School Counselors asserts that its principles of ethical behavior are “necessary to maintain the high standards of integrity, leadership and professionalism among its members.”⁴¹ Similarly, the American Counseling Association’s Section C.1: “Knowledge of Standards” requires that “[c]ounselors have a responsibility to read, understand, and follow the *ACA Code of Ethics* and adhere to applicable laws and regulations.”⁴² Both Associations describe the importance of the professional responsibility of its members and provide a mandate for adherence to the code that binds them, and neither do the Associations nor their respective codes provide options for non-adherence to the code.

Noted educational policy researcher Linda Darling-Hammond writes, “Professionals are obligated to do whatever is best for the client, not what is easiest, most expedient, or even what the client himself or herself might want.”⁴³ Similarly, William J. Goode asserted that one of the two core principles of professionalism is a “service orientation.”⁴⁴ The second pillar of professionalism is the acquisition of a specialized body of knowledge. Simply put, professionals exercise the standard of accepted practice acknowledged by the profession within the structure of a recognized code of ethics that is developed in the best interests of the client, patient, or student. Professional practice is not exercised for the benefit of the practitioner; it is exercised for the benefit of the recipient of the service.

Counselors, like other professionals, through their associations adopt a

DAEDALUS 669, 672 (1963).

40. Am. Pharmacist Ass’n, *Code of Ethics for Pharmacists* (1994), available at <http://www.pharmacist.com/AM/Template.cfm?Section=Search1&template=/CM/HTMLDisplay.cfm&ContentID=2903>.

41. AM. SCH. COUNS. ASS’N, *Ethical Standards for School Counselors*, (2010 Revised), available at <http://asca2.timberlakepublishing.com/files/EthicalStandards2010.pdf>. (“School Counselor educators should know them, teach them to their students, and provide support for school counseling candidates to uphold them.”).

42. *ACA Code of Ethics*, *supra* note 5 at 9.

43. Linda Darling-Hammond, *Accountability for Professional Practice*, 91 TEACHERS C. REC. 59, 67 (1989).

44. William J. Goode, *Encroachment, Charlatanism, and the Emerging Profession: Psychology, Medicine, and Sociology*, 25 AMER. SOC. REV. 902, 903 (1960).

code of ethics with an expectation that their members will conform to that code. Failure to follow the code is commonly considered unprofessional conduct. School counselors use two codes of ethics: one developed by the American School Counselor Association, *Ethical Standards for School Counselors*,⁴⁵ and the other developed by the American Counseling Association, *ACA Code of Ethics*.⁴⁶ For the purposes of this article, we will focus on the *ACA Code of Ethics*. However, there is significant consistency between these two codes in the area of religious beliefs of the practitioner and the requirements of the profession.

The connection between the practitioner's ethical requirements and the actions of the graduate student being prepared for the profession is found in the following: "Counselors-in-training have a responsibility to understand and follow the *ACA Code of Ethics* and adhere to applicable laws [and] regulatory policies . . . Students have the same obligation to clients as those required by professional counselors."⁴⁷ Section F.6.d: "Teaching Ethics" requires the counseling faculty to make students aware of their ethical responsibilities and the standards of the profession by infusing "ethical considerations throughout the curriculum."⁴⁸ Consequently, students have the same obligations for practice when they are in their practicum or internships interacting with potential clients.

Two central requirements that build a foundation for this discussion are found in Section C.5: "Nondiscrimination." It reads:

Counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion, spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law. Counselors do not discriminate against clients, students, employees, supervisees, or research participants in a manner that has a negative impact on these persons.⁴⁹

In support of this nondiscrimination requirement, counselors must "take steps to maintain competence in the skills they use . . . and keep current with the diverse populations and specific populations with whom they work."⁵⁰ The counseling faculty is required to infuse multicultural and diversity awareness, knowledge, skills, and competency in their training and supervision practices.⁵¹ There is no provision in the code for

45. ASCA Ethical Standard for School Counselors, *supra* note 41.

46. *ACA Code of Ethics*, *supra* note 5.

47. *Id.* at 15.

48. *Id.*

49. *Id.* at 10.

50. *Id.* at 9.

51. *Id.* at 16; *See also* ASCA Ethical Standards for School Counselors, *supra* note

counselors or counseling graduate students to claim an exemption from the *ACA Code of Ethics*, nondiscrimination and diversity requirements based on their personal values.

However, there are two other exceptions in the *ACA Code of Ethics* that may be pertinent to this discussion. The first pertains to counseling for end-of-life situations. Section A.9.b recognizes the personal, moral, and competence issues related to end-of-life situations. A counselor may refer to this section so as to provide appropriate counseling services. This section does not specifically address the issue on non-discrimination against specific groups found in Section C5: “age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law”.⁵² A second exception is found in Section A.11: “Termination and Referral.” This section states that “[c]ounselors do not abandon or neglect clients in counseling.”⁵³ Specifically, Section A.11.b: “Inability to Assist Clients” allows a counselor to determine an inability to be of professional service to clients and, thus, refuse to enter into or continue a counseling relationship.⁵⁴ Section A.11.c provides for a counselor to end a counseling relationship when the client is being harmed.⁵⁵

These stated exceptions raise the issue of whether they can be used to refer clients or students to get around the non-discrimination requirement. Section C.2.c: “Qualified for Employment” states that counselors must only accept employment in “positions in which they are qualified and competent by education, training, supervised experience, state and national professional credentials, and appropriate professional experience.”⁵⁶ Thus, the question under this section becomes whether a counselor who refuses to work with individuals in a protected category, and who are likely to become their clients must not accept employment as a counselor. In other words, can a school counselor refer students to other counselors because they do not value who that client is (“homosexuals are condemned by God” for example) and still expect to be hired as a school counselor? This section asks whether the counselor in training who refuses to work with, and does

41, at 12 (“Monitor and expand multicultural and social justice advocacy awareness, knowledge and skills. School counselors strive for exemplary cultural competence by ensuring personal beliefs or values are not imposed on students or other stakeholders.”).

52. *ACA Code of Ethics*, *supra* note 5, at 10.

53. *Id.* at 6; *see also id.* (“Counselors assist in making appropriate arrangements for the continuation of treatment, when necessary, during interruptions, illness, and following terminations.”).

54. *Id.*

55. *Id.*

56. *Id.* at 9.

not learn to work with certain students the counselor is likely to encounter in the school, is qualified by education, training, and supervised experience to hold the job. And conversely, can a college or university's preparation program graduate students under Section C.2.c of the *ACA Code of Ethics* who refuse to work with specific clients and do not accept training in working with those individuals?⁵⁷ Under Section C.2.c, the answer should be no.

A case involving a school counselor is instructive in exploring the requirement to "behave in a legal, ethical, and moral manner in the conduct of their work."⁵⁸ Kathryn Grossman was a counselor in the South Shore Public School District in Port Wing, Wisconsin (population 500). Her contract was not renewed, and she brought suit against the school district claiming that the school district was hostile to her religious beliefs.⁵⁹ Based on her religious beliefs, Grossman asserted a preference for abstinence over birth control. Thus, she removed the student literature on birth control and replaced it with literature on abstinence. The small school showed a marked increase of teen pregnancies for its size. The court opined:

Six teenage pregnancies among the students at the school seem like a lot, and it is easy to understand how the people running the school would think it imprudent to retain a guidance counselor who throws out pamphlets instructing in the use of condoms and replaces them with pamphlets advocating abstinence.⁶⁰

In addition, on two occasions she asked two students who sought her help to join her in prayer. The Seventh Circuit Court of Appeals wrote:

Teachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment's Establishment Clause, even if the religious composition of the local community makes a legal challenge unlikely. The First Amendment is not a teacher license for uncontrolled expression at variance with established curricular content.⁶¹

The Seventh Circuit held that religious principles do not trump the requirements of the profession.⁶²

57. *Id.*

58. *Id.*; *see also id.* at 18-19; Section H: "Resolving Ethical Issues" (Introduction).

59. *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097 (7th Cir. 2007).

60. *Id.* at 1099.

61. *Id.* at 1099-1100 (citations omitted).

62. *Id.* at 1100.

IV. THE CONSTITUTION AND THE CURRICULUM

Both *Keeton v. Anderson-Wiley*⁶³ and *Ward v. Polite*⁶⁴ turn on the issue of whether graduate students must adhere to the curriculum which is based, in part, on the *ACA Code of Ethics* of the counseling program, even when that curriculum is in opposition to their deeply-held religious views. The beginning point for the discussion is the level of control that a college or university exercises over its curriculum. The Supreme Court has held the analysis of student free speech and its intersection with the college or university's academic requirements is conducted "in light of the special characteristics of the school environment."⁶⁵ The most often cited constitutional basis for the authority of the college and university is found in Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*,⁶⁶ an early academic freedom case, in which he articulated four essential freedoms of the college and university—to "determine for itself on academic grounds, who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁶⁷ Similarly, in *Christian Legal Society v. Martinez*,⁶⁸ the Supreme Court stated, "A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process."⁶⁹ Clearly, the institution has broad authority to establish the curriculum.

The breadth of this right to control the curriculum is amply demonstrated in cases involving the rights of individual faculty members. Faculty members are hired to teach the adopted curriculum. For example, the Third Circuit Court of Appeals in *Edwards v. California State University of Pennsylvania*⁷⁰ held that professors "[d]o not have a constitutional right to choose curriculum materials in contravention of the University's dictates."⁷¹ Furthermore, the court concluded that the college or university, and not the professor, has the academic freedom to decide "what will be taught in the classroom."⁷² The First Circuit Court of Appeals similarly

63. 664 F.3d 865 (11th Cir. 2011).

64. 667 F.3d 727 (6th Cir. 2012).

65. *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981) (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).)

66. 354 U.S. 234 (1957).

67. *Id.* at 263 (Frankfurter, J. concurring).

68. 130 S. Ct. 2971 (2010).

69. *Id.* at 2988–89.

