CASE NO. 10-2100/10-2145

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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JULEA WARD,

Plaintiff-Appellant/Cross-Appellee,

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/Cross-Appellants,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Docket No. 09-11237
The Honorable George Caram Steeh

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# DEFENDANTS-APPELLEES'/CROSS-APPELLANTS' BRIEF

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Dated: February 4, 2011

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Defendants-Appellees/Cross-Appellants provide the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Answer: No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Answer: No.

## Certificate of Service

I certify that on February 4, 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/ David R. Grand

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## STATEMENT REGARDING ORAL ARGUMENT

While this case has nothing to do with "speech codes" or "codes of conduct," it does present issues of national importance. The case challenges the firmly-established right of public universities to determine, implement and enforce pedagogically-grounded curricula, even over an individual student's religious objections. Without that right, our universities would be forced to confer degrees on students who have not demonstrated the knowledge and skills required to earn them. That dangerous proposition has created great public interest in the outcome of this case. Accordingly, Appellees respectfully request an opportunity to present oral argument on these important issues.

## JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. §§1331 and 1343, the district court had original federal question jurisdiction over Appellant's claims brought under the First and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. §§1983 and 1988.

Following the district court's entry of judgment in Appellees' favor on July 26, 2010, Appellant timely filed a Notice of Appeal on August 23, 2010. Appellees timely filed their Notice of Cross-Appeal on September 7, 2010; the Notice of Cross-Appeal is conditional in that Appellees only seek review of the district court's denial of their qualified immunity motion in the event this Court grants relief to Appellant on her appeal. This Court's jurisdiction rests on 28 U.S.C. §1291.

## STANDARD OF REVIEW

"This Court reviews a grant or denial of summary judgment de novo. *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 450 (6th Cir.2005). Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.'" *Profit Pet v. Arthur Dogswell, LLC*, 603 F.3d 308, 311 (6th Cir. 2010).

Although courts ultimately decide whether a constitutional violation has occurred, the Supreme Court recently reiterated that "First Amendment rights [] must be analyzed in light of the special characteristics of the school environment… Cognizant that judges lack the on-the-ground expertise and experience of school administrators [] we have cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review'…determinations of what constitutes sound educational policy [] fall within the discretion of school administrators and educators." *Christian Legal Society Chapter of the Univ. of Cal. Hastings College of Law v. Martinez*, 130 S.Ct. 2971, 2988 (2010).

A district court's ruling granting or denying qualified immunity involves solely a question of law, and is reviewed *de novo* by the Sixth Circuit.

*Merriweather v. Zamora*, 569 F.3d 307, 315 (6th Cir. 2009) (citing *Thomas v. Cohen*, 304 F.3d 563, 568 (6th Cir. 2002)).

## COUNTER-STATEMENT OF THE ISSUES FOR REVIEW

1. Did the district court properly grant summary judgment to Appellees, when Appellant's dismissal from EMU's Graduate Counseling Program resulted from her refusal to comply with its pedagogically-legitimate curricular requirements?

2. Did the district court properly dismiss Appellant's claims against EMU's Regents and President, when they had no personal involvement with the challenged curricular requirements?

3. Were Appellees entitled to qualified immunity, when Appellant's constitutional rights were not violated and when no reasonable person in Appellees' position would have understood their actions to violate those rights?

## STATEMENT OF THE CASE

### Nature of the Case

This case challenges Eastern Michigan University's ("EMU") firmly-established right to determine, implement and enforce a pedagogically-grounded curriculum of its choosing, even over an individual student's religious objections. Appellant's arguments against that right are founded upon two mistaken premises: (1) that the pedagogically-based *curricular requirements* in question (*i.e.*, those prohibiting student counselors from imposing their own values on a client, and from discriminating against a client on the basis of his sexual orientation) constitute a "speech code" that supposedly is applicable "at all times," and (2) that she was disciplined for holding certain religious beliefs.

The district court properly ruled against Appellant on both issues. First, it held that the learned and scientifically-based professional standards that governed Appellant's conduct as a student counselor do not constitute a "speech code" because they do "not apply to non-academic student behaviors." (ECF 139, at 12-13)[1] Second, it held that Appellant's "dismissal was entirely due to [her] refusal to change her behavior, not her beliefs," and that she:

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[1] Citations to ECF pages are to the page referenced in the document's header (*e.g.*, at 12-13 of 48). However, citations to deposition and hearing transcript pages are to the actual transcript page containing the cited testimony.

> has distorted the facts in this case to support her position that defendants dismissed her due to her religious beliefs…[Defendants] never demonstrated a purpose to change her religious beliefs. Defendants were at all times concerned with plaintiff's refusal to counsel an entire class of people whose values she did not share. Defendants acknowledged that plaintiff's beliefs motivated her behaviors, but always made the distinction between the two, and in no way attacked her beliefs. Even Plaintiff is forced to agree that Drs. Callaway and Dugger never told her she needed to change her religious beliefs.

(*Id*., at 21, 28)

Under settled U.S. Supreme Court and Sixth Circuit law, EMU had the right not only to determine the contours of its graduate counseling program ***curriculum***, but also to dismiss a student who, after voluntarily applying to that program, and regardless of her ***beliefs***, refused to adhere her ***behavior*** to that curriculum.

The district court's judgment should be affirmed.

**Course of Proceedings and Disposition Below**

After her dismissal from the program, Appellant filed a Complaint in the United States District Court for the Eastern District of Michigan under 42 U.S.C. §1983. Appellees moved for summary judgment as to qualified immunity, and, following the development of the factual record, for summary judgment on the

merits. The district court denied the early qualified immunity motion, but later granted summary judgment in Appellees' favor on the merits.[2]

This Court should affirm the district court and dismiss Appellant's appeal.[3]

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[2]Appellant's contention that "[i]t is inexplicable how the exact same evidence was sufficient to defeat EMU's qualified immunity motion but was insufficient to defeat its motion for summary judgment on the merits" is another distortion. (Appellant's Brief, at 41). Appellees' qualified immunity motion was filed, at the district court's request, early in the case, and prior to the taking of depositions and the development of a factual record. (ECF 28) It is thus disingenuous to suggest that the district court's denial of qualified immunity was based on a consideration of the substantial evidence that supported Appellees' later-filed summary judgment motion. (ECF 116). Further, prior to the district court's granting of summary judgment, Appellees moved it to reconsider the qualified immunity issues in light of the record that had been developed in the interim. (ECF 118, 119). The district court directed Appellees to instead file a renewed summary judgment motion on the qualified immunity issues, noting that this was the "proper vehicle for what [Appellees] are attempting to do, which is to supplement their [qualified immunity] motion ***with discovery that was not available on the date their original [qualified immunity] motion was filed***." (ECF 125) (emphasis added). However, before that renewed motion was decided, the district court granted summary judgment to Appellees on the merits, mooting the qualified immunity issue. (ECF 138-139). Given the less stringent standard for obtaining qualified immunity, the only conclusion to be surmised is that the district court would have granted qualified immunity had it ruled on Appellees' renewed motion.

