

No. 10-2100

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JULEA WARD,

Plaintiff-Appellant,

v.

ROY WILBANKS, FLOYD CLACK, GARY D. HAWKS, PHILIP A. INCARNATI,
MOHAMED OKDIE, FRANCINE PARKER, THOMAS W. SIDLIK, JAMES F. STAPLETON,
DR. SUSAN MARTIN, DR. VERNON POLITE, DR. IRENE AMETRANO,
DR. PERRY FRANCIS, DR. GARY MARX, PAULA STANIFER,
DR. YVONNE CALLAWAY, AND DR. SUZANNE DUGGER,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan, No. 09-11237
Before the Honorable George Caram Steeh

**BRIEF FOR THE AMERICAN COUNSELING ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES
AND AFFIRMANCE**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 10-2100

Case Name: Julea Ward v. Roy Wilbanks, et al.

Name of counsel: David Sapir Lesser, Alan E. Schoenfeld, and Brian A. Sutherland

Pursuant to 6th Cir. R. 26.1, American Counseling Association
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on February 11, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Brian A. Sutherland

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF INTEREST

The American Counseling Association (“ACA”) is the largest organization for professional counselors in the United States, with over 45,000 members nationwide. For over 50 years, it has promulgated a code of ethics (the “ACA Code of Ethics” or “Code”), the codification of the shared rules of professional conduct of the counseling profession.¹ The ACA is uniquely situated to address numerous issues in this case, including the fundamental objectives and ethical constraints of the counseling profession, as embodied in the Code, and the proper interpretation of the Code as pertains to the facts below.²

¹ The current ACA Code of Ethics was published in 2005. It is the product of an ethics task force comprised of leading practitioners, educators, and academics, which periodically reviews and updates the Code to reflect the prevailing standard of ethical conduct in the profession. After the Ethics Revision Task Force has completed its revisions, it submits the draft to the ACA’s Governing Council, a board of elected representatives from each of the ACA’s divisions and regions. When the Council approves the draft, it becomes the ACA’s official statement of ethical conduct for professional counselors and counseling students and educators.

The 2005 ACA Code of Ethics, which was in place during the time of the events that gave rise to this litigation, is available on ACA’s website (<http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx>) and in the record (R.E. 14-17). Throughout this brief, the ACA cites the relevant section of the 2005 Code in parenthetical shorthand notation, *e.g.*, Section A.4.b of the 2005 ACA Code of Ethics appears as “A.4.b.”

² No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made any monetary contribution toward the preparation or submission of this brief. The parties have consented to the filing of this brief.

STATEMENT OF THE ISSUES

Eastern Michigan University (“EMU”) requires all students in its graduate counseling program to follow and to demonstrate an ability to follow the ACA Code of Ethics. The Code requires students to refrain from imposing their own values on clients and, relatedly, to refrain from discriminating against certain classes of clients, including based on sexual orientation. Correspondingly, it requires counseling supervisors to identify areas where counseling students may lack competence. The district court held that it was constitutionally permissible for EMU to dismiss Julea Ward because she refused to fulfill an educational requirement reasonably related to professional conduct—abiding by the ACA Code of Ethics during a counseling practicum. Ms. Ward violated the ACA Code of Ethics by refusing to counsel clients who may wish to discuss homosexual relationships, as well as others who fail to comport with her religious teachings, *e.g.*, persons who engage in “fornication.” R.E. 1-5, Transcript of Formal Review Hearing, Mar. 10, 2009, at 27:21. Ms. Ward contends that she was not dismissed for her conduct, but rather for her religious beliefs.

This *amicus* brief addresses two issues of great concern to the ACA: First, whether the ACA Code of Ethics permits a counseling practicum student to refuse to counsel an assigned client based on the student’s concern that the client may seek advice regarding homosexual relationships; and second, whether requiring

students to demonstrate the competence to counsel different types of clients as assigned by their supervisors is a matter of legitimate pedagogical concern in the training of future counselors.