70. 156 F.3d 488 (3d Cir. 1998).

71. *Id.* at 492.

72. *Id.* at 491. For a discussion of institutional academic freedom, see Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?*, 168 EDUC. L. REP. 1 (2002).

asserted in *Lovelace v. Southeastern Massachusetts University*⁷³ that the plaintiff professor did not have the freedom to unilaterally decide standards within the classroom and that course content, homework load, and grading policies are core university concerns.⁷⁴ The university was vested with the authority to establish the overall academic standards.⁷⁵ The First Circuit opined: “The first amendment [sic] does not require that each nontenured professor be made a sovereign unto himself.”⁷⁶ In *Bishop v. Aronov*⁷⁷ the Eleventh Circuit Court of Appeals held that a university could regulate a professor’s religious speech in his exercise physiology class. The court asserted that the classroom was reserved for instruction on the topic of the course and that the university had the right to regulate the professor’s classroom speech.⁷⁸ The court wrote, “The [Supreme] Court’s pronouncements about academic freedom . . . cannot be extrapolated to deny schools command of their own courses.”⁷⁹ And, finally, in *Stastny v. Central Washington University*⁸⁰ the court held that “[a]cademic freedom is not a license for activity at variance with job related [sic] procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the university or disruptive to the education process.”⁸¹ Two legal scholars, Neal Hutchens and Jeffrey Sun, note that in matters of classroom instruction the institution retains “considerable” authority.⁸²

The collective faculty develops the curriculum as part of their institutional duties; however, individual faculty members do not have a constitutional right to disregard the curriculum. Therefore, can a student successfully assert that she or he has the right to alter the requirements of the curriculum or the administration of the program when their professor in charge of the class does not possess that right? The Supreme Court in an early college student case stated, “[t]his Court has long recognized ‘the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’”⁸³ For example, a nursing

73. 793 F.2d 419 (1st Cir. 1986).

74. *Id.* at 426

75. *Id.*

76. *Id.*

77. 926 F.2d 1066 (11th Cir. 1991).

78. *Id.* at 1077.

79. *Id.* at 1075.

80. 647 P.2d 496 (Wash. Ct. App. 1982).

81. *Id.* at 504.

82. Neal H. Hutchens & Jeffrey C. Sun, *Legal Standards Governing Faculty Speech*, CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW 97, 109 (Richard Fossey et al. eds. 2d. ed., 2011).

83. *Healy v. James*, 408 U.S. 169, 180 (1972).

student brought suit against the School of Nursing at Auburn University for her dismissal from the program.⁸⁴ A federal district court in Alabama held that the student's opinion was not "entitled to the same weight as her instructors' and administrators' assessments of her performance."⁸⁵ The Eleventh Circuit Court of Appeals succinctly captured the issue of who decides what shall be taught, writing, "[i]n matters pertaining to curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity."⁸⁶

The courts are loath to intervene in the academic decisions made by college and university faculty and officials. For example, the Supreme Court in *Regents of the University of Michigan v. Ewing*⁸⁷ stated that the judiciary should only intervene in academic decisions when it has been shown that there was a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."⁸⁸ Consequently, the faculty member's right to alter the curriculum is attenuated and the student's right is virtually non-existent. In the marketplace of ideas, the college or university is the seller and the student can choose to buy its product or not.

V. GRADUATE COUNSELING STUDENTS, THEIR RELIGIOUS BELIEFS, AND THE CURRICULUM

This section examines the two counseling cases, stated, in which graduate students sought to compel the college or university to grant them religiously based exemptions to the adopted curriculum, specifically the counseling professions' codes of ethics.

A. *Keeton v. Anderson-Wiley*⁸⁹

The graduate program in school counseling at Augusta State University integrated the *ACA Code of Ethics* into its curriculum. A graduate student in the program ran afoul of the *Code* because of her religiously based beliefs on homosexuality.⁹⁰ Jennifer Keeton, a conservative Christian, publicly voiced her views about the gay and lesbian "lifestyle" in class

84. *Heenan v. Rhodes*, 761 F. Supp. 2d 1318, 1320 (M.D. Ala. 2011).

85. *Id.*

86. *Virgil v. Sch. Bd. of Columbia Cnty., Fla.*, 862 F.2d 1517, 1520 (11th Cir. 1989).

87. 474 U.S. 214 (1985).

88. *Id.* at 224; *see also*, *Mittra v. Univ. of Med. & Dentistry of New Jersey*, 719 A.2d 693, 697 (N.J. Super. Ct. App. Div. 1998) (reasoning "the role of the courts in resolving the dismissal of a student for academic reasons was limited to a determination whether the university complied with its own regulations and whether the institution's decision was supported by evidence.").

89. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

90. *Id.* at 868.

discussions, written assignments, and in conversations with her professors. For example, in one assignment, she condemned “homosexuality based upon the Bible’s teachings.”⁹¹ In conversations with her fellow students she encouraged them to adopt her views on gays and lesbians. One student testified, “During one . . . discussion outside of the classroom, [Keeton] expressed to me her view that the gay population could be changed and that, *as school counselors*, we could help them.”⁹² At one point Keeton stated, “It would be difficult for her to work with GLBTQ clients and to separate her views about homosexuality from her clients’ views.”⁹³ She considered gays and lesbians to be suffering from identity confusion and attempted to convert them from being homosexual to being heterosexual.⁹⁴ Furthermore, when a faculty member posed a hypothetical question, she responded that as a high school counselor she would confront the sophomore in crisis by questioning his sexual orientation and would tell him that it is “not okay to be gay.”⁹⁵

At some point during Keeton’s graduate work at Augusta State, the counseling faculty became concerned that Keeton might not be able to separate her personal religious views from her professional obligation as a counselor and that she intended to violate several sections of the *ACA’s Code of Ethics*.⁹⁶ The faculty also concluded that Keeton’s personal views on sexual behavior were not consistent with psychological research.⁹⁷ Keeton, based on her religious convictions, expressed an interest in conversion therapy, sometimes called reparative therapy, for lesbian, gay,

91. Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368, 1371 (S.D. Ga. 2010).

92. *Id.* at 1374 (emphasis in original).

93. Keeton v. Anderson-Wiley, 664 F.3d 865, 868 (11th Cir. 2011).

94. *Id.* Keeton’s comment about GLBTQ students having identity confusion was stated in a paper following a Diversity Sensitivity course presentation on GLBTQ populations. *Id.* at 873.

95. *Id.* at 868.

96. *Id.* The *ACA Code of Ethics*, sections that Keeton’s statements indicated she would violate are:

(1) Section A.1.a: “The primary responsibility of counselors is to respect the dignity and to promote the welfare of clients”;

(2) Section A.4.b: “Counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants”;

(3) Section C.2.a: “Counselors gain knowledge, personal awareness, sensitivity, and skills pertinent to working with a diverse client population”; and

(4) Section C.5: “Counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law.” *Id.* at 869.

97. *Id.* at 881.

bisexual, transgender, and queer/questioning populations.⁹⁸ In the faculty's view, conversion therapy violated the *ACA Code of Ethics* and was in opposition to the clinical literature.⁹⁹

The counseling faculty concluded, following the policies contained in their student handbook,¹⁰⁰ that Keeton was not making satisfactory progress regarding interpersonal or professional criteria. Consequently, the faculty placed Keeton on a remediation plan prior to allowing her engage in one-on-one counseling with a student. In order to have the remedial status removed she had to comply with the remediation plan crafted by the faculty.¹⁰¹ The faculty stated in the remediation plan that it was designed to help her learn to comply with the *ACA Code of Ethics* and to "improve her 'ability to be a multiculturally competent counselor, particularly with regard to working with [GLBTQ] populations.'"¹⁰²

The remediation plan had two parts. The first part was designed to improve her writing skills and Keeton had no problem with this part of the plan. The second part was intended to address issues of multicultural competence in working with GLBTQ student populations which she would encounter in the schools.¹⁰³ This portion of the remediation plan required her to complete several tasks. For example, she was required to attend at least three workshops that emphasized improving cross-cultural communication, developing multicultural competence, or enhancing diversity sensitivity toward working with GLBTQ populations.¹⁰⁴ She was also required to read at least ten scholarly articles that pertained to improving counseling effectiveness with GLBTQ populations.¹⁰⁵ Keeton was also directed to increase her exposure to, and interaction with, gay populations, and it was suggested that she attend the Gay Pride Parade in

98. *Id.* at 869, 873.

99. *Id.* at 876. ("Moreover, the ACA, in addition to several other professional organizations, including the American Psychology [sic] Association, holds that '[t]he promotion in schools of efforts to change sexual orientation by therapy or through religious ministries seems likely to exacerbate the risk of harassment, harm, and fear for [GLBTQ] youth.'") *Id.* at 876, citing to JUST THE FACTS COALITION, *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel*, 4 (2008), available at <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf> [hereinafter *just the facts*] (the 12 member coalition states that reparative therapy runs counter to the general consensus of the major medical, health, and mental health professions and that efforts to implement it "have serious potential to harm young people because they present the view that the sexual orientation of lesbian, gay, and bisexual youth is a mental illness or disorder, and they often frame the inability to change one's sexual orientation as a personal and moral failure.").

100. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 869 (11th Cir. 2011).

101. *Id.*

102. *Id.*

103. *Id.* at 869–70.

104. *Id.* at 870.