[3] Such a ruling would moot Appellees' conditional cross-appeal of the district court's March 24, 2010 denial of their motion for summary judgment based on qualified immunity. However, if this Court grants relief to Appellant on this appeal, Appellees request that it consider the qualified immunity question.

## STATEMENT OF FACTS

### A. Background: EMU's Graduate Program In School Counseling

EMU is a public university organized under Article VIII, Section 6 of the Michigan Constitution. EMU's College of Education offers a Master's Degree program in counseling (the "Program"). Students enrolled in the Program are eligible, upon completion of all of its curricular requirements, to become licensed professional counselors and/or K-12 school counselors. The Program's primary goals are to (1) promote student development, (2) protect clients who utilize the Program's services, and (3) serve as gatekeepers for the counseling profession. (ECF 14-3, Dugger Decl.) As part of its gatekeeper function, the Program must ensure that its graduates have the knowledge and skills to become competent licensed counselors, including that they are familiar with, and know how to follow, the profession's codes of ethics. (ECF 14-3, Dugger Decl.; ECF 14-4, Callaway Decl.; ECF 14-5, Francis Decl.)

In 2006, Appellant applied to, and was admitted into, the Program. Appellant's religious views were not an obstacle. To the contrary, her application included numerous details about her faith. (ECF 82-3, Ward at 100) Appellant chose the Program's "School Counseling" tract, which would have enabled her to continue working in a public high school environment (where she currently is a teacher) as a school counselor. (*Id*. at 87-88) In that role, Appellant likely would

be assigned to counsel students on a random basis. (*Id*. at 40; ECF 82-6, Dugger at 65-66) Appellant admits that, as a school counselor, she could encounter a student seeking counseling about his/her sexual orientation, and that the school at which she currently works provides such counseling to students. (ECF 82-3, Ward at 46, 91)

The Program is governed and bound by certain ethical codes of conduct, curricular requirements, accreditation requirements, and government regulations. All students enrolled in the Program are required to abide by these standards. *See e.g*., EMU Practicum Manual (ECF 14-9, at 23-53) and EMU Counseling Student Handbook (ECF 14-7, at 48-83 and 91-101). For instance:

- **CACREP:** The Program is fully accredited by the Council for Accreditation of Counseling and Related Educational Programs ("CACREP"), the premier independent agency recognized by the Council for Higher Education Accreditation. (ECF 82-4, Ametrano at 14-15) Appellant admits that CACREP accreditation is important because it provides stature to the Program and is therefore beneficial to students. (ECF 82-3, Ward at 95-96) Among other things, CACREP requires that the Program provide students with curricular experiences and demonstrated knowledge in the ethical standards of the American Counseling Association ("ACA") and other such professional associations. (ECF 14, §II(B)(1); ECF 14-14)

- **State of Michigan Regulations:** The Michigan Board of Counseling and Michigan Department of Education regulate licensed professional counselors and school counselors. EMU's faculty has extensive experience with the regulatory process governing licensed counselors: Dr. Ametrano helped write the State's regulations for the counseling profession in her capacity as a member of the first Board of Counseling, and Dr. Dugger has served as Chair of the Board of Counseling. (ECF 82-4, Ametrano at 13; ECF 82-6 Dugger at 89-90) These government bodies have issued regulations that,

among other things, incorporate the standards of CACREP (and therefore the ethical standards of the ACA) as well as the Ethical Standards of the American School Counselor Association ("ASCA"), and require professional counselors and school counselors to be trained in ethics. (ECF 14, §II(B)(4); ECF 14-23; ECF 14-25; ECF 14-26)

- **ACA Code of Ethics:** Consistent with CACREP and State of Michigan standards, students enrolled in the Program must study and adhere to the ACA Code of Ethics. (ECF 14-7, at 73). ***The ACA Code of Ethics applies only to students enrolled in the Program***, and not to any other student or faculty member at EMU. (ECF 82-5, Callaway at 94) Dr. Ametrano, a tenured professor who has taught at EMU for 29 years and supervises EMU's CACREP accreditation process, testified that EMU could lose its CACREP accreditation if it stopped teaching and enforcing the ACA Code of Ethics. (ECF 82-4, Ametrano at 71) The ACA Code of Ethics requires professional counselors (including counseling students) to, among other things, ***"avoid imposing values that are inconsistent with counseling goals,"*** to ***"not condone or engage in discrimination based on … sexual orientation, marital status/partnership,"*** and to ***"use techniques/procedures/modalities that are grounded in theory and/or have an empirical or scientific foundation."*** (ECF 14-7, at 51, 63, 73) The ACA's Ethics Committee issued a position statement in 2006 finding that a professional counselor who refers a homosexual client for reparative or conversion therapy (to "change" his or her sexual orientation) without first warning the client of the unproven nature of such therapy, violates the ACA Code of Ethics. (ECF 14-18)

- **ASCA Code of Ethics:** The ASCA Code of Ethics is also part of CACREP's accreditation requirements (as well as the State of Michigan's regulations), and provides: "[e]ach person has the right to be respected, be treated with dignity, and have access to a comprehensive school counseling program that advocates for and affirms all students from diverse populations regardless of ethnic/racial status…sexual orientation, gender, gender identity/expression…Each person has the right to receive the information and support needed to move toward self-direction and self-development and affirmation within one's group identities…" (ECF 14-7, at 91); ***"a professional school counselor … respects the student's values and beliefs and does not impose the counselor's personal values"*** and "adheres to ethical standards of the profession [and] other official policy statements, such as the ASCA's position statements." (*id*., at 92; ECF 14-20, at 4)

(emphasis added) The ASCA has issued a position statement expressly providing that, "***It is not the role of the professional school counselor to attempt to change a student's sexual orientation/gender identity*** but instead to provide support to LGBTQ students to promote student achievement and personal well-being." (ECF 14-21)(emphasis added) Finally, the ASCA's Ethical Standards provide that school counselors are to ***"[a]cquire[] educational, consultation and training experiences to improve awareness, knowledge, skills and effectiveness in working with diverse populations: … sexual orientation, gender, gender identity/express…"*** (ECF 14-7, at 99).