SUMMARY OF ARGUMENT

The ACA Code of Ethics prohibits both graduate counseling students and professional counselors from refusing to counsel someone simply because he wishes to discuss homosexual relationships. First, the Code provides that counselors must “avoid imposing values that are inconsistent with counseling goals.” A.4.b. Counselors may—and do—hold and express their own individual beliefs and values. But they cannot act on those beliefs by referring clients whose counseling goals implicate a different set of values. Refusal to discuss an issue—and refusing to accept a client based on the issue he or she wants to discuss—communicates and imposes the counselor’s position, dislike, or discomfort with that issue, which may in turn harm the client. Second, the Code provides that counselors must not “engage in discrimination based on ... sexual orientation.” C.5. Categorical refusal to counsel persons seeking guidance concerning homosexual relationships is plainly impermissible under the Code.

A university may reasonably require student counselors to demonstrate competence in counseling different types of clients. University counseling programs serve a gate-keeping function under the ACA Code in that they require

counselor educators and supervisors to endorse only those students who demonstrate competence to counsel different types of clients. Graduate counseling students must be able to show that they can respect the dignity and promote the welfare of persons (A.1.a) who do not share their values because every counselor, no matter how specialized, comes across such persons as a routine part of his or her professional experience. The capacity to advance the client's goals without interjecting and imposing the counselor's own values (A.4.b) is not just reasonably related to the pedagogical concerns of counseling; it is at the very core. The same is true of adherence to the Code's nondiscrimination provision (C.5): Students cannot become counselors if they are unwilling to abide by, and demonstrate the capacity to fulfill, the basic ethical standards that govern their chosen profession; relevant here, a standard of nondiscrimination based on sexual orientation.

Ms. Ward does not dispute that she rejected an assigned client because he identified himself as homosexual and as seeking counseling related to his homosexuality. This action, not her beliefs, violated the ACA Code of Ethics. Because she refused to see assigned clients based on her objection to engaging in client-affirming counseling about homosexual relationships, EMU advised her that she would need to change her conduct in order to continue in the counseling program. When she did not, but instead insisted that she would not counsel anyone on homosexual issues, Ms. Ward failed to fulfill a legitimate academic

requirement—demonstrating an ability to adhere to the ethical standards of the counseling profession, as embodied in the ACA Code of Ethics. Defendants properly dismissed her.

ARGUMENT

I. THE ACA CODE OF ETHICS FORBIDS BLANKET REFUSAL TO COUNSEL BASED ON THE COUNSELOR’S OWN PERSONAL VALUES, INCLUDING BASED ON A CURRENT OR PROSPECTIVE CLIENT’S SEXUAL ORIENTATION³

A. The Code Promotes The Professional Objective Of Fostering Client Welfare Based On The Client’s Values, Rather Than The Counselor’s Values

The overarching objective of the counseling profession is to “encourage client growth and development in ways that foster the interest and welfare of clients and promote the formation of healthy relationships.” A.Intro. Consistent

³ As the drafter of the ACA Code of Ethics, the ACA is in the best position to advise the Court concerning the proper interpretation of the Code and its application to particular facts. This commonsense proposition is not controversial, and in fact, Ms. Ward agreed that the “ACA know[s] better what its own code of ethics means and how to apply it than [she does]” at her deposition for this case. R.E. 82-3, Deposition of Julea Ward, Dec. 22, 2009, at 129. Indeed, the ACA’s interpretation of the Code and views concerning ethical standards necessary to sustain the counseling profession are entitled to substantial deference. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (relying on *amicus* briefs from the American Medical Association and the American Public Health Association to determine reasonable expectation of privacy regarding drug testing); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (deferring to AMA’s position that physician-assisted suicide is “fundamentally incompatible with the physician’s role as healer”); *Washington v. Harper*, 494 U.S. 210, 223 n.8 (1990) (citing guidelines of the American Psychiatric Association regarding involuntary medication of prisoners).

with this goal, the “primary responsibility of counselors is to respect the dignity and to promote the welfare of clients,” A.1.a, and to avoid harming clients, A.4.a. The Code of Ethics applies to students in counseling programs. *See* F.8.a (“Counselors-in-training have a responsibility to understand and follow the ACA Code of Ethics. ... Students have the same obligation to clients as those required of professional counselors.”).⁴ Students must demonstrate that they are capable of offering counseling services to their assigned clients, even if they hold different beliefs and values from those clients. They must demonstrate, to the satisfaction of their supervisors, competence to handle different types of clients and issues in accordance with the ethics that govern their chosen profession.