105. *Id.*

Augusta, Georgia.¹⁰⁶ Finally, Keeton was required to prepare some written reflections that summarized what she learned from her research on gay issues.¹⁰⁷ Failure to complete the remediation plan would result in expulsion from the counseling program.¹⁰⁸

According to the terms of the remediation plan, Keeton was required to meet twice with faculty prior to December 2010, after which the faculty would decide whether Keeton should continue in the counseling program.¹⁰⁹ Although Keeton initially agreed to participate in the second part of her remediation plan (the part that addressed exposure to lesbian populations), she changed her mind, stating, “I am not going to agree to a remediation plan that I already know I wouldn’t be able to successfully complete.”¹¹⁰

Keeton sued in federal court, alleging several constitutional violations, including viewpoint discrimination, retaliation, and compelled speech, in violation of her First Amendment rights and her right to free exercise of religion.¹¹¹

In an order dated August 20, 2010, federal district court Judge J. Randall Hall denied Keeton’s motion for a preliminary injunction, finding that she was unlikely to win her case on the merits.¹¹² Judge Hall began his decision by stating that:

This case is not about the propriety of Keeton’s view or beliefs or the views and beliefs of the ASU counseling faculty. Despite any suggestion to the contrary, this is not a case pitting Christianity against homosexuality. This case is only about the constitutionality of the actions taken by Defendants regarding [Keeton] within the context of [Keeton’s] Counselor Education masters degree program at . . . ASU, and no more.¹¹³

Keeton appealed. Keeton alleged that the ASU counseling program discriminated against her viewpoint on homosexuals, retaliated against her, and compelled her to express views she does not hold.¹¹⁴ The panel found that the counseling program was not a traditional public forum, nor was it a designated forum. Instead the program was a nonpublic forum in which the state university reserved its intended purposes as “‘a supervised learning experience,’ connected in this case to the requirements of a profession

106. *Id.*

107. *Id.*

108. *Id.* at 871.

109. Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368, 1373 (S.D. Ga. 2010).

110. Keeton v. Anderson-Wiley, 664 F.3d 865, 871 (11th Cir. 2011).

111. *Id.*

112. Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368, 1371 (S.D. Ga. 2010).

113. *Id.*

114. Keeton v. Anderson-Wiley, 664 F.3d 865, 871 (11th Cir. 2011).

whose accreditation is required for the school to offer a degree that allows its students to become licensed as professional counselors.”¹¹⁵ Consequently, the court reviewed Keeton’s viewpoint discrimination claim by asking whether the remediation plan was reasonable and whether it was viewpoint neutral.¹¹⁶

The court asserted that the evidence did not support Keeton’s claim. The remediation plan was not instituted because of her religiously based views on homosexuality. Rather, the plan was developed because Keeton “expressed an intent to impose her personal religious views on her clients, in violation of the *ACA Code of Ethics*.”¹¹⁷ The remediation plan was established to teach her how to effectively counsel all student populations, especially GLBTQ students, and to maintain ethical behavior in all counseling situations with all clients and not impose her religious views.¹¹⁸

The court rejected the plaintiff’s argument that she was singled out for disfavored treatment because of her views on homosexuality. Instead, the court asserted that the program required that all students counsel their clients regardless of their personal beliefs in accordance with the *ACA Code of Ethics*. Counselors are taught to support their client’s welfare, to respect the dignity and the autonomy of the client, and to assist the client in pursuing his or her own goals and to do this without imposing the counselor’s personal beliefs and views. The curriculum “requires that all students be competent to work with all populations, and that all students not impose their personal religious values on their clients, whether, for instance, they believe that persons ought to be Christians rather than Muslims, Jews, or atheists, or that homosexuality is moral or immoral.”¹¹⁹

The court acknowledged that Keeton is free to hold her beliefs and is free to express those views, but she cannot compel the ASU counseling program to accept her views in lieu of the ethical requirements of the *ACA Code of Ethics*.¹²⁰ She must be willing to set aside her beliefs and attend to the needs of the client. The counselor cannot, as Keeton states she would do, “impose their values on clients.”¹²¹ The remediation plan seeks to assist Keeton to meet the standards required of all graduate counseling students without regard to any personal beliefs that she may hold. The plan targets her unwillingness to comply with the *ACA Code of Ethics*, serving the

115. *Id.* at 871–72.

116. *Id.* at 872.

117. *Id.*

118. *Id.* at 873. (“These concerns arose from Keeton’s own statements that she intended to impose her personal religious beliefs on clients and refer clients to conversion therapy, and her own admissions that it would be difficult for her to work with the GLBTQ population and separate her own views from those of the client.”).

119. *Id.* at 874.

120. *Id.*

121. *Id.*

client's best interests, and leaving her personal beliefs outside of the counseling session. Consequently, ASU "provides an adequate explanation for its [remediation plan] over and above mere disagreement with [Keeton's] beliefs and biases."¹²²

After deciding that the imposition of the remedial plan was viewpoint neutral, the appellate court turned to the reasonableness of the plan. The Eleventh Circuit Court of Appeals cited *Hazelwood School District v. Kuhlmeier* as authority for the ASU decision to establish a remediation plan in response to Keeton's statements and curricular choices.¹²³ The court exercised caution so as to not substitute its judgment for the judgment of educators who are trained in educational policy and curricular matters. The court deferred to educators as to what constitutes sound educational policy and as to how their curriculum will be implemented. In addition, *Keeton* held that the decision to base the graduate counseling program and clinical practicum on the *ACA Code of Ethics*, which prohibits counselors from imposing their moral values on clients, is reasonable.¹²⁴

Keeton's argument of retaliation was quickly dispatched by the court because her speech was not protected. As the court reasoned, the ASU faculty imposed the remediation plan not because of her religious views, "but because she was unwilling to comply with the *ACA Code of Ethics*."¹²⁵

The last free speech argument that Keeton asserted was that the remediation plan constituted compelled speech forcing her to express beliefs with which she disagrees. The court asserted that Keeton was not compelled to profess a belief contrary to her beliefs; instead, she was required to comply with the *ACA Code of Ethics* and separate her personal beliefs from her work as a counselor. For example, the court wrote:

When a GLBTQ client asks, for example, if his conduct is moral, [counseling graduate] students are taught to avoid giving advice, to explore the issue with the client, and to help the client determine for himself what the answer is for him. If a client determines for himself that his conduct is moral, the *ACA Code of Ethics* requires the counselor to affirm the client, which means that the counselor must respect the dignity of the client by accepting the client's response without judgment, not that the counselor must say that she *personally* believes that the client is correct.¹²⁶

The critical portion of the court's statement is that affirming the values of the client is not an affirmation that the counselor agrees with the value.

122. *Id.* at 875 (internal quotations omitted).

123. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

124. *Keeton*, 664 F.3d at 876.

125. *Id.* at 878.

126. *Id.* at 878–79 (emphasis in original).

Affirmation is a non-judgmental acknowledgement of the client's values. Affirming a client's homosexuality is not a statement by the counselor approving or accepting the client's sexual orientation. The counselor can personally condemn homosexuality but professionally affirm the beliefs of the GLBTQ client. Similarly, a client may hold and espouse deeply held religious beliefs that are counter to the religious beliefs of the counselor. The *Code of Ethics* does not require that affirming the beliefs and values of the client must result in an abdication of the counselor's religious beliefs. In addition, the court held that a college or university may require its students to demonstrate that they have grasped the curricular material.¹²⁷ Answering questions on an exam, writing papers from a particular viewpoint,¹²⁸ and reading the words of a playwright as written¹²⁹ are not compelled speech.

Keeton's last allegation was the remediation plan violated her right to the free exercise of her religion. The court dispatched this claim in three paragraphs. The court found that the two threshold questions of the neutrality of the law and its general applicability were met. The defendant university met the test in that the *ACA Code of Ethics* is neutral and is generally applicable to all students and, thus, easily survives rationale basis review.¹³⁰ The court concluded, "[i]n seeking to evade the curricular requirement that she not impose her moral values on clients, Keeton is looking for preferential treatment, not equal treatment."¹³¹ The Eleventh Circuit Court of Appeals upheld the district court's denial of Keeton's motion for summary judgment.¹³²

B. *Ward v. Polite*¹³³

The Master's Degree program in counseling at Eastern Michigan University requires students to pass specific lecture/discussion classes as well as a practicum. The practicum involves actual counseling of real clients in a clinic operated by the University and supervised by University faculty. The practicum and the student handbook specifically state that all students in the counseling program must abide by the *ACA Code of Ethics*

127. *Id.* at 879 ("A school must, for instance, be free to give a failing grade to a student who refuses to answer a question for religious reasons, or who refuses to write a paper defending a position with which the student disagrees.").

128. *See, e.g.,* *Head v. Bd. of Tr. of Cal. State Univ.*, No. C 05-05328-WHA, 2006 WL 2355209, at *7 (N.D. Cal. Aug. 14, 2006) (a university may require students "to improve their understanding of other races and cultures so that they could better teach students in those groups.).

129. *See, e.g.,* *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

130. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 879-80 (11th Cir. 2011).

131. *Id.* at 880.

132. *Id.*

133. 667 F.3d 727 (6th Cir. 2012).

and the American School Counselor Association's *Ethical Standards for School Counselors*.¹³⁴ In addition, the state of Michigan requires school counselors to be trained in ethics.¹³⁵ Furthermore, the graduate-level counseling program "prohibits students from discriminating against others based on sexual orientation and teaches students to affirm a client's values during counseling sessions."¹³⁶

In 2006, Julea Ward, a high school teacher, began a master's degree program in counseling at Eastern Michigan University (EMU) with the goal of becoming a high school counselor.¹³⁷ Ward openly shared her religious-based views of homosexuality in classroom discussions. She made it clear that she believed homosexuality to be morally wrong by turning in a paper in which she discussed the potential for conflict when a counselor with religion-based values encounters a client with different values.¹³⁸ In such circumstances, Ward wrote, "standard practice" would be for the counselor to refer the client to a different counselor whose values were more compatible with the values of the client. Ward received a perfect score for the paper, and she received an "A" in all her classes.¹³⁹ In addition to stating that her faith precluded her from affirming a client's same-sex relationship, she could not affirm certain heterosexual conduct such as extramarital relationships.¹⁴⁰ "When Ward expressed these views, professors disagreed, sometimes kindly, sometimes less so, but consistently making the point that, as a counselor, she must support her clients' sexual orientation, whatever that may be."¹⁴¹

Three years after beginning her graduate counseling program, in January 2009, Ward ran into a conflict with the faculty during her practicum course. At some point during the course, she was assigned to counsel a client who had been suffering from depression but who had previously been counseled

134. *Id.* at 731; *see also* Ward v. Wilbanks, No. 09-CV-11237, 2010 WL 3026428, at *4 (E.D. Mich. July 26, 2010). (the court noted the Student Handbook outlines various behaviors that result in disciplinary action: "Academic disciplinary action may be initiated when a student exhibits the following behavior in one discrete episode that is a violation of law or of the *ACA Code of Ethics* and/or when a student exhibits a documented pattern of recurring behavior which may include, but is not limited to . . . [u]nethical, threatening, or unprofessional conduct; . . . [c]onsistent inability or unwillingness to carry out academic or field placement responsibilities; . . . inability to tolerate different points of view, constructive feedback or supervision.") (quoting EASTERN MICHIGAN UNIVERSITY, FINDING YOUR WAY: THE COUNSELING STUDENT HANDBOOK 13 (2011)).