Importantly, these provisions are not university-wide policies, but rather apply ***only to students enrolled in the Program and enrolled in Practicum***.[4] (ECF 14-7, at 1 ("all students newly admitted to [EMU's College, Community or School] Counseling Program"); ECF 14-9, at 2 ("manual is designed specifically to address practicum experiences in the Counseling Clinic"))

**B. <u>The Program Curriculum</u>**

Consistent with the applicable ethical standards and government regulations, students enrolled in the Program are bound by a Counseling Student Handbook ("Handbook") that specifically incorporates the ACA Code of Ethics and the ASCA Ethical Standards. (ECF 14-7, at 48-101) Dr. Callaway testified that inclusion of the Code of Ethics in the Program curriculum "is not a decision. It's a

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[4] Appellant and her amici argue that Appellees are excluding her from the counseling profession, and are impinging on client choice. Neither contention is true. Appellant is free to apply to, and potentially complete the academic requirements of, another educational institution. She also is free to become a Christian counselor (which is what she appears to wish to be). And clients remain free to elect whatever counseling options they may desire.

requirement by our licensure, our professional codes, our accreditation, so that's no choice." (ECF 82-5, Callaway, at 103) Appellant admits that it is appropriate for EMU to teach and require that student counselors adhere to the ACA Code of Ethics. (ECF 82-3, Ward at 143); *id*. at 118, 124 (admitting that the ASCA Ethical Standards are part of the Program curriculum); ECF 1, ¶¶29-30)

Appellant thus knew and agreed that if she wished to graduate from the Program, she would be required to adhere to these ethical obligations. In furtherance of that requirement, the Program's curriculum provides that:

- "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 …" (ECF 14-7, at 18)

- Counseling students must "uphold[] ethical and legal standards such as … working in the best interests of the client" and "exhibit a willingness to work with clients of different ages, cultures, disabilities, ethnicities, races, religions/spiritualities, genders, gender identities, sexual orientations, marital status/partnership, language preferences, socioeconomic statuses or national origin." (ECF 14-10, at 2)

- Counseling students must "avoid the imposition of personal values on the client." (*Id*., at 4)

As the district court properly held, and as is obvious by their very nature and placement in the Counseling Student Handbook and (as discussed below) Practicum Manual, these ethical requirements do "not apply to non-academic student behaviors," but rather apply only in the counseling setting. (ECF 139, at

12-13) The assertion on which Appellant bases her argument that the ethical requirements constitute a "speech code," applicable "at all times," is a fallacy.[5]

## C. The Curriculum Addresses Counselor *Behavior*, Not Counselor *Beliefs*

Although the distinction remains lost on Appellant, the ethical obligations referenced above regulate student-counselors' behavior, not their beliefs. And, contrary to the allegations in her Complaint, Appellant could not identify a single time when ***any*** EMU faculty member told her that she had to advocate for the homosexual cause or express support for homosexuality.[6] In fact, ***Appellant could not identify a single instance when any EMU faculty member ever told her that she had to change her religious beliefs***. (*Id*., at 66, 163) Indeed, EMU has no "gay affirmative" message or position:

> The counselor's … belief system is irrelevant. … [W]hat my personal beliefs are, truly they don't matter… it doesn't matter if the counselor is completely anti gay, doesn't believe in it, whatever, is like way gay, out loud, out proud, the counselor's values need to stay out to allow the space for the client to do the

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[5] The "at all times" language does not appear in the Counseling Student Handbook (ECF 14-7) or Practicum Manual (ECF 14-9), nor in the ACA Code of Ethics. It thus appears nowhere in the documents containing the ***curricular requirements*** that Appellant was found to have violated. It appears only in EMU's Graduate Catalogue, and only in the following innocuous way: "Students in counseling programs are expected to conduct themselves in a responsible and professional manner at all times." (ECF 14-6, at 2)

[6] Appellant admits that she merely inferred such a standard based on the faculty's teachings that she had to "respect [all clients] as human beings." (ECF 82-3, Ward at 62-64)

> exploration and to make the decisions. ***It's no more appropriate for a counselor to say come out, come out, come out right now. You know, let's get you a rainbow button and whatever, than it is to push them in the closet.*** You know, stay in there, ignore this. Help the client make those decisions.")

(ECF 82-6, Dugger at 37, 82-83)

Similarly, Dr. Callaway explained that EMU does not have "any particular view regarding homosexual behavior, whether it's right or wrong," and does not "make a judgment one way or another." (ECF 82-5 Callaway at 83) EMU's curricular approach is *client*-directed, in that a client's goals are for a ***client***, not a counselor, to determine or influence. Therefore, EMU would be equally supportive of a homosexual ***client's*** religion-based desire to explore heterosexuality. (*Id*. at 52-53, 67) ("[I]f a [homosexual] client wanted to modify their behavior? Absolutely, we would support that.).

Appellant and her *amici* ignore this testimony and falsely assert – without citation to the record – that EMU sought to advance a pro-gay "ideology." There is no material dispute of fact on the issue; EMU's curricular teachings are pro-client, not pro-gay.

**D. <u>Appellant Enrolls in Practicum</u>**

One component of the Program curriculum is a course called "Practicum," which involves real-life counseling of real-life clients in a real-life clinic operated by EMU and supervised by EMU faculty. (ECF 82-3, Ward at 131-132) The

Board of Counseling regulations require licensed counselors in Michigan to satisfactorily complete a Practicum course. (ECF 82-6, Dugger at 90) Appellant agrees that:

- Practicum constitutes an "important professional preparation activity" (ECF 82-3,, Ward at 132);
- Practicum is a required course and that she would not be eligible to graduate from the Program without successfully completing it (*id*., at 109); and
- Practicum was intended to, among other things, prepare students to work with diverse clients and diverse client situations. (*id*., at 133) "[I]t is a good learning tool to have to reach outside your comfort zone as a student," and specifically in learning to counsel clients on "sexual orientation" issues. (*id*., at 188)

The Practicum Manual expressly requires Practicum students to "abide by the Code of Ethics and Standards of Practice of the American Counseling Association," and to "adhere to the ethics of our professional association(s)" (specifically including the ACA Code of Ethics and the ASCA Ethical Standards for School Counselors). (ECF 14-9, at 23)

Appellant enrolled in Practicum in January 2009. Her supervisor was Dr. Callaway. (*Id*., at 138) Appellant admits that, as a Counselor-In-Training ("CIT"), she was not licensed to provide counseling services, and was therefore operating under Dr. Callaway's State-issued license. (*Id*.) As part of her Practicum supervision, Appellant met weekly with Dr. Callaway. During one of their weekly sessions, Appellant challenged the ACA's authority:

> In a supervision meeting before [Appellant's] refusal to see the client … she had asked me about, who was the ACA to tell her what to do, she answered to a higher power…, at which I laughed, and I said, "Do you realize how ridiculous it is for me to sit here and argue my code of ethics with you?" And – [Appellant's] an English teacher – I said, "it's just as ridiculous as you arguing punctuation with a student who turned in a paper."