The Code specifically addresses the potential harm that may arise when counselors have different values than their clients, and directs counselors to “avoid imposing values that are inconsistent with counseling goals.” A.4.b. Thus, the Code contemplates and assumes that counselors will have regular contact with clients who do *not* share their values. Even if the counselor perceives a difference in values between the counselor and client, that is not a basis for terminating the

⁴ *See also* Baird, *The Internship, Practicum, and Field Placement Handbook: A Guide for Helping Professions* 30 (4th ed. 2005) (“Students, in particular, should know that violations of ethical standards for their profession can be considered grounds for academic discipline and possibly dismissal from a training program.”).

counseling relationship in all but truly exceptional cases. In all cases, the decision requires great care and deliberation.

B. The Code Prohibits Discrimination, Including Based On Sexual Orientation

Consistent with the professional objective of making counseling services widely available to as many persons as possible and making counselors aware of the harms that may be inflicted by refusals or discrimination during treatment, the Code directs that counselors may not “engage in discrimination based on” numerous factors, including race, gender, disability, and relevant here, “sexual orientation.” C.5. The nondiscrimination provision applies to each of the counselor’s professional functions, including, of course, fostering the interests and welfare of clients. A.1.a. A counselor who refuses to provide counseling with respect to homosexual relationships engages in discrimination based on sexual orientation, because he or she chooses whether to provide counseling services based on this category of issues. For the same reason, a counselor who attempts to identify and refer homosexual clients who may raise sexual orientation concerns also engages in discrimination based on sexual orientation. Under the ACA Code of Ethics, a counseling student can no more reject an assigned client because he might seek advice concerning a homosexual relationship than she could reject a client because he could be expected to discuss his disability or Jewish ancestry. All are discrimination under the Code. C.5.

The nondiscrimination provision is essential to the goals of the counseling profession, and thus a counselor cannot willfully violate the nondiscrimination provision and be professionally competent at the same time. Counselors are expected to help clients to sustain healthy relationships with all persons, including persons with different backgrounds and sexual identities. A.Intro., C.5. A student who refuses to help whole classes of people, or refuses to provide counseling on a whole class of issues, manifests an inability to embrace the core objectives at the heart of counseling and the ACA Code: to serve a broad client base and to promote the welfare of clients in ways that are meaningful and sustaining *to the clients*. A.1.a. Excluding homosexual relationships from the bounds of discourse signals the counselor's intent to impose his or her own values in the area of sexual relationships (A.4.b), and perhaps other areas. Especially in a diverse society, a counselor will inevitably be asked to provide services to persons with different values, and the competent and ethical counselor must be prepared to do so.⁵

The nondiscrimination provision thus expresses one of the primary obligations of the profession—to give help without regard to class-based characteristics or topics of discussion. It is also grounded in history. The Code

⁵ See Barnett & Johnson, *Ethics Desk Reference for Counselors* 147 (2010) (“The ACA Code of Ethics recognizes the real danger of inflicting harm when counselors fail to recognize, appreciate, and effectively address cultural dynamics in their counseling work.”); Corey et al., *Issues and Ethics in the Helping Professions* 110 (6th ed. 2003) (“[C]ounselors can no longer afford to ignore the issues involved in counseling culturally diverse populations.”).

proscribes discrimination on the basis of membership in groups that have historically been subject to discrimination and marginalization. These groups “are particularly vulnerable when counselors perpetuate discrimination against them.”⁶ The Code thus makes explicit that counselors must protect those most likely to be discriminated against and those most likely to be harmed by counselor discrimination.

C. The Code Permits Practicum Students To Make Referrals Only Under Extremely Limited Circumstances

The Code devotes careful attention to value conflict and discrimination because fostering access to continuous and productive counseling treatment for all is a key objective of the ACA. In furtherance of this objective, and recognizing that refusal or abandonment of clients has proven particularly pernicious and harmful to the well being of clients, the Code specifically mandates that counselors “do not abandon or neglect clients in counseling.” A.11.a. A counselor who drops a client whenever potential values-based conflicts arise, or categorically refuses to discuss certain issues, violates this provision. The Code recognizes that a client may suffer harm if the counselor turns away at the very moment that the client’s most sensitive issues arise. Because of this risk, termination and/or referral are