135. MICH. COMP. LAWS § 333.18107(1)(b) (1978).

136. *Ward*, 667 F.3d at 729.

137. *Id.* at 730.

138. *Ward*, 2010 WL 3026428, at *1. ("Plaintiff strictly adheres to orthodox Christian beliefs, a fact which she shared in her application to the Program.")

139. *Id.*

140. *Ward*, 667 F.3d at 729.

141. *Id.* at 730.

about a homosexual relationship. Ward reviewed the client's file about two hours before the counseling session was scheduled to begin and noted that the client was homosexual. Ward contacted her supervisor, Dr. Callaway, and asked whether she should refer the client to another counselor because she could not affirm his homosexual behavior.¹⁴² Because of time constraints, which "precluded a full discussion of the conflict,"¹⁴³ Dr. Callaway decided that it was in the best interests of the client to cancel the appointment and reschedule it at a later time with a different counselor.¹⁴⁴

Dr. Callaway later told Ward that she would be assigned no more clients and told her that she would schedule an informal review before herself and Ward's advisor, Dr. Dugger, to assist her in improving her performance or to explore the option of voluntarily leaving the program.¹⁴⁵ At the informal review, Ward restated her religious objection to affirming same-sex relationships.¹⁴⁶ All three agreed that a remediation plan would not be possible given Ward's uncompromising view and the dictates of nondiscrimination and counselor affirming behavior.¹⁴⁷ Ward was given the option of withdrawing or requesting a formal review. She asked for a formal review.¹⁴⁸

Prior to the formal review, Dugger told Ward that she had violated the *ACA Code of Ethics* "by: (1) 'imposing values that are inconsistent with counseling goals,' Rule A.4.b, and (2) 'engag[ing] in discrimination based on . . . sexual orientation,' Rule C.5."¹⁴⁹ On March 10, 2009, Ward was given a formal hearing before four faculty members and one student representative. During this hearing, Ward told the panel "that while she objected to counseling homosexual clients on their same-sex relationships, she would counsel them on any other issue."¹⁵⁰ She also "refused to affirm any behavior that 'goes against what the Bible says.'"¹⁵¹ In addition, Ward

142. *Id.* at 731; *see also Ward*, 2010 WL 3026428, at *1 (the district court characterizes Ward's request to her supervisor under whose license she was practicing for a referral "because [Ward] could not affirm the client's homosexual behavior."); *Ward*, 667 F.3d at 731 (the Court of Appeals described the incident without a statement of the time constraint and depicted Ward's request as willing to meet but wanted to refer the client if the counseling required her to affirm the client's same-sex relationship or the school could reassign at the outset).

143. *Ward*, 2010 WL 3026428, at *1.

144. *Ward*, 667 F.3d at 731.

145. *Id.*

146. *Id.*

147. *Ward*, 2010 WL 3026428, at *9.

148. *Ward*, 667 F.3d at 731.

149. *Id.*; *see also Ward*, 2010 WL 3026428, at *9 (the district court characterized the charges as "not one referral, but rather plaintiff's refusal to counsel an entire class of people that resulted in her discipline.").

150. *Ward*, 2010 WL 3026428, at *2.

151. *Id.*

told the hearing panel that she “disagreed with the [American Counseling Association’s] prohibition on reparative therapy (viz., therapy targeted at changing a homosexual individual’s sexual orientation), but that she would comply with such rules.”¹⁵² It is unknown if Ward’s position in support of reparative therapy is religiously based. Ward’s belief in this type of therapy is similar to Keeton’s.¹⁵³

At the conclusion of the hearing, the panel unanimously decided to dismiss Ward from the counseling program for violation of the *ACA Code of Ethics* and her “unwilling[ness] to change [her] behavior.”¹⁵⁴ Ward appealed the committee’s decision to the Dean of the EMU College of Education who upheld the committee’s decision.¹⁵⁵

C. District Court Decision: *Ward v. Wilbanks*

Ward then sued several members of EMU’s counseling faculty in federal court, charging them with violating her constitutional rights to due process, freedom of speech, free exercise of religion, equal protection and violation of the Establishment Clause. In an opinion dated July 26, 2010, Judge George Caram Steeh granted the EMU defendants’ motion for summary judgment and dismissed Ward’s case.¹⁵⁶

The district court prefaced its analysis of Ward’s constitutional claims by first reviewing the requirements of the *ACA Code of Ethics* which begins with a central tenet “that a counselor’s primary responsibility . . . is to respect the dignity and to promote the welfare of clients.”¹⁵⁷ Furthermore, the “ACA also binds counselors to comply with a nondiscrimination policy, which prohibits them from ‘condon[ing] or engag[ing] in discrimination based on age, culture, . . . sexual orientation, marital status/partnership. . . . Counselors do not discriminate against clients . . . in a manner that has a negative impact. . . .’”¹⁵⁸ These requirements apply to counseling students as well as school counselors. Section F.8.a: “Standards for Students,” reads in pertinent part, “[s]tudents have the same obligation to clients as those required of professional counselors.”¹⁵⁹

The court denied each of Ward’s constitutional claims, beginning first with Ward’s due process claim. Ward argued that EMU defendants violated

152. *Id.* See *supra* text accompanying note 99 for a discussion of reparative/conversion therapy.

153. See *supra* accompanying text note 99.

154. *Ward*, 667 F.3d at 731.

155. *Id.* at 732.

156. *Ward*, 2010 WL 3026428, at *27.

157. *Id.* at *4 (quoting *ACA Code of Ethics*, *supra* note 5, at A.1.a).

158. *Id.* (quoting *ACA Code of Ethics*, *supra* note 5, at C.5).

159. *ACA Code of Ethics*, *supra* note 5, at 15.

her right to due process by disciplining her for violation of a “speech code” that was vague and overbroad and that did not give her fair notice that asking to refer a homosexual patient to another counselor could lead to her dismissal from the counseling program.¹⁶⁰ The court found that “the University’s disciplinary policy is not a speech code but is an integral part of the curriculum.”¹⁶¹ The student handbook outlined various behaviors that result in disciplinary action including violations of law, the *ACA Code of Ethics*, and “inability to tolerate different points of view, constructive feedback, or supervision.”¹⁶²

A central argument for Ward was that she, as stated in her paper that received a grade of “A,” can refer and should refer, under certain circumstances, a student/client to another counselor.¹⁶³ The court noted that the ACA recommends that “[i]f counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing counseling relationships,” then a referral may be made.¹⁶⁴ However, ACA Chief Professional Officer, David Kaplan asserted “[t]here is no statement in the *ACA Code of Ethics* that referral can be made on the basis of counselor values’ unless they are counseling ‘terminally ill clients who wish to explore options for hastening their death.’”¹⁶⁵ Furthermore, Kaplan’s expert report agreed with the decision of the Review Committee that Ward “had violated the *ACA Code of Ethics* by imposing her own values on a client, which is ‘inconsistent with the counseling goal of nondiscrimination on the basis of sexual orientation.’”¹⁶⁶ Following this line of reasoning, Kaplan stated that had Ward refused to counsel a student based on the student’s race, because her values did not allow her to counsel people of color, she would also have violated the *ACA Code of Ethics*.¹⁶⁷ Ward did not refuse to counsel just one client, but rather refused to “counsel an entire class of people.”¹⁶⁸

When Ward was asked to discuss her behavior, “instead of exploring options which might allow her to counsel homosexuals about their relationships,” she adopted an uncompromising position that she would not engage in affirming gays, who she believed live an “immoral lifestyle.”¹⁶⁹ Ward’s dismissal stemmed, according to the formal charges, from a

160. *Ward*, 2010 WL 3026428, at *7.

161. *Id.*

162. *Id.* at *4 (quoting EASTERN MICHIGAN UNIVERSITY, FINDING YOUR WAY: THE COUNSELING STUDENT HANDBOOK 14 (2011)).

163. *Id.* at *8.

164. *Id.* at *4 (quoting *ACA Code of Ethics*, *supra* note 5, at A.11.b).

165. *Id.* (quoting *ACA Code of Ethics*, *supra* note 5, at A.9).

166. *Id.*

167. *Id.* at *18.

168. *Id.* at *9.

169. *Id.*

violation of the *ACA Code of Ethics* and a “stated intention to continue violating” the *Code*.¹⁷⁰ When asked about improper condoning of discrimination, Ward responded, “I would believe that persons involved in an interracial marriage to be improper, immoral, and contrary to the human condition.”¹⁷¹ It is not known whether this perceived immoral activity of interracial marriages would also preclude her ability to provide counseling services related to interracial marriage, such as counseling the children from an interracial marriage.¹⁷² Furthermore, the court held that Ward’s “statement that she would [only] counsel homosexuals on non-relationship issues demonstrates her lack of understanding of the nature of counseling.”¹⁷³ Counselors never know where their counseling session will take them. Therefore, it is impractical to bracket the issues the counselor will discuss. Counseling is a personal and unpredictable activity. “[T]he nature of issues and topics confronting individual clients are often unforeseen.”¹⁷⁴ “A counselor’s job is to facilitate answers that are right for the client,”¹⁷⁵ not what fits with the counselor’s worldview and beliefs.