(ECF 82-5, Callaway at 85)[7]

**E. Appellant Refuses to Counsel Her Assigned Client Because He Identified as Being Gay**

On January 26, 2009, Appellant was scheduled to counsel a client in EMU's clinic, whom she admits was randomly assigned based on scheduling availability. (ECF 82-3, at 204-05) Upon reading the client's file in EMU's clinic (*id*., at 207), Appellant called Dr. Callaway – less than two hours before the scheduled appointment – and expressed concern because the file indicated that the client was homosexual. (ECF 82-3, Ward at 210-211)

Appellant claims that she sought advice from Dr. Callaway about whether to see the client and then "refer if it becomes necessary" (ECF 82-3, at 212); Dr. Callaway recalls that Appellant said defiantly, "you know I can't counsel gay people on relationship issues." (ECF 82-5, at 75) Regardless of the details of their

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[7] Appellant wrongly implies that Dr. Callaway "laughed" at her religious beliefs. (ECF 1, ¶62) As the quote makes clear, and as Dr. Callaway unequivocally testified, she did not laugh at Appellant's "religious beliefs," but rather "at the lunacy of the situation" of having to argue the profession's Code of Ethics with a student who wished to discriminate against her clients. (ECF 82-5, at 85-86)

conversation, it is undisputed that Appellant conveyed a refusal to counsel the client if he at any time sought counseling regarding a same-sex relationship. (ECF 82-3, at 210-212)

At the time of Appellant's phone call, Dr. Callaway was 45 minutes away. (ECF 82-5, at 76) The counseling session with the client was scheduled to occur within an hour or two (ECF 82-3, at 207; ECF 14-4, ¶22), so there was no time to address Appellant's behavior before the client appointment. Because Appellant was practicing counseling under Dr. Callaway's State license, Dr. Callaway recognized that she could face liability or disciplinary action if Appellant counseled a client in a manner that violated the ACA Code of Ethics. (ECF 82-5, at 90-91) Knowing that the ACA Code of Ethics also prohibits discrimination based on sexual orientation, Dr. Callaway and the clinic had no practical choice but to cancel the appointment and to reschedule it to occur on a later date, with another CIT.

## F. Appellant's Dismissal From The Program

### 1. The Informal Review

Pursuant to the Handbook, Dr. Callaway promptly scheduled an informal review in an effort to work with Appellant to help her understand her obligation to provide counseling services based on the ***client's*** – not her own – values. (ECF 82-5, at 23) The informal review was held in early February 2009 among

Appellant, her advisor, Dr. Suzanne Dugger, and Dr. Callaway. During the informal review, Appellant admits telling Drs. Callaway and Dugger that she would not see any homosexual clients who wanted counseling regarding a same-sex relationship because she would not "affirm their lifestyle." (ECF 82-3, at 220) Drs. Callaway and Dugger explained to Appellant that she must counsel based on the clients' value systems, consistent with the codes of ethics and standards of conduct that govern the counseling profession. (ECF 82-6, at 104)

Pursuant to the Handbook, Appellant was offered a remediation plan to help her learn this skill (the very skill which the Practicum course was designed to teach), and thus to enable her to continue in the Program while continuing to maintain her religious beliefs. Contrary to the representations in Appellant's Complaint (*see e.g.*, ECF 1, ¶¶6, 8, 45) and court filings (*see e.g.*, ECF 9, at 15; ECF 51, at 14-15), ***Appellant has acknowledged that Drs. Callaway and Dugger never told her that she "had to change [her] religious beliefs," and never told her that the purpose of the remediation plan was to show her "the error of [her] religious beliefs***." (ECF 82-3, at 223)[8] Yet Appellant refused to participate in a remediation plan to help her learn to counsel clients based on their values. It thus

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[8] Dr. Dugger testified that her use of the phrase "error of her ways" was meant "certainly not to change her beliefs," but rather for Appellant "to see that her behavior [*i.e.*, her refusal to counsel the client consistent with the Program's curricular teachings] was in error." (ECF 82-6, at 105)

was mutually agreed that no remediation plan would be possible. (ECF 23-13; ECF 80-2, at 2) At that juncture, Appellant could no longer have had any reason to believe – if ever she had had reason to believe – that her refusal to counsel the client in Practicum was in accordance with the teachings of the curriculum.

**2. The Formal Review Hearing**

Appellant requested a formal hearing (ECF 1-6) before the three faculty representatives and one student representative who served on the formal review committee. At that formal hearing, Appellant again insisted that in the future she would continue to refuse to counsel gays about their relationships, and even articulated an expanded list of the categories of persons whose values she did not share, and could not counsel, such as persons engaged in pre-marital sex, or those considering an abortion. (ECF 82-5, Callaway at 86-87, 91; ECF 82-6, Dugger, at 101, 105; ECF 1-5, at 10, 17, 27)

Because Appellant stakes so much of her argument on the formal review hearing, it is worth discussing, in detail, what actually transpired there. The formal review began with Dr. Callaway stating that she "requested the hearing ***because of Ms. Ward's… stated intention to violate and to continue violating the American Counseling Association's code of ethics***," and that "these violations are based on her stated ***unwillingness to intentionally and competently provide counseling***

***services concerning relationship issues to clients who identify as gay***." (ECF 1-5, at 1-2).

Dr. Callaway then described the particular Code of Ethics provisions that she believed Appellant had violated (*id*., at 2), and their "rather lengthy and serious [prior] discussion" where Appellant "questioned the ACA's authority… to regulate her behavior in that way," and had stated, "as close as [Dr. Callaway could] can recall, … 'Well who's the ACA to tell me what to do[?] I answer to a higher power and I'm not selling out God.'" (*Id*. at 3)

Dr. Callaway then discussed the earlier informal review and stated that she had used that time to again explain to Appellant that professional counseling "requires … a non-discrimination approach and that we service all clients competently and professionally based on those clients [sic] goals and outcomes without regard to sexual orientation," and stated: "that was a position that I saw as untenable and non-negotiable and that professional counseling was not the place where such attitudes [*i.e*., discriminating against clients] would be condoned." (*Id*.) Dr. Dugger also addressed the two specific ACA ethical codes Appellant was accused of violating: that counselors "***avoid imposing values that are inconsistent with counseling goals," and "do not condone or engage in discrimination based on, among other things, … sexual orientation***," and concluded that "***[i]t is my***

***professional opinion that Ms. Ward has violated both of these ethical standards***." (*Id*., at 5).

After some further dialogue, Appellant read a prepared statement providing her position. But it is important to note that, up to that point in the hearing, there had been no discussion of the contours of Appellant's religious beliefs. It was ***Appellant*** who ***then interjected those beliefs*** into the discussion:

> The only thing[9] I am unwilling to do is validate or affirm homosexual behavior, due to my religious beliefs.
>
> As to my religious ideologies, I am a Christian and rely on the Bible as the source of my beliefs. The Bible teaches that God ordained sexual relationships between men and women and not between persons of the same sex. On several occasions, uh, in the Bible, homosexual conduct is described as immoral sexual behavior…While people may struggle with homosexual inclinations and behavior, I believe (and the Bible teaches) that people should strive to cultivate sexual desires for persons of the opposite sex. I am morally obligated to adhere to these fundamental teachings of the Christian faith and to express the biblical viewpoint regarding proper sexual relationships. It would be a violation of my religious beliefs to be required to affirm or validate homosexual conduct…Now that I have given a broad overview of my religious beliefs and views, I will address the specifics of this situation. (*Id*., at 10-12)

After Appellant gave her prepared remarks about her "religious ideologies" and "religious beliefs," Dr. Ametrano (the committee chair) asked: "…is there

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[9] Appellant later identified other issues on which she claimed she could not counsel due to her religious beliefs. *See infra*, at 22.

anything else you'd like to add before we ask questions?" (ECF 1-5, at 16). Appellant then, of her own volition, went into more detail about her beliefs, explaining that they also would prevent her from counseling a client who wished to have an abortion. (*Id*., at 17-18) This was a new issue that Appellant voluntarily interjected into the discussion.

Dr. Francis appropriately followed up by exploring with Appellant some other hypothetical situations, in order to "[h]elp [him] understand" (*id*., at 22) how she felt her religious beliefs would impact her ethical obligations as a professional counselor. In the course of that discussion, Appellant further revealed that she additionally could not counsel a heterosexual client who was engaged in "fornication," *i.e*., non-marital sexual behavior. (*Id*., at 27).

The conversation then turned to the fact that whereas Appellant had initially said "the only thing" she could not do was counsel a homosexual client about his or her relationships, she now was identifying a much broader array of clients whom she could not counsel. (*Id*.) Appellant rationalized the expanded breadth of her self-professed professional limitations by again interjecting her religious beliefs:

> I will not and cannot affirm any behavior that goes against what the Bible says as a Christian and so as a Christian, ***I'm not a Christian in name only***. A Christian means that you live your life according to the word of God, which is the Bible, so, um, in answer to your question … no, I cannot affirm somebody's

> behavior if it is, uh, going against my religious beliefs. (*Id*., at 27-28).

It was ***Appellant*** who again brought her religious beliefs into the discussion, essentially distinguishing between her particular form of Christianity, and that of those whom she might characterize as Christians "in name only," and offered that distinction as a basis for her professed inability to counsel numerous classes of clients-in-need.[10]

While Dr. Francis followed up with some additional questions that he (as a former ordained Christian minister) described as a "theological bout" (*id*., at 28), the record reflects that he was simply attempting to reconcile Appellant's position with the fundamental tenant of Christianity that, in Appellant's own words, "God says that we're all the same." (*Id*., at 29) That entire discussion, in which Appellant ironically stated that she was able to distinguish between the "person" and his "behavior," comprised a total of only 30 of the transcript's 884 total lines. (*Id*., at 29-30)[11]

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[10] Appellant distorts the record in contending (Appellant's Brief, *e.g*., at 13, 28) that Appellees "targeted and pried into" her religious beliefs at the hearing. After *Appellant* raised her beliefs in an attempt to explain her behavior, it was not only appropriate for Appellees to explore the matter with her to fully understand why she felt that her beliefs necessarily prevented her from behaving in compliance with the Code of Ethics, but it would have been an abdication of their responsibility to fail to do so.

[11] While "theological bout" was perhaps not the best choice of words to describe a short 30-line portion of the overall discussion, it is the substance of that discussion,

A few minutes later in the hearing, during a discussion about the ACA Code of Ethics, came perhaps Appellant's most telling assertion, where she explained that ***the problem*** with EMU's curriculum is that it ***only allowed counselors to help clients feel comfortable with themselves***, and prohibited counselors from proselytizing to clients about whom the Bible says they should be:

> it's just, OK, this is who you [the client] are, so we're only going to deal with helping you feel comfortable with who you are. You cannot discuss any other treatment plans that would, um, bring them out of that particular lifestyle.

(ECF 1-5, at 35-36).

Notwithstanding that such proselytizing would directly violate the ACA's and ASCA's prohibition on counselors imposing their own values on a client (and on the governing bodies' formal positions regarding "reparative therapy"), (ECF 1-5, at 11, 13, 36-38; ECF 14-7, at 51, 92; ECF 14-18; ECF 14-19, at 9; ECF 14-21), Appellant adamantly insisted that: "I believe you should offer all options…Them being able to change [their sexuality] [] is an option. It's not an

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not its on-the-fly characterization, that matters, and Appellant points to nothing in that brief discussion that suggests a sinister motive.

option that's accepted by the counseling department but it is still an option." (*Id*., at 37)[12]

### 3. The Committee Dismisses Appellant from the Program Due to *Her Behavior*

Following the formal review, the committee voted unanimously to dismiss Appellant from the Program based on her unwillingness to counsel clients in the manner required by the ACA Code of Ethics. (ECF 1-7) In the letter informing Appellant of her dismissal, the committee identified ***two specific ACA ethical provisions that she violated***: "'Counselors…avoid imposing values that are inconsistent with counseling goals' (A.4.b.) and 'Counselors do not condone or engage in discrimination based on age, culture…sexual orientation…' (C.5)." (*Id*.)

The letter also made clear that it was her ***behavior***, not her ***beliefs***, that violated those ethical provisions. The letter began: "I am writing to convey to you the decision of the Formal Review Committee [] "regarding the concerns ***about your behavior in COUN 686 Counseling Practicum…***" (*Id*.)(emphasis added). It then noted that "***by your behavior***, you have violated the ACA Codes of Ethics including [the "imposing values" (A.4.b.) and "discrimination" (C.5.)