⁶ Hermann & Herlihy, *Legal and Ethical Implications of Refusing to Counsel Homosexual Clients*, 84 J. Counseling & Dev. 414, 418 (Fall 2006).

matters of last resort, to be handled on a case-by-case basis with sensitivity to the facts specific to the client in question.⁷

The Code recognizes that a counselor *should* refer a client if the counselor has an “inability to be of professional assistance.” A.11.b. But this provision does not have the same meaning for students as it does for counselors (and as discussed below, it does not have the meaning that Ms. Ward would give it for counselors, either). A practicum student, by definition, is not engaged in the delivery of “professional assistance,” and a student who would refer a client every time she experiences doubt about her abilities will have no clients at all. All practicum students provide counseling under the supervision of a counselor educator, and the supervisor takes responsibility for ensuring that the client receives appropriate treatment. *See* F.1.a (“A primary obligation of counseling supervisors is to monitor the services provided by other counselors or counselors-in-training. Counseling supervisors monitor client welfare and supervise clinical performance[.]”). A supervisor and counselor educator seeks to assign only clients that the practicum student can assist, while at the same time exposing the student to a range of issues and opportunities to demonstrate competence necessary to graduate. F.6.a, F.6.d, F.9.a.

⁷ *See* Corey et al., *Issues and Ethics in the Helping Professions* 76 (“Merely having a conflict of values does not necessarily require a referral; it is possible to work through such conflicts successfully. In fact, we think of a referral as the last resort.”).

Because a primary purpose of the student practicum experience is to demonstrate competence while counseling clients under the supervision of a counselor educator, students do not have the same latitude to specialize and refer clients that professionals enjoy. Even if it were possible or acceptable for a student to attempt to identify prospective clients that may wish to discuss homosexual issues and refer such clients to other students (it is neither, *see infra* Part I.D), a student cannot turn away clients based on the client's desire to discuss subjects that the student hopes to avoid in her professional life. A counselor educator must have an opportunity to assess whether the student is competent to counsel her clients without discriminating or imposing her own values, and the Court should not replace the judgment of university faculty with a ruling that restricts their ability to make that assessment. If a student had the latitude to refer every client with whom she disagrees, the practicum supervisor would not be able to determine whether the student is capable of entering the profession.

This is not to say that students may not make referrals under any circumstances; rather, the ACA Code of Ethics contemplates that for students, such circumstances are extremely limited and unlikely to arise because the student is operating under the supervision of a professional. For instance, the supervisor can prevent, by careful assignment, a practicum student whose mother just died from encountering a client whose presenting problem is difficulty in coping with the

death of a loved one. Similarly, a supervisor would likely not assign a client who has perpetrated a serious crime to a student who was the recent victim of the same crime. Under these circumstances, referral might be appropriate because “emotional problems” would be likely to impair the student’s ability to provide counseling services. In that case, however, referral is only appropriate “until such time it is determined that [the counselor] may safely resume work.” C.2.g.

The Code expects that students are trained to overcome values-based conflicts. *See* A.4.b (directing counselors to avoid imposing their values on clients, who have different values); A.9.b (discussed *infra*). The drafters of the ACA Code of Ethics, themselves practicing counselors and educators, had ample experience with the full range of values-based conflicts that can exist between counselor and client, as well as the input of the ACA membership. They did not authorize referral based on conflict or discomfort with the client’s values and lawful goals, with the sole exception that “counselors may choose to work or not to work with terminally ill patients who wish to explore their end-of-life options.” A.9.b. This is the “exception that proves the rule,” *i.e.*, the fact that the drafters felt compelled to include a specific provision for referral relating to end-of-life counseling is dispositive evidence that under *other* circumstances, categorical refusal to counsel clients with respect to particular issues is *not* allowed.

Ms. Ward erroneously contends that the “ACA Code of Ethics states that counselors can make referrals at any time, even before a counseling relationship begins[.]” Appellant’s Br. 11. This is incorrect. As explained above, the Code only permits referrals under limited circumstances—and in any event, it specifically prohibits referrals based on sexual orientation. *See supra* Part I.B.

Ms. Ward relies on Section A.11.b of the ACA code, which provides:

If counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing counseling relationships. Counselors are knowledgeable about culturally and clinically appropriate referral resources and suggest these alternatives. If clients decline the suggested referrals, counselors should discontinue the relationship.