Rejecting Ward’s arguments, the court concluded that EMU’s nondiscrimination policy for students in the counseling program was not a speech code. Rather, the policy, which incorporated the *ACA Code of Ethics*, was part of the curriculum. In the court’s view, Ward had notice of the policy, which was contained in the student handbook and taught in the curriculum. Thus, the court denied Ward’s due process claim.¹⁷⁶

Next, the court examined Ward’s free speech claim and dismissed it as well. Drawing on the Supreme Court’s ruling in *Hazelwood School District v. Kuhlmeier*,¹⁷⁷ the court concluded that the counseling program’s

170. *Id.*

171. *Id.* at *11.

172. *See* *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (Chief Justice Burger wrote in a unanimous decision, which held that a child could not be removed from his white mother’s custody because she chose to live with an African American man, that the “Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”). Extending to this case, does the state through either its public university or an employing public school tacitly support a position of prejudice by allowing one of its students or employees to treat clients differentially because of the protected status of the client? *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (Justice O’Connor writing in her concurrence, “Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause . . .”).

173. *Ward*, 2010 WL 3026428, at *13.

174. *Id.* at *16. (“A counselor may hold himself out to specialize in a particular issue, like eating disorders, but that disorder may be due to underlying issues, perhaps, coming to terms with homosexuality.”).

175. *Id.* at *13.

176. *Id.* at *13–17.

177. 484 U.S. 260 (1988). While *Hazelwood* was a K-12 decision, the court and others have applied the framework to higher education cases, *see* *Hosty v. Carter*, 412

nondiscrimination policy formed part of the curriculum and was based on “legitimate pedagogical concerns.”¹⁷⁸ Citing to the Supreme Court, which first recognized that “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school,”¹⁷⁹ the district court found support for the EMU faculty’s decision.¹⁸⁰ In the classroom and practicum setting, the court pointed out, the faculty can restrict students’ speech for pedagogical purposes, and the faculty’s insistence that Ward set aside her personal beliefs about homosexuality when counseling a client did not violate Ward’s constitutional right to free speech. Ward was enrolled in a school-counseling program that believes, consistent with the code of ethics of counselors, its students need clinical experiences in order to learn to deal with counseling situations in an ethical manner. “Providing such skills to its graduates is the legitimate pedagogical concern of the University. EMU could not confer a counseling degree on a student who said she would categorically refer all clients who sought counseling on topics with which she had contrary moral convictions.”¹⁸¹

Ward also asserted a First Amendment retaliation claim arguing that she had been dismissed from the counseling program because providing “gay-affirmative” acts as part of her counseling “violated her religious beliefs.”¹⁸² The court held that her retaliation claim failed because she was not involved in a protected activity. Ward violated a valid curriculum requirement by refusing to counsel a client and her dismissal was academically legitimate.¹⁸³ Moreover, EMU’s counseling faculty did not require Ward to change or give up her religious beliefs; she was only required to set them aside during the counselor-client relationship and serve the best interests of the client, which is required by the counseling code of ethics.¹⁸⁴

Next, she alleged a violation of the Establishment Clause. The trial court also rejected Ward’s arguments that EMU’s faculty had violated the Establishment Clause in the way it conducted its counseling program. The court subjected the program to the three-part *Lemon* test¹⁸⁵ and concluded

F.3d 731 (7th Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002). For a critique of the use of *Hazelwood* in higher education, see generally Karyl Roberts Martin, *Demoted to High School: Are College Students’ Free Speech Rights the Same as Those of High School Students*, 45 B.C. L. REV. 173 (2003).

178. *Ward*, 2010 WL 3026428, at *16.

179. *Id.* at *14 (quoting *Hazelwood*, 484 U.S. at 266).

180. *Id.* at *16.

181. *Id.*

182. *Id.* at *20.

183. *Id.*

184. *Id.*

185. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

that the program was not operated for the purpose of advancing religion or inhibiting religion, that the program's operation did not have the effect of inhibiting or enhancing religion, and that the program had not been excessively entangled with religion.¹⁸⁶ The court also dismissed the claim that the counseling program had established the "religion of secularism."¹⁸⁷

D. Sixth Circuit Court of Appeals Decision

Ward appealed the summary judgment ruling in favor of the university, asserting a denial of her free speech and her free exercise of religion.¹⁸⁸ The three-judge appellate panel reversed the trial court's grant of summary judgment, asserting, "When the facts are construed in Ward's favor, as they must be at this stage of the case, a reasonable jury could conclude that Ward's professors ejected her from the counseling program because of hostility toward her speech and faith, not due to a policy against referrals."¹⁸⁹ The court argued that the university did not have a non-referral policy upon which it based its decision to deny Ward's request for a referral. It further argued that the *ACA Code of Ethics*, the basis for the dismissal, contains no bar to a student being given a referral based on the counselor's values, "like the one Ward requested."¹⁹⁰ Thus, if there is no non-referral policy that was adopted prior to Ward's request and there is no bar to granting a referral under the *ACA Code of Ethics* adopted by the university, a reasonable jury could conclude that the basis for the dismissal was a pretext for "punishing Ward's religious views and speech."¹⁹¹ The three-judge panel notes, "The inquiry was not a model of dispassion,"¹⁹² calling the non-referral policy "an after-the-fact invention."¹⁹³

Turning to the free speech analysis, the appellate court, similar to the district court, found that the university's curriculum is a form of speech

186. *Ward*, No. 09-CV-11237, 2010 WL 3026428 at *21-23. (holding "the curriculum has a secular purpose, as it based on national accreditation standards, professional codes of ethics, and State licensing requirements.").

187. *Id.* at *24; *see also Id.* ("Clearly, the Program was designed to encourage respect for, not hostility toward, various points of view.").

188. *Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012).

189. *Id.* at 730.

190. *Id.* at 735.

191. *Id.*; *see also id.* at 737 ("On top of the absence of a written policy barring referrals in the practicum class, there is plenty of evidence that the only policy governing practicum students was the *ACA Code of Ethics*, which as shown contemplates referrals."). The Court of Appeals went on to cite Ward's comment that her professors told her that, once she got to the practicum, she was "'supposed to use everything that has been taught to you in previous courses,' including the code of ethics." *Id.* It can be reasonably argued that includes nondiscrimination based on sexual orientation.

192. *Id.* at 737.

193. *Id.* at 736.

over which it retains control of the message. The “selection and implementation of a curriculum—the lessons students need to understand and the best way to impart those lessons—and public schools have broad discretion in making these choices.”¹⁹⁴ In other words, the university could adopt a curriculum that incorporated the *ACA Code of Ethics*. Having adopted its curriculum, the educational institution must, through its faculty, “assure that participants learn whatever lessons the activity is designed to teach.”¹⁹⁵ And, once the curriculum and the class requirements have been laid out for all to see, “it is a rare day when a student can exercise a First Amendment veto over them.”¹⁹⁶

While developing a strong case for university control over its curriculum, the Court of Appeals, however, noted several limitations to the university’s speech. First, the restrictions on student speech must be reasonably related to a legitimate pedagogical concern.¹⁹⁷ The panel did not assert that the basis for adopting the curriculum or making any other academic decisions violated this principle. Rather, the panel found that there was a dispute as to a material fact on this point, over which it felt it was inappropriate to grant summary judgment. Second, the university is not permitted to “invoke curriculum ‘as a pretext for punishing [a] student for her . . . religion.’”¹⁹⁸ “Gauged by these requirements, Ward’s free-speech claim deserves to go to a jury.”¹⁹⁹

The court found, in opposition to the lower court, that the code of ethics allows for values-based referrals such as the one Ward requested.²⁰⁰ In other words, the court states that counselors, or counselors-in-training, can make referrals based on their values. The court reviews the two provisions, which formed the basis for the dismissal, and constructs an analysis that is different than the district court’s analysis. First, the panel addresses Section A.4.b: “Personal Values,” which reads “[c]ounselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants.”²⁰¹ The court asks and answers the question of what Ward did wrong in making the referral

194. *Id.* at 732.

195. *Id.* at 733; (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

196. *Id.* at 734; *see also Id.* at 733 (“That the First Amendment protects speech in the public square does not mean it gives students the right to express themselves however, whenever and about whatever they wish in school assignments or exams.”).

197. *Id.* at 732 (quoting *Hazelwood*, 484 U.S. at 271).

198. *Id.* at 734 (quoting *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995)).

199. *Id.* at 735.

200. *Id.*

201. *Id.* (quoting *ACA Code of Ethics*, *supra* note 5, at A.4.b).

request. The three judges find that her referral was made “to *avoid* imposing her values on gay and lesbian clients.”²⁰² Ward’s willingness to counsel gay and lesbian clients on subjects other than sexual relations “respected the diversity of practicum clients,” the court stated.²⁰³ In other words, Ward will only counsel clients/students on her terms, and consistent with her values. Is the argument, I am not discriminating against you by refusing to counsel you because I am acting in your best interest? Can this argument be used as cover for all discrimination?

In practical terms, will Ward tell her homosexual clients upfront that she will help them as gay men with anything but their sexuality, or will she wait until the subject surfaces and then say she cannot counsel them because it offends her values? Either way it seems highly questionable whether Ward’s values will be imposed on her client and whether any respect for the gay client will have been communicated. It appears that the court’s reasoning is constructed so as to elevate the values, attitudes, beliefs, and behaviors of the counselor over the needs of the client—“as long as I am not offended by your problem or who you are, I will provide counseling.”