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[12]Fundamentally, Appellant's disagreement is with EMU's, the Appellees' and the profession's governing bodies' pedagogical conclusion that the appropriate standard of care for counselors generally, and for school counselors specifically, is not to try to change clients to conform to the counselor's value system, but rather to counsel them within their own belief systems and goals.

prohibitions]" just noted. (*Id.*)(emphasis added). It also noted that Appellant had declared that she was "unwilling to change ***this behavior***." (*Id.*)(emphasis added). The "behavior" was clearly not that Appellant held certain beliefs, but that she had "violated the ACA Codes of Ethics…" (*Id.*)

The letter took one last opportunity to try to explain the distinction to Appellant: "Your stance [i.e., being "unwilling to change this behavior"] is firm despite information provided directly to you throughout your program … regarding the conflict between your values that motivate your behavior and those behaviors expected by the profession." (ECF 1-7) Contrary to the picture painted by Appellant, that was the letter's only reference to her "values." (*Id.*) [13]

Appellees testified that their decision to dismiss Appellant from the Program had nothing to do with her religious beliefs or her views about homosexuality. (*See, e.g.*, ECF 82-4, at 75-76; ECF 82-5, at 93; ECF 82-6, at 108-09; ECF 82-7, at 101; ECF 82-8, at 37; ECF 44-5, ¶10)

Appellant appealed her dismissal from the Program to Dr. Vernon C. Polite, then-Dean of EMU's College of Education. After reviewing the documents provided to him by Appellant, Dean Polite affirmed her dismissal. (ECF 1-9).

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[13] On page 28 of Appellant's Brief, she selectively excises (and splices with her own language) only a portion of this sentence to argue that EMU told her "that the 'values that motivate [her] behavior' are contrary to the Profession." Appellant thus distorts the letter's clear meaning.

Dean Polite's letter made clear, again, that Appellant was dismissed because of her "***conduct*** while in COUN 686 [the Practicum course]" – her failure to "adhere to the code of ethics of the American Counseling Association (ACA)." (*Id.*) (emphasis added).

## SUMMARY OF THE ARGUMENT

Public universities like EMU enjoy a firmly-established right not only to design the contours of their curricula, but to determine the level of knowledge and skills students must demonstrate before being conferred the title "graduate." The law is clear that so long as the curricular requirements are pedagogically legitimate, a student cannot refuse to satisfy those requirements on religious grounds and still demand credit as if she had satisfied them.

EMU's graduate counseling Program rightly required that its students demonstrate a proficiency in counseling clients without imposing their (the CITs') own values, and without discriminating on the basis of certain protected classes, including sexual orientation. Importantly, as the district court found, those curricular requirements (the only ones on which Appellees based their decision to dismiss Appellant), are academic in nature as they apply only in the counseling setting, and not to "non-academic student behaviors." (ECF 139 at 13) As such, they do not constitute a "speech code," and EMU could enforce them "in any reasonably manner," including by requiring students to demonstrate a proficiency

in applying them to real-life counseling experiences in the required Practicum course.

The district court properly found that Appellant's "refusal to counsel an entire class of people" violated the curricular requirements and that she failed to raise a material question of fact that her "dismissal was entirely due to [her] refusal to change her behavior, not her beliefs." (*Id*. at 15, 21).

The district court also properly dismissed EMU's President and Board of Regents because they had no involvement in developing the curricular requirements that Appellant challenges.

The district court's rulings should be affirmed.

## ARGUMENT

### I. EMU'S ENFORCEMENT OF ITS PEDAGOGICALLY-BASED CURRICULAR REQUIREMENTS DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

#### A. EMU Had "Wide Latitude" to Create a Curriculum that Fit Its Educational Mission

"Courts have traditionally given public educational institutions, ***especially colleges and graduate schools***, wide latitude to create curricula that fit schools' understandings of their educational missions." *Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F.3d 177, 180-81 (6th Cir. 1993) (citing *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988)) (emphasis added). *See also, e.g.*,

*Christian Legal Society Chapter of the Univ. of Cal., Hastings College of Law v. Martinez*, 130 S.Ct. 2971, 2988-89 (2010) ("*CLS*") ("A college's commission – and its concomitant license to choose among pedagogical approaches – is not confined to the classroom…")[14]; *Settle v. Dickson Cnty. Schl. Bd.*, 53 F.3d 152, 156 (6th Cir. 1995) ("[public school] teachers have broad leeway . . . to determine the nature of the curriculum…").

The only curricular elements at issue here are the two that the Formal Review committee found Appellant to have violated (ECF 1-7), and on which their decision to dismiss her was based:

- "Counselors … avoid imposing values that are inconsistent with counseling goals (A.4.b.)" (the "No Imposing Values" requirement); and

[14] Although the *CLS* Court noted that it was the final arbiter of whether a public university's conduct violated the Constitution, the right to determine appropriate curricula still firmly resides with the school: "First Amendment rights [] must be analyzed in light of the special characteristics of the school environment… Cognizant that judges lack the on-the-ground expertise and experience of school administrators [] we have cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review'…determinations of what constitutes sound educational policy [] fall within the discretion of school administrators and educators." *CLS*, 130 S.Ct. at 2988 (internal citations omitted).

- "Counselors do not condone or engage in discrimination based on age, culture…sexual orientation… (C.5)." (the "No Discrimination" requirement) (*Id.*)[15]

Both of those ACA Code of Ethics provisions were expressly incorporated into the Counseling Student Handbook and Practicum Manual, and thus it is fair to characterize them as "curricular requirements" (hereafter the "Curricular Requirements"). (ECF 14-7, at 51, 63 and ECF 14-9, at 27 and 36). They are not

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[15] Appellant faslsely asserts that EMU expelled her "for insufficient tolerance," (a reference to a so-called "Intolerance Policy") as well as for violating the two Curricular Requirements, (Appellant's Brief, at 10, 17), when in fact, ***only the two Curricular Requirements served as a basis for her dismissal***. (ECF 1-5, at 5) ("It is my professional opinion that Ms. Ward has violated the [two Curricular Requirements]."); (ECF 1-7) (finding that Appellant violated only the two Curricular Requirements) Her added challenge to another irrelevant provision is a red herring, designed to bolster her "speech code" theory of the case. That provision is taken from a section of the Handbook that identifies the general types of behaviors that could give rise to possible dismissal from the Program. (ECF 82-5, Callaway at 103)(Handbook section represents "the faculty's attempt to give examples of the kinds of conduct that could violate the ACA Code of Ethics," *i.e.*, to "operationalize the ethical principles") By its own terms, the list is non-exhaustive, and includes any violation of the ACA Codes of Ethics. (ECF 14-7, at 18 (including "Unethical, threatening or unprofessional conduct"). Indeed, the letter advising Appellant of the formal review referenced both her "Unethical, threatening or unprofessional conduct" and her "failure to tolerate different points of view," and goes on to identify "***[t]he specific ethical code violations***" that Appellant was accused of violating, including the Curricular Requirements, but not the purported "Intolerance Policy." (ECF 1-4, at 2) (emphasis added)

university-wide policies, but rather apply ***only to students enrolled in the Program and enrolled in Practicum***.[16] *Supra*, at 11.