A.11.b; *see* Appellant’s Br. 12. Ms. Ward does not explain why this provision means that “counselors can make referrals at any time,” Appellant’s Br. 11, and it clearly does not. Instead, it authorizes referrals only *if* the counselor is unable “to be of professional assistance.” A.11.b. Ms. Ward suggests that a values conflict may give rise to “inability” (Appellant’s Br. 11-15), but “inability” here primarily means a deficit of skills or experience necessary to treat a specialized problem, not a conflict in values, and especially not a conflict with a group specifically protected from discrimination.

To be sure, the literature on which Ms. Ward relies recognizes that a difference in values may be so arresting that it renders the counselor unable to be of professional assistance. *See* Appellant’s Br. 12. She points out that one

textbook observed that 40 percent of counselors responding to survey indicated they “had to refer a client because of a value conflict” regarding “personal values about sexual practices” at some point in their careers. *Id.* But no counseling textbook teaches that a counselor may identify a values conflict with a whole class of persons or issues—especially those identified in the nondiscrimination provision of the Code. And for that matter, no textbook teaches that a student may refuse to show her supervisors that she is capable of promoting the counseling goals of a person with whom she disagrees.

To the extent that value-based referrals were, at some time in the past, as widespread as the textbook reports, the case for teaching and requiring competence in the proper approach for handling referrals is all the more compelling. Of course, Ms. Ward’s blanket refusal to counsel a substantial percentage of the American population is no minor or solitary breach; it is the equivalent of submitting a promise to drive recklessly with one’s application for a driver’s license. To return to counseling, Ms. Ward cannot expect EMU to award her a professional degree while promising to violate the profession’s ethical code.

D. Blanket Referral Of All Persons Who Wish To Discuss Homosexual Relationships Violates The Code And Is Unworkable

Ms. Ward does not dispute that the University assigned her “a potential client who was seeking counseling regarding a homosexual relationship”; that she asked her supervisor whether “she should refer the potential client immediately or

meet with him and then refer in the event a values conflict arose”; that Ms. Ward refused to participate in a “remediation plan”; and that, during a formal review, Ms. Ward refused to counsel clients concerning homosexual relationships.

Appellant’s Br. 11, 15, 57 (internal quotation marks omitted). These undisputed facts are sufficient to conclude that Ms. Ward committed and vowed to continue committing violations of the ACA Code of Ethics, specifically, Sections C.5 and A.4.b.

Ms. Ward’s proposed approach to counseling, in which she would at the outset refer all potential clients with whom her personal values conflict, is untenable in the real world. She supposes that she could detect values-based conflicts in advance, and screen out such persons before they even walk through the door. This cannot work, at least not without harming the client. For instance, consider a person who comes into a clinic seeking counseling. He completes an intake form, and identifies himself as homosexual. If the counselor reviews the intake form and refers the individual to someone else based on the individual’s sexual orientation, he may infer the reason why he was rejected—or worse, he may be told the actual reason. This same individual may find little comfort in an explanation that the referral counselor “specializes” in homosexual issues, insofar as the explanation suggests that homosexuality is a rare disorder of some kind.

More unrealistic still, Ms. Ward states that she would be perfectly willing to counsel homosexual clients, so long as they don't seek advice concerning homosexual relationships. R.E. 82-3, Deposition of Julea Ward, Dec. 22, 2009, at 189, 200, 212. But of course, the counselor—and sometimes the client—cannot know all the issues that will arise in the course of counseling, and if such an issue does arise, the client is poorly served by a counselor who tells him that the issue is off limits. Harm to the client is especially likely to occur in the situation Ms. Ward invites—where the counselee discloses his homosexuality after developing trust and a seemingly productive relationship with the counselor, and the counselor subsequently ends the relationship for that reason. The ACA Code of Ethics, as well as common sense, prohibit abandoning the client at the moment he raises an issue that may well go to the heart of his personal identity and emotional well being. Suppose, for example, that a client is trying to decide whether to come out to her friends and family. Rather than help the client make that decision, Ms. Ward would essentially tell her, “go back in the closet and stay there, I don't want to talk about it.” To state the obvious, this approach does not “promote formation of healthy relationships.” A.Intro.