Second, the court believes Ward’s referral of the gay client is consistent with and not a violation of the nondiscrimination requirement of the *Code*.²⁰⁴ In fact, the court opined that there was no negative impact on the client because the client did not know and the client “perhaps received better counseling than Ward could have provided.”²⁰⁵ The court states that Ward was willing to work with the gay client as long as he did not discuss his sexuality. If the session turned to the gay client’s sexual relations, “the school’s affirmation directives” require her to affirm the sexual practices, which offend her values.²⁰⁶ The court drew the following analogy to find that Ward’s referral would not be discriminatory: a Muslim counselor would not be required to tell a Jewish client that his religious beliefs are correct.²⁰⁷ The court misconstrued the meaning of affirming the client’s values. An affirmation is not a statement of agreement with the client. A counselor can counsel a lesbian about sexual matters and affirm that the client holds certain values that define her behavior without stating that her

202. *Id.* at 735 (emphasis in original).

203. *Id.*

204. *Id.* (quoting *ACA Code of Ethics*, *supra* note 5, at C.5).

205. *Ward*, 667 F.3d at 735; this assertion begs the question as to what would the court say if the client knew that Ward had referred him to another counselor because of his sexual practices as a gay man and that those legal practices offended the values of the counselor. Would the client have felt discriminated against because of who he was as a person?

206. *Id.*

207. *Id.* (the court concluded this part of the analysis, writing, “[t]olerance is a two-way street. Otherwise the rule mandates orthodoxy, not anti-discrimination.”).

behavior and beliefs are ‘correct.’ Ward was not required to affirm that the gay client’s values and behaviors were correct even though they conflicted with hers.

Cabining the counseling sessions to only those topics Ward finds acceptable is to misunderstand the realities of LGBT students’ lives in school. Will she be able to institute policies at the school where she may work someday as a counselor, to protect LGBT students from harassment because of their sexual orientation when she reserves the right to not counsel them?²⁰⁸ Also, because LGBT students are often bullied at school, it is reasonable to assume that they may seek assistance from their school counselor in response to the bullying. There is a growing body of research that documents the elevated risk of victimization that these students face.²⁰⁹ Gay and lesbian students report physical and verbal harassment, stigmatization, and isolation with 91 percent hearing homophobic epithets and 39 percent reporting being bullied.²¹⁰ For the bullied LGBT students seeking help, can there be a counselor erected a firewall between the life of the student and the bullying which separates what topics counselors will provide counseling and what topics they will not counsel? There is simply no clear way to protect the school counselor from counseling bullied gay and lesbian students without the issue of sexual differences possibly arising. Many of the epithets hurled at them have explicit and implicit sexual connotations. What may start as a discussion on failing grades, may lead to a discussion of the bullying about his/her sexual orientation and its impact on the student’s grades.

The court argues that the *ACA Code of Ethics* allows for referrals such as

208. For examples of educator discriminatory conduct directed towards LGBT students, *see* *Nabozny v. Podlesny*, 92 F.3d 446, 455-56 (7th Cir. 1996) (holding that the school violated the Equal Protection Clause by its failure to protect a harassed gay male student); *Henkle v. Gregory*, 50 F. Supp.2d 1067 (D. Nev. 2001) (finding discrimination under Title IX based on demands by school officials to keep his sexual orientation to himself).

209. *See, e.g.*, Russell B. Toomey, Caitlin Ryan, Rafael M. Diaz, Noel A. Card, & Stephen T. Russell, *Gender Non-Conforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, DEVELOP. PYSCH 1 (2010) available at http://lgbtguild.com/youth_files/APA%20-%20Gender-Nonconforming%20Lesbian,%20Gay,%20Bisexual,%20and%20Transgender%20Youth-%20School%20Victimization%20and%20Young%20Adult%20Psychosocial%20Adjustment.pdf. The authors call for examination of “the school context to gain a deeper understanding of effective protective measures that schools use to prevent the victimization and harassment of LGBT and gender-nonconforming students” at 8. School counselors who not prepared or are unwilling to work with LGBT students to provide a safe environment thus reducing victimization may be exacerbating the school context through their approach to LGBT students instead of ameliorating the school context.

210. V. Paul Poteat & Dorothy L. Espelage, *Predicting Psychosocial Consequences of Homophobic Victimization in Middle School Students*, 27 J. EARLY ADOLSC. 175, 176 (2007).

the one requested by Ward. Therefore, the university adopted the *Code* with its referral provisions, though the university denied the referral based on a policy. The court could not find a written rule for the blanket denial of referrals for counselor trainees.²¹¹ Thus, the policy could be an after-the-fact policy designed to obscure religious discrimination. As evidence, the court cited an instance in which a practicum referral was granted to a student. The student was grieving and received permission for referral from counseling a grieving client.²¹² The court used this as an indication of potential animus for Ward's religion.²¹³ The university characterized it as a "single incident of non-assignment."²¹⁴ The court characterized the policy implementation as riddled with "individualized exemptions."²¹⁵

The court concludes that the university has "ample" authority to adopt the *ACA Code of Ethics* and its non-discrimination provisions for its graduate school-counseling program. However, the problem is not the policy, it is the implementation and the application of the policy in an uneven manner that the court questions.²¹⁶ It left to the lower court on remand the issue of whether the policy contained in the code of ethics was applied in an even-handed manner and in a faith-neutral manner.²¹⁷ The court tried not to tip its hand as to the eventual outcome.²¹⁸ It concluded, "At this stage of the case and on this record, neither side deserves to win as a matter of law."²¹⁹

On December 10, 2012, the lawsuit ended. Eastern Michigan University and Julea Ward agreed upon a settlement of \$75,000.²²⁰ The Court of

211. *Ward*, 677 F.3d. at 736.

212. *Id.* at 737.

213. *Id.* The court questioned, "Why treat Ward differently? That her conflict arose from religious convictions is not a good answer; that her conflict from religious convictions for which the department at times showed little tolerance is a worse answer." *Id.* However, *see* Brief for Americans United for Separation of Church and State as Amicus Curiae Supporting Appellees, *Ward v. Wilbanks et al.*, No. 09-CV-11237, 2010 WL 3026428, at *9 (E.D. Mich. July 26, 2010) (Nos. 10-2100, 10-2145), 2011 WL 1460534 ("[Ward] was admitted into the University graduate program even after disclosing that she 'strictly adheres to orthodox Christian beliefs.' And she received A's in all of her classes, even though she was not shy about expressing her religious views.") (internal citations omitted).

214. *Ward v. Polite*, 667 F.3d 727, 737 (6th Cir. 2012).

215. *Id.* at 740.

216. *Id.* at 739.

217. *Id.*

218. *Id.* at 741; *see also Id.* at 740 ("Allowing a referral would be in the best interest of Ward (who could counsel someone she is better able to assist) and the client (who would receive treatment from a counselor better suited to discuss his relationship issues)."). This type of analysis could be used by a counselor to avoid counseling anyone for any reason, even a discriminatory reason.

219. *Id.* at 741.

220. *See* Doug Lederman, *Settlement in Counseling Conflict*, INSIDE HIGHER ED (December 11, 2012) available at <http://www.insidehighered.com/news/>

Appeals support of values based referrals that run counter to the non-discrimination portions of the *ACA Code of Ethics* appears to be the stance in the Sixth Circuit. Does this now mean that a school counselor can claim a values based referral so as not to counsel students with whom the counselor disagrees with their legal life choices? Thus, the calculus of private beliefs as a basis for referrals and professional non-discrimination responsibility remain unresolved.²²¹

The impact of the case and the settlement is unclear. The attorney for Ward stated it is clear from the Court of Appeals decision and the university's settlement that "public universities shouldn't force students to violate their religious beliefs to get a degree."²²² However, a visiting law professor at the University of Michigan stated "it was 'harder to know' whether faculty members in similar situations in the future 'will feel the need to compromise educational policies or give special accommodations to students based on religious beliefs simply out of fear of litigation, even when the policies are educationally necessary and applied fairly.'"²²³ The settlement in *Ward* may mean in the Sixth Circuit the control over a central aspect of counselor preparation, the supervised practicum, may have been turned over to students the power to decide who they will counsel and whom they will not counsel based on their personal values asserting that it is in the best interests of the client and discrimination.

E. Recap of Cases

The four courts in *Keeton v. Anderson-Wiley* and *Ward v. Polite* expressed a judicial philosophy that is deferential to the judgment of the

2012/12/11/university-and-student-settle-lawsuit-over-requirement-counseling-gay-people

221. See *id.* for conflicting statements on the meaning of the settlement.

For the plaintiff: "Besides that great settlement for Julea personally, we also got published decisions that put universities on notice that they need to tread very lightly in this area in the future," said Jeremy Tedesco, a lawyer for the alliance."

For the defendant University: "The resolution of the lawsuit leaves the university's policies, programs, and curricular requirements intact," Walter Kraft, Eastern Michigan's vice president for communications, said via e-mail. "Our faculty retains its right to establish, in its learned judgment, the curriculum and program requirements for the counseling program."

See also, Neal Hutchens, *Student and University Settle Over Her Dismissal From Counselor Education Program*, HIGHEREDUCATIONLAW (Dec. 13, 2012) available at <http://www.highereducationlaw.org/url/2012/12/13/student-and-university-settle-over-her-dismissal-from-counse.html> (writing, "[s]o, while I'm assuming the parties in the *Ward* litigation are relieved to have a conclusion to the lawsuit, the settlement agreement leaves some important legal questions in the air.").

222. *Id.*

223. *Id.*

higher education community regarding academic matters, so long as that judgment reflects academic norms and serves a legitimate pedagogical concern. The *Keeton* and *Ward* rulings upheld the curriculum incorporation of the *ACA Code of Ethics* as part of the required curriculum. For professional preparation programs, their curriculum can be anchored by the ethics of the profession.