### B. EMU Had the Right to Enforce Its Curricular Requirements "In Any Reasonable Manner," and Its Actions Were Reasonable and Did Not Violate Appellant's Constitutional Rights

#### 1. The Court Should Consider the Non-Public, School-Sponsored, Curricular Setting in Which the Curricular Requirements Are Implicated

Appellant does not challenge the pedagogical legitimacy of the Curricular Requirements,[17] but rather challenges "EMU's enforcement" of them.[18] (*E.g.*,

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[16] Appellant and her amici argue that Appellees are excluding her from the counseling profession, and are impinging on client choice. Neither contention is true. Appellant is free to apply to, and potentially complete the academic requirements of, another educational institution. She also is free to become a Christian counselor (which is what she appears to wish to be). And clients remain free to elect whatever counseling options they may desire.

[17] Appellant admits that Practicum is "an important professional preparation activity." (ECF 82-3, at 132). She has not presented any facts to suggest that the requirements that counselors not impose their values on their clients and that they not discriminate against their clients are not the product of reasoned discourse among the profession's governing bodies. The closest Appellant comes to such a challenge is to claim the requirements constitute a "gay-affirmative" ideology. (*E.g.*, Appellant's Brief, at 20) But, as explained above, to the extent the curriculum has an "ideology," it is simply "pro-client," not "pro-gay." *See supra*, at 13-14. And, rather than claiming that there is something inherently improper about requiring counselors not to discriminate against their clients, Appellant's underlying position appears simply to be that she does not view her conduct as discrimination.

Appellant's Brief, at 11) She urges a truncated "facial review" of the Curricular Requirements that ignores the "special characteristics of the school environment" in which they arose. *CLS*, 130 S.Ct. at 2988.

The Court should reject Appellant's approach, which is based on the fallacy that the Curricular Requirements constitute a "speech code." The limitations of what EMU can and cannot require of its counseling students turn, in part, on such factors as whether the salient events involved a public or private setting, and whether the speech being restricted constitutes "school-sponsored" speech. The analysis must start by answering those questions, and the seminal U.S. Supreme Court case on point is *Hazelwood v. Kuhlmeier,* 484 U.S. 260 (1988).

In *Hazelwood,* students participating in a high school journalism class brought free speech claims against the school after its principal refused to allow them to publish certain articles in the school paper. The Supreme Court rejected the students' claims, first finding that the school was entitled to wide leeway because the restricted speech arose in a non-public forum:

> We deal first with the question whether [the school newspaper] may appropriately be characterized as a forum for public expression … school facilities may be deemed to be public forums only if school authorities have "by policy or by

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[18] Actually, Appellant admitted in her deposition that EMU has "a right to require that counselors in training ***adhere*** to the ACA Code of Ethics," and that she had "agreed to do that." (ECF 82-3, Ward at 143) Those admissions also support rejecting her new position.

> practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.

(*Id*. at 267) (internal citations omitted).

The Court ruled that it was also important to consider the curricular context in which the challenged restrictions arose:

> …the First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. ***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***….

(*Id*. at 266-267) (internal citations omitted)(emphasis added).

Finally, the Court held that the school could "exercise greater control" over the speech because it could be mistakenly construed as being made on behalf of the school:

> [school-sponsored activities that might be perceived as having the] imprimatur of the school … may fairly be characterized as ***part of the school curriculum***, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. ***Educators are entitled to exercise greater control over this … form of student expression to assure that*** participants learn whatever lessons the activity is designed to teach … and that ***the views of the individual speaker are not erroneously attributed to the school… A school must be***

> ***able to set high standards for the student speech that is disseminated under its auspices … and may refuse to disseminate student speech that does not meet those standards.***

(*Id*. at 270-272) (emphasis added).

Ultimately, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities ***so long as their actions are reasonably related to legitimate pedagogical concerns***." (*Id*. at 273) (emphasis added).

Applied to the facts of this case, the *Hazelwood* framework makes clear that EMU was entitled to regulate the speech of its CITs in Practicum "in any reasonable manner." First, the Court should consider that the Practicum course, in which Appellant's conduct led to her dismissal, involved the most private of

forums.[19] There, CITs counsel real clients about real issues, ***in private***. Appellant does not allege that the counseling rooms are available for "indiscriminate use" by the public at any time, let alone during these counselor/patient counseling sessions. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

Second, it is easy to see how one could perceive that a CIT's speech to a client in the Practicum setting is made under EMU's "auspices" as "school-sponsored speech." Practicum clients are EMU students who receive counseling

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[19] Appellant's argument that "*Hazelwood* should not apply to universities" is baseless. (Appellant's Brief, at 42) The issue has nothing to do with the age of the speaker, but rather the setting in which that speech is regulated. *See, e.g., Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) ("The Supreme Court's jurisprudence does not hold that an institution's interest in mandating its curriculum and in limiting a student's speech to that which is germane to a particular academic assignment diminishes as students age. Indeed, arguably the need for academic discipline and editorial rigor increases as a student's learning progresses."); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290-1291 (10th Cir. 2004)("[W]e hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum…."). The *Kincaid* case cited by Appellant noted that "Hazelwood has little application to this case" because the yearbook containing the speech was "a limited public forum-rather than a nonpublic forum…" *Kincaid v. Gibson*, 236 F.3d 342, 346, n. 5 (6th Cir. 2001) However, *Kincaid* further explained that, in a non-public forum like the Practicum setting, restrictions on speech are permissible "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.*, at 348. As discussed throughout this brief, the curricular requirements serve a valid pedagogical purpose, and are viewpoint neutral. Moreover, Appellant is right to say that *Hazelwood* "applies to speech that members of the public might reasonably perceive bears the imprimatur of the school," (Appellant's Brief, at 43), but she errs in failing to recognize that a Practicum student counselor's speech to a client is susceptible to precisely that perception.

from EMU counseling students (under the licensure of their EMU professor-supervisors) in an EMU building. From the client's perspective, he is receiving counseling services from EMU. As such, EMU has a right to prohibit its CITs from providing unethical counseling services, including the proselytizing in which Appellant wanted to engage. *Hazelwood*, 484 U.S. at 272; *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103 (9th Cir. 2000) ("allowing [co-valedictorian] to make a sectarian, proselytizing speech as part of the graduation ceremony would have lent District approval to the religious message of the speech").