II. EMU PROPERLY DISMISSED MS. WARD FOR FAILURE TO ADHERE TO THE ACA CODE AND HENCE TO FULFILL AN ACADEMIC REQUIREMENT THAT WAS REASONABLY RELATED TO LEGITIMATE PEDAGOGICAL CONCERNS

A. The ACA Code Of Ethics Requires Counselor Educators To Recommend Dismissal Of Students Who Are Unwilling To Abide By The Ethical Standards Of The Counseling Profession

Graduate counseling programs accredited by the Council for Accreditation of Counseling and Related Educational Programs (“CACREP”) incorporate the ACA Code of Ethics as the applicable ethical authority. Counselor educators in such programs are expected to become “aware of the limitations of supervisees that might impede performance,” F.5.b, including any student’s inability to demonstrate to their supervisors the competence in areas of counseling where the supervisor has any concern about their ability, F.5.b, F.6.a, F.6.d, F.9.b. If a counselor educator becomes aware that a student under his or her supervision is unable to discharge the student’s ethical obligations, the counselor is expected to assist the supervisee “in securing remedial assistance when needed.” F.5.b, F.9.b. Counselors “recommend dismissal from training programs, applied counseling settings, or state or voluntary professional credentialing processes when those supervisees are unable to provide competent professional services.” F.5.b, F.9.b. Similarly, “[c]ounselor educators ... are aware of and address the inability of some students to achieve counseling competencies.” F.9.b.

Counselor educators, as members of the profession and supervisors of prospective members of the profession, are expected to identify limitations in the competence of their students and must “recommend dismissal from training programs, applied counseling setting, or state or voluntary professional credentialing processes when ... supervisees are unable to provide competent professional services.” F.5.b. The Code specifically requires counselor educators to become “aware of and address the inability of some students to achieve counseling competencies,” and to dismiss students who cannot obtain sufficient competency to give professional assistance to clients. F.9.b.

Ms. Ward triggered the ethical obligations of her supervisors when she asked for referral based on the sexual orientation of a practicum client. At that point, her supervisor had an obligation “to assist [her] in securing remedial assistance.” F.5.b, F.9.b. Rather than seek to work within the ethical standards of the profession, however, Ms. Ward refused, unequivocally, to treat clients who wish to discuss homosexual relationships, or any client that wished to discuss a premarital relationship. This conduct showed deficiencies in her ability to become a counselor, and her supervisors were obliged to respond accordingly.

First, Ms. Ward refused to treat all people who may wish to discuss a relatively commonplace issue. This alone makes her unfit to counsel clients drawn from the general population that a university serves, and her supervisors were

obligated to ensure that she did not graduate, at least not without improving her performance. F.5.d, F.9.b. Second, in holding certain issues off limits, she manifested a willingness to impose her values in a manner inconsistent with counseling goals. A.4.b. And third, she discriminated based on sexual orientation. C.5. Defendants, having observed this conduct, had an ethical obligation under the Code to seek remedial assistance for Ms. Ward, and failing that, to dismiss her from the counseling education program. F.5.b, F.9.b. Far from being a pretext, when a student violates the Code of Ethics as flagrantly as Ms. Ward did and vows to deliver more of the same, dismissal is appropriate.

B. Requiring Students To Demonstrate An Ability To Follow The ACA Code Of Ethics Is A Legitimate Pedagogical Objective

The Constitution entrusts responsibility for determining the content of an educational program to educators and state officials, not the courts. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 90-91 (1978); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995). The law intervenes only when the educational requirement to which the student objects is not “reasonably related to legitimate pedagogical concerns.” *Hazelwood*, 484 U.S. at 273. Here, Ms. Ward failed to fulfill a legitimate academic requirement—demonstrating an ability to adhere to the ethical standards of the counseling profession, as embodied in the ACA Code of Ethics—when she refused to counsel any client who might wish to

discuss homosexual relationships, or indeed, any sexual relationship outside of marriage.