The divergence occurred in the *Ward* appellate court decision. This court found in the *ACA Code of Ethics* a values-based exemption for counselors, asserting that the exemption imposes values or discriminates against clients. The courts *Keeton* and the district court in *Ward* did not find a values-based exemption that the plaintiff could assert as a shield for their actions. This argument allows the counselor to control who they will counsel and for what topics they will provide counseling. The assertion of the Sixth Circuit Court of Appeals that this does not run afoul of the general requirement that counselors not discriminate against their clients is highly suspect.²²⁴ It is hard to reconcile how a counselor's values-based exemption grounded in a belief of the immorality of the client is not an imposition of a counselor's personal values. The ability to withhold services for any reason that the counselor chooses based on the counselor's values, attitudes, and beliefs may thinly mask a discriminatory basis in violation of Section A.1.a: "Primary Responsibility." This section reads, "The primary responsibility of counselors is to respect the dignity and to promote the welfare of clients."²²⁵ The Sixth Circuit Court of Appeals argues that referring all members of a protected group to another counselor because the counselor finds the group objectionable is not discrimination. This appears to construct a safe harbor for discrimination. That counselors can assert that counseling a member of a group of clients offends the counselor's values and beliefs, and find cover for that discrimination through the assertion of the right to use a referral is not discrimination, seems like tortured reasoning and a misuse of the intent of the code of ethics. The assertion that the referral is made in the best interests of the client and not in the best interests of the counselor is highly debatable. Professionalism is not built on self-interest; it is built on serving the interests of the client. If the counseling student can refer all clients who are objectionable to their values and beliefs, can the professional counselor also only provide service to those of whom she or he approves? If yes, why incorporate codes of ethics that are meant to constrain and define actions if the true standard is the individual beliefs of the professional? How is the primary responsibility to clients served when the values of the

224. See Rita M. Marinoble, *Homosexuality: A Blind Spot in the School Mirror*, 1 PROF. SCH. COUNS. 4, 4-7 (1998) (asserting that school counselors who reject or judge GLBTQ students can create profound harm for this vulnerable student population).

225. *ACA Code of Ethics*, *supra* note 5, at 4.

counselor are the gatekeeper to providing a service? This issue is exacerbated when the counselor is a school counselor employed by a school district, which serves all students without regard to their race, religion, or sexual orientation.

VI. DISCUSSION

The decisions of the *Keeton* and *Ward* courts stand for the proposition that the university controls its curriculum and that students must adhere to its requirements. This broad authority includes the incorporation of a professional code of ethics with its required skills, knowledge, dispositions, and nondiscrimination requirements.

The public institution of higher education selects what shall be taught and what students must learn from the options of competing curricula. The selection of the curriculum can be viewed as government speech.²²⁶ For example, in a K-12 case, the federal district court of Massachusetts stated, “Public officials have the right to recommend, or even require, the curriculum that will be taught in public school classrooms. Doing so is a form of government speech, which is not generally subject to First Amendment scrutiny.”²²⁷ In the *Keeton* and *Ward* cases, the public universities adopted the *ACA Code of Ethics* as part of their curriculum. It was expected by their respective institutions that *Keeton* and *Ward* would adhere to the curriculum, which included a prohibition against discriminating against a client because of his or her sexual orientation. All four courts upheld this proposition. Even the Sixth Circuit Court of Appeals in *Ward* did not state that the university did not have the right to adopt its curriculum including the prohibition against discrimination. The Sixth Circuit panel in *Ward*, however, raised the issue on remand as to whether the university appropriately implemented the curriculum through its policies allowing for a student referral from counseling a gay student.

As we have seen, courts have traditionally given institutions of higher

226. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (“When the University determines the content of education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”); *Rust v. Sullivan*, 500 U.S. 173, 179 (1991), laid the foundation for the doctrine of government speech by stating that the government could selectively fund a program and require its employees to implement the program, including prohibiting its employees from mentioning abortion as an option. *Id.* at 179. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), is another example; a rare unanimous decision finding government speech in a decision of the State of Utah to not allow the erection of a monument on a government park. The Court asserted that government has the right to speak for itself: “‘It is entitled to say what it wishes,’ and to select the views it wants to express.” *Id.*, 555 U.S. at 467–68 (internal citations omitted).

227. *Griswold v. Driscoll*, 625 F. Supp. 2d 49, 54 (D. Mass. 2009).

education wide latitude “to create curricula that fit schools’ understandings of their educational missions.”²²⁸ This includes practica, internships, and clinical settings.²²⁹ The Sixth Circuit Court of Appeals in *Kissinger v. Board of Trustees of Ohio State University*, in which the plaintiff sought an exception to a surgery requirement on healthy animals on religious grounds, opined, “[The plaintiff] was not compelled to attend Ohio State for her veterinary training. She matriculated with the knowledge that operations on live animals were part of the curriculum established by the Ohio State program’s faculty. She cannot now come forward and demand that the college change its curriculum to suit her desire.”²³⁰ This case raises the argument that since adults are not compelled to attend any one program of post-secondary or graduate study, they should choose those programs that best fit their interests and needs. It is not reasonable that programs of study must accede to the exceptions and preferences that any student demands even if they fit best with the student’s sincerely held beliefs, religious or otherwise.

However, as one legal commentator points out, students should have the right to take reasoned positions against the curriculum and that the courts need to ensure that the faculty act in good faith when determining “that a student is unable to or unwilling to satisfy curricular requirements, including professional and ethical obligations.”²³¹ Raising questions about the curriculum is an appropriate and protected activity.²³² The perspective of students is important and can provide a mirror or counterbalance for review of the curriculum. And clearly the faculty must act in good faith and without animus towards student disagreements. Truth may be discovered through dissent rather than assent of accepted positions. But, an American Civil Liberties Union attorney commenting on the *Ward* case stated, “While no public university can discipline any student because of her beliefs, universities have a right to insist that their graduate students adhere to accepted standards of professionalism and place the needs of their clients first.”²³³

228. *Kissinger v. Bd. of Trust. of Ohio State Univ.*, 5 F.3d 177, 181 (6th Cir. 1993).

229. *See Doherty v. Southern Coll. of Optometry*, 862 F.2d 570 (6th Cir. 1988).

230. *Kissinger*, 5 F.3d at 180-81.

231. Neal H. Hutchins, *A Delicate Balance: Faculty Authority to Incorporate Professionalism Standards Into the Curriculum Versus College and University Students’ First Amendment Rights*, 270 EDUC. LAW REP. 371, 388 (2011).

232. *See Keeton v. Anderson-Wiley*, 664 F.3d 865, 882 (11th Cir. 2011) (Pryor, J., concurring) (“But we have never ruled that a public university can discriminate against student speech on the concern that the student might, in a variety of other circumstances, express views at odds with the preferred viewpoints of the university.”)

233. *6th Circuit Reinstates Student’s Lawsuit Against University*, FIRST AMENDMENT CTR. (Jan. 30, 2012, 10:45 AM), <http://www.firstamendmentcenter.org/6th-circuit-reinstates-student’s-lawsuit-against-university>.

A. Deeply Held Beliefs and the Professional Curriculum

Freedom of speech and the right to hold one's views is decidedly different than compelling the college, university, or the profession to make room for the individual to act in accordance with her or his own beliefs within the pedagogical interests of the college or university. Religious tenets may and should govern private conduct and can inform public actions. However, religious or personal precepts²³⁴ which are at odds with the professional service tenets of counseling, or other helping professions,²³⁵ cannot control the professional behavior of the individual when that person is working in the capacity of the professional. Professional standards of care required of the profession must dictate the quality of the service rendered and to whom it is rendered. When personal beliefs conflict with professional codes of conduct, something must give. The individual may retain his or her deeply held religious beliefs but may not require that the profession change its also deeply held propositions of the proper conduct of its members. To decide otherwise is to eviscerate what it means to have a code of ethics for all adherents that require a certain type of service rendered for the benefit of the public.

Julian Savulescu, the Director of the Oxford Centre for Practical Ethics at Oxford University, offered the following controversial statement²³⁶ about conscientious objection in medicine, "If people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors."²³⁷ He raises an important question about whether professional practice must serve the conscience of the practitioner, or whether the professional must serve the conscience of the profession. A person who cannot perform the requirements of the profession, such as being a married priest, cannot assert that the church must conform to the needs, interests, and dictates of those

234. See *United States v. Seeger*, 380 U.S. 163, 166 (1965) (asserting that a person's religious beliefs need not be based in the traditional concept of "God," but may instead be grounded in a belief in something that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . .").

235. For a discussion of pharmacist refusal clauses based on a matter of personal conscience, see Heather A. Weisser, Note, *Abolishing the Pharmacist's Veto: An Argument in Support of a Wrongful Conception Cause of Action Against Pharmacists Who Refuse to Provide Emergency Contraception*, 80 S. CAL. L. REV. 865 (2007). Weisser asserts when pharmacists refuse to dispense a medication, such as emergency contraception, based on her or his personal beliefs "without concern for the greater dictates of the medical profession . . .," the pharmacist violates the tenants of the profession "to act in the best interest of the patient . . ." *Id.* at 881.

236. See, e.g., Christopher Kaczor, *Abortion, Conscience, and Doctors*, THE WITHERSPOON INST.: PUB. DISCOURSE, ETHICS, LAW, AND THE COMMON GOOD (Oct. 29, 2010), available at <http://www.thepublicdiscourse.com/2010/10/1922>.

237. Julian Savulescu, *Conscientious Objection in Medicine*, 332 BRIT. MED. J. 294, (2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1360408/>.

who want to be priests. Personal beliefs may trump professional ethics when the individual is acting as an individual. However, the profession should not be required to abandon its ethical precepts in favor of every professional's personal views when the person is acting as a professional.

All professions are dependent upon the post-secondary programs that prepare individuals for service in the profession. A counseling program, or for that matter any educational program, cannot exist if it must provide for a system of particularized exemptions that allows students to determine what elements of the curriculum or code of ethics they choose to follow. While individuals have the constitutionally protected right to exercise their religion, they do not have the right to require that a college or university program accede to their needs, demands, and desires, no matter how sincerely their beliefs are held. To allow otherwise is to shift the fulcrum toward the needs of the professional and away from the recipient of the professional service who depends on the service. This is unwise. Professionals meet the needs of their clients/students; clients do not have to meet the standards and requirements of the counselor.

B. Legislative Response to the Controversy

However, in contrast to this "collective professional conscience," Arizona House Bill 2565 seeks to allow a statutory exception for religious viewpoints in higher education in just the circumstance discussed in this commentary. The Bill reads, in pertinent part:

A university or community college shall not discipline or discriminate against a student in a counseling, social work or psychology program because the student refuses to counsel a client about goals that conflict with the student's sincerely held religious belief if the student consults with the supervising instructor or professor to determine the proper course of action to avoid harm to the client.²³⁸

This legislation, much like Keeton and Ward's positions, places the interests of the counselor over the interests of the client. This legislation appears to compel colleges and universities to erect separate programs for those students who have sincerely held beliefs that keep them from following the profession's code of ethics. If, according to the Arizona House Bill, school counseling students can elect not to counsel those students or clients with whom they disagree because of the life circumstances of the client or student, does the employing school district for these school counselors have to also provide the same exemption of only working with those students who comport with the counselor's

238. H.R. 2564, 2011 Leg., 1st Reg. Sess. (Ariz. 2011), *available at* <http://www.azleg.gov/legtext/50leg/1r/bills/hb2565s.pdf>.

sincerely and deeply held religious beliefs? It makes little sense to exempt graduate students in counseling programs from working with gay and lesbian students as part of their professional preparation to be a school counselor, and then require them to work with those same students in the schools as a school counselor for which they are totally unprepared to provide counseling. Therefore, should the exemption be transferred to the employing school so that counselors can choose which students they will not counsel? And, if deeply held religious beliefs require an exemption for counselors from working with gay and lesbian students and possibly other student populations, it can be reasonably argued that this exemption should be extended to all educators, not just to counselors. Once again, the calculus of what constitutes professional service shifts from what are the best interests of the client to the preferred interests of the counselor. What shall the curriculum of the college or university protect, the personal interests of the student or the professional ethics of the profession?

This legislation and its approach are unworkable in the public schools, which are designed to serve the public, all of the public. To identify a student population, which already faces discrimination, as being immoral and thus is not entitled to access counseling services like any other student at school, should be considered demeaning and discriminatory.²³⁹ If school counselors have an exemption from working with GLBTQ students, to what lengths can other students and other educators be emboldened to take action against these youths who have been identified as unworthy? Why should the teacher or the principal be forced to work with GLBTQ students when counselors can choose not to work with that student population? If it is not discrimination for counselors or counselors in training to withhold services to GLBTQ students that other students receive, based on their status alone, then it would not be discrimination for teachers to send those students whom they do not want to work with, to teachers who are willing to work with that student population. This is unworkable, unsustainable, and unethical.

C. Deeply Held Personal Beliefs and Rendering Professional Service in the Public Square

This intersection of deeply held religious beliefs and the public good as embodied in professional codes of ethics is not an easy intersection allowing traffic to flow easily on both avenues. An individual's right to hold a religious view must be scrupulously protected as an individual, personal right. Religious and other deeply held beliefs help to form the

239. See, e.g., *Harper v. Poway Unif. Sch. Dist.*, 445 F.3d 1166, 1178-79 (9th Cir. 2006) ("The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development.").

character of the individual. However, a profession by its very nature requires its members to set aside their personal preferences to serve the needs and interests of the person receiving their service. The ethics of the profession become individually-based when the school counselor can gather to himself or herself the right to decide which group of students is entitled and worthy of receiving their counseling service in a public school. Nondiscrimination is central to the counseling profession.²⁴⁰ When an individual is treated only as a member of a group and not as an individual, it is an easy step to discriminate because the person is shorn of individuality; she or he becomes a stereotype, the status ascribed to her or him by the speaker.

The Supreme Court has noted that there is no distinction between conduct and status. For example, in *Lawrence v. Texas*, Justice O'Connor noted that the criminalization of homosexual conduct invites discrimination of homosexual persons, based on their status.²⁴¹ The prohibition on conduct also targets "gay persons as a class."²⁴² Therefore, the argument that the counselor is only refusing to counsel the student because of the homosexual conduct is disingenuous in that it also targets the status of the person as gay or lesbian. Espousing an ethic of nondiscrimination while actively discriminating against a class of individuals by withholding services to them based on their status is professional dissonance and a violation of the *Code of Ethics*.

Individuals in their private life can and should follow the dictates of their conscience; they can associate with whomever they choose for whatever reason and they can choose not to associate with individuals for any reason. However, professionals must follow the ethics of their profession and render service that does not discriminate against individuals due to their group status. To upend this calculus is to elevate the private interests of the individual counselor over the professional requirement of service rendered in the best interests of the client/student. Professionals hold a privileged place in our society in part because the public, which relies on their services, believes that the professional works for their best interests and not the self-interest and personal values of the professional. While Jennifer Keeton and Julea Ward can assert that their refusal to counsel gay and lesbian students because of who the clients are is acting in the best interests

240. Dr. Donald C. Haldeman, former chairman of the American Psychological Association's committee on lesbian, gay, and bisexual concerns, in response to the *Ward* appellate decision, stated, "[W]e don't train our students in discriminatory patterns of treatment, and we don't permit them." Mark Oppenheimer, *A Counselor's Convictions Put Her Profession on Trial*, N.Y. TIMES, Feb. 3, 2012, <http://www.nytimes.com/2012/02/04/us/when-counseling-and-conviction-collide-beliefs.html>.

241. 539 U.S. 558, 583 (2003).

242. *Id.*

of the client, their assertion is wrong. Theirs is a triumph of the counselor's values over the values and needs of the client. Personal values are then substituted for professional ethics in the public square. GLBTQ students are implicitly told that they are of lesser value than the rest of the student body.²⁴³ Keeton and Ward appeared to send the message to GLBTQ students that they must seek the full range of counseling services offered to other students from another counselor (if one is available and also willing to work with GLBTQ students). This is unworkable in a public school where one study found that almost one-half of the GLBTQ student population sought assistance from their school counselor.²⁴⁴

College and university programs prepare individuals for service as a professional. The ethics in which colleges and universities infuse their preparation programs is important to the life of a profession. The working definition of a professional is dependent upon the preparation that its novices receive in their college and university preparation programs. As the First Circuit Court of Appeals asserted, a university's practicum "closely resembles an employer-employee relationship" because the supervised student teaching activity reflects "the rudiments of a profession."²⁴⁵ How the professional is trained influences how she or he will practice.

VII. CONCLUSION

Personal values are important, but in the public square where who can provide specific professional services is regulated by licensure, the college or university must be able to establish its curriculum to support the ethics of the profession.²⁴⁶ Individuals are free to advocate and act upon on their

243. See *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, n.15 (5th Cir. 2001) (asserting that a counselor who sought an accommodation to be excused from counseling clients on issues which conflicted with her religious beliefs "would have a potential negative impact on those being counseled" by being assigned to other counselors).

244. Diane E. Elze, *Gay, Lesbian, and Bisexual Youths' Perceptions of their High School Environments and Comfort in School*, 25 *CHILDREN & SCHOOLS* 225, 232 (2003).

245. *Hennessy v. City of Melrose*, 194 F.3d 237, 245 (1st Cir. 1999). See also *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (asserting that public employee professional responsibilities may reduce the speech rights "the employee might have enjoyed as a private citizen." Essentially, work-related speech of the public employee is the speech of the government employer, which the state may control).

246. See *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007) (holding that a state university could discipline a social work student for making religious comments during his required counseling practicum). See also Brief for Americans United for Separation of Church and State as Amicus Curiae Supporting Appellees, *Ward v. Wilbanks et al.*, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010) (Nos. 10-2100, 10-2145), 2011 WL 1460534, at *8 ("The University was entitled to train its students to provide professional care to all of those clients, not just

religious beliefs in many venues, but there are boundaries to the relationship between state and religion. Government has been able, within constitutional bounds, to enact laws that incidentally conflict with religious beliefs.²⁴⁷ As the Supreme Court asserted in 1940, the Free Exercise Clause embraces two concepts — “freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”²⁴⁸ The Supreme Court forty-six years later in *Bowen v. Roy* stated, “The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”²⁴⁹ By way of analogy, because a graduate student holds a religious conviction that homosexuals are immoral and refuses to counsel those individuals, this is in opposition to a state college or university’s requirement that its students do not discriminate against individuals because of their sexual orientation. The college or university can require that its programs, including counseling services, not discriminate against designated groups. Just as occurred when an Amish employer sought an exemption from collection and payment of social security taxes because of his faith, the Supreme Court upheld the state requirement over religious objections.²⁵⁰ The Court wrote, “To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.”²⁵¹ The preparation of school counselors to work with all students is a public

those who make choices that its students embrace.”).

247. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879) (“Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”); *Emp’t Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 235 ((1948) (Jackson, J. concurring) (“Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or is inconsistent with any of their doctrines, we will leave the public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant lawsuits.”).

248. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *see also Reynolds v. United States*, 98 U.S. 145, 166 (1879) (“Laws are made for the government actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).

249. *Bowen v. Roy*, 476 U.S. 693, 700 (1986); *see also Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (writing “the state has no legitimate interest in protecting any or all religions from views distasteful to them . . .”).

250. *United States v. Lee*, 455 U.S. 252 (1982).

251. *Id.* at 259.

good. Preparing interns to work with students in our schools involves more than acquiring technical competence; it is a casting aside of “self-serving status enhancement” and focusing on the development of “caring communities” that place the welfare and best interests of students at the center of service.²⁵²

One venue of action, the professional workspace, must be reserved for the ethics of the profession. The college or university must prepare its students to discharge all of the requirements of the profession, not just the ones the student interprets as personally acceptable to his or her beliefs. The college or university’s ability to establish and regulate its curriculum, and particularly to regulate the clinical internship in a professional preparation program, is critical to the mission of the program and the college or university.

252. Andy Hargreaves & Igor Goodson, *Teachers’ Professional Lives: Aspirations and Actualities*, in *TEACHERS’ PROFESSIONAL LIVES* 1, 20 (Ivor F. Goodson & Andy Hargreaves eds., 1996).