The counseling program at EMU is accredited by the Council for Accreditation of Counseling and Related Educational Programs—CACREP—which requires its accredit institutions to follow the ACA Code of Ethics. And CACREP specifically requires that students demonstrate knowledge of the ACA Code of Ethics. R.E. 14-14, CACREP 2001 Standards § II.K.1.h. CACREP accredits 604 counseling programs at approximately 250 institutions of higher learning.⁸ Ms. Ward's practicum course required that students comply with the ACA Code of Ethics. R.E. 14-9, Practicum Manual, at 7. In other words, EMU's counseling program, like hundreds of other programs, requires students to demonstrate that they are willing and able to comply with the code of ethics promulgated by their chosen profession's self-regulating body. This is an eminently reasonable pedagogical choice.

Ms. Ward sought a degree at a university that serves the entire community, not just the people who share her views. To the extent that her professors are aware that she cannot provide competent services to a portion of the community (especially one that the ACA deems to be particularly susceptible to harm), she cannot be awarded a degree to be a counselor in that community. A counselor may

⁸ See <http://www.cacrep.org/directory/directory.cfm> (follow links).

expect to see many clients who identify themselves as homosexual, and many more who do not but may wish to discuss their relationships with friends or family members who do.⁹ In the experience of the ACA, these issues surface too often, and are too important to the welfare of clients, to avoid.¹⁰

Ultimately, however, the Court need not decide whether Ms. Ward's refusal to abide by the ACA Code of Ethics would result in harm to clients. The ACA has made a considered, formal, and professional judgment that discrimination based on sexual orientation is unacceptable in the counseling profession. In a close case, the court might inquire whether that judgment—embodied in the nondiscrimination provision—is so warped that requiring students to demonstrate an ability to abide by it is not a legitimate pedagogical goal. This is not a close case. Scores of recognized organizations prohibit discrimination based on sexual orientation. *See, e.g., Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2979 (2010) (holding that law school did not infringe constitutional rights of

⁹ At the formal hearing, Ms. Ward expanded the range of issues on which she refused to provide counseling further, stating that she could not help or affirm a client who wishes to engage in “fornication.” R.E. 1-5, Transcript of Formal Review Hearing, Mar. 10, 2009, at 25:16-28:3. These statements also evidence an unwillingness to avoid imposing her own values on client (A.4.b) and further increase the risk that Ms. Ward would seek to refer the client, contrary to the ACA Code of Ethics, based on her values alone.

¹⁰ *See also* Barret & Logan, *Counseling Gay Men and Lesbians: A Practice Primer* 42 (2002) (“If you’ve been practicing for any length of time, it is likely that you have worked with a gay or lesbian client.”).

student group by conditioning access to funds and facilities on adherence to the school's nondiscrimination policy, which prohibited discrimination based on, *inter alia*, sexual orientation); Brief for *Amicus Curiae* American Bar Association in Support of Respondents 2, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), *available at* 2010 WL 989699 (noting that ABA's Law Student Division forbids discrimination based on sexual orientation).

Ms. Ward asserts that EMU requires counseling students to counsel *all* clients within the client's value system (Appellant's Br. 45-46), and proceeds from this false premise to the conclusion that "the list of morally offensive values a counselor must be willing to counsel ... is limited only by the imagination," *id.* at 47. This is a substantial distortion of the University's policy and the ACA Code of Ethics, insofar as the implicit suggestion is that homosexuality is "morally offensive." The Code of Ethics does not require counselors to affirm any and all values, no matter how "morally offensive." But while students need not counsel within every *client's* value system, they must counsel within the ethical framework of the *profession*. A student who refuses to abide by the ethics code of the profession she purportedly seeks to join is, by definition, not well-suited to be a member of that profession.

CONCLUSION

When Ms. Ward enrolled as a student in an accredited counseling program that requires students to abide by the ACA Code of Ethics, she became subject to certain rules that protect clients from discrimination by counselors. When she refused to counsel assigned clients based on her objection to homosexual relationships—and stated a further refusal to counsel any clients with views about premarital sex that differ from hers—she violated the ACA Code of Ethics and demonstrated an unwillingness and inability to perform competently as a counselor. Having refused to accept her supervisors' remedial assistance, dismissal was proper.

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief uses Times New Roman (14-point) proportional type, and contains 5,450 words, exclusive of exempted portions.

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CERTIFICATE OF SERVICE

I certify that on February 11, 2011, I electronically filed the foregoing Brief for Petitioner-Appellee with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the Court's CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF system.

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