Third, the speech that Appellant would deliver in a Practicum clinic session was subject to a greater level of restriction because that speech itself was part of the curriculum. The Practicum course was designed to teach CITs how to counsel a variety of clients, including those whose values the counselor does not share. What the CITs say to their clients, and how they treat their clients in those Practicum sessions, is every bit as much a part of the CITs' education as is reading the assigned textbooks or attending class. Citing to *Hazelwood*, 484 U.S. at 273, the Sixth Circuit recently held that with respect to school-sponsored "speech made as part of a school's curriculum, schools are afforded greater latitude to restrict the speech." *Curry ex rel Curry v. Hensiner*, 513 F.3d 570 (6th Cir. 2008). Thus, under *Hazelwood* and this Court's more recent *Curry* decision, EMU could

"impose reasonable restrictions on the speech of student[] [counselors in Practicum]." *Id*. at 266-67.[20]

### 2. EMU's Enforcement of the Curricular Requirements in its Practicum Course was Reasonable and Did Not Violate Appellant's Constitutional Rights

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[20] In pressing her "speech code" theory and urging the Court to conduct a "facial analysis" of constitutionality without considering the *Hazelwood* factors, Appellant asks the Court to evaluate the Curricular Requirements in a context in which they did not arise, as if she had been disciplined for voicing her discriminatory beliefs in the student commons, rather than for refusing to counsel Practicum clients in a manner consistent with the Curricular Requirements. Just as the "Intolerance Policy" is not before the Court, neither is the applicability of the Curricular Requirements to a public forum setting, and the Court therefore should avoid addressing that separate and distinct hypothetical question. *United States v. Elkins*, 300 F.3d 638, 647 (6th Cir. 2002) ("Courts should avoid [deciding] unnecessary constitutional questions.") (citing *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)); *see also*, *BeWedgewood Ltd. Partnership I v. Twp. of Liberty*, 610 F.3d 340, 355 n. 9 (6th Cir. 2010).

Appellant's argument also short-changes the district court's analysis on the matter. She claims it committed "plain error" by distinguishing the provisions here from those at issue in the "speech code" cases on which she relies on the basis that the former "only applied to students in the counseling program" whereas the latter applied university-wide to all students. (Appellant's Brief, at 33, citing ECF 139 at 17). But, she ignored that the district court went on to explain that the salient consideration was the "setting" in which the Curricular Requirements applied. (ECF 139, at 17-18) (noting that the Curricular Requirements are "not a prohibition on a counselor making statements about their values and beliefs other than with a client. This section is quite narrowly drawn to avoid imposing harm on clients.") *See also id*., at 12-13 (noting that the Code of Ethics do "not apply to non-academic student behaviors.") The district court properly distinguished the speech code cases on which Appellant relies because each dealt with university-wide policies governing ***general conduct*** to foster a less hostile environment, as opposed to the provisions at issue here which were curricular in nature and which applied only to students in the Program and Practicum course. *Supra*, at 10-11.

Appellant's argument that EMU could teach about the ACA Code of Ethics, but not enforce it (Appellant's Brief, at 45), turns established and binding law on its head, and demonstrates her fundamental misunderstanding of the Curricular Requirements and how they advance the role of a professional counselor.

U.S. Supreme Court and Sixth Circuit law make clear that academic disciplinary decisions are best left to the schools. *See, e.g.*, *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985); *Board of Curators of the Univ. of Missouri v. Horowitz*, 435 U.S. 78, 90-92 (1978)("[T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking…"); *Bell v. Ohio State Univ.*, 351 F.3d 240, 251 (6th Cir. 2003) ("judiciary's review of academic decisions is limited."); *Megenity v. Stenger*, 27 F.3d 1120, 1125 (6th Cir. 1994) (noting "the respect and deference that courts should accord academic decisions made by the appropriate university authorities…. Judicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate….").

**a. EMU Had Valid Pedagogical Reasons for Enforcing the Curricular Requirements**

Appellant fails to understand a professional counselor's role and how that role is advanced by the Curricular Requirements. She sees the notion of "helping you feel comfortable with who you are" as an improper limitation, when in fact, it

fits precisely with a professional counselor's role. (ECF 1-5, at 35-36) As Dr. Callaway explained, professional counselors assist clients in making choices based on the clients' values and goals:

> This isn't like some tennis club. ***This is a healthcare service***. And part of our ethical and professional obligation – and the fact that we're licensed, we're a facility – ***people that walk through the door can expect that we are going to offer them supportive services to meet their needs***, … that we're going ***to support them in making personal choices that are appropriate for their life*** … we're not coming in there, trying to create clones of who we are. ***We're trying to help people live more whole and fulfilling lives that they select***….

(ECF 82-5, Callaway at 92) Callaway similarly explained that in professional counseling:

- Counselors must "communicate verbally and nonverbally to the client a nonjudgmental attitude while helping the person make free and responsible choices." (*Id*. at 33-34)[21]

- Counseling requires "unconditional positive regard" for clients, and "client autonomy" is essential, regardless of theoretical approach. (*Id*. at 33-34, 82-83), and

- Counselors must "let the clients set their own agenda." (ECF 82-3, Ward at 180) To do so, a counselor must learn to work with clients based on the ***client's*** – not the counselor's – values system. (*Id*. at 163).

[21] Appellant admits that a counselor is not competent to practice in the profession if she is judgmental toward clients. (ECF 82-3, Ward at 50)

Dr. Dugger explained that "the requirement of our curriculum and code of ethics is that we set aside that value system and work within the client's value system." (ECF 82-6, Dugger at 104)

Clearly, the Curricular Requirements represent far more than information to be gleaned from a textbook and identified on a multiple-choice exam. They represent ***professional counseling skills*** in which the EMU faculty have determined it is essential for its students to demonstrate proficiency. (*E.g.*, ECF 80-2, at 1 ("the EMU counseling program, in accordance with the ethical standards of the counseling profession (American Counseling Association, 2005), requires that students demonstrate in practicum the ability to consistently set aside their personal values or beliefs [sic] systems and work within the value system of the client.") As explained in the Practicum Manual, "practicum [] experiences are one

of the primary ways in which department faculty can observe and evaluate the skills of the student." (ECF 14-9, at 2)[22]

Additionally, Practicum is an academic course designed to meet CACREP's accreditation and the State of Michigan's licensing standards for graduate professional counseling programs. CACREP requires that the Program provide students with curricular experiences and demonstrated knowledge as to ACA's ethical standards and of applications of ethical considerations in professional counseling. *Supra*, at 9. Failure to follow those requirements could result in the Program losing its accredited status. Similarly, the State of Michigan's regulations, which govern professional counselors, incorporate the standards of CACREP and require counselors to be trained in the ethical standards of the ACA and ASCA. *Supra*, at 9-10. Therefore, the Program prepares its counseling students by giving them the appropriate Practicum training. Requiring its students to demonstrate not only the knowledge of what the ACA Code of Ethics says, but

[22] Appellant admits that Practicum and clinic are "an important professional preparation activity." (Ex. 1, Ward at 132) She also admits that "the ACA and the ASCA have the right to promulgate ethical standards," that "the faculty and the program have a right to require that counselors in training adhere to the ACA Code of Ethics," and that it is appropriate for the Program's faculty to "teach those ethics" if "CACREP and the State of Michigan require" it to do so (which they do) (*Id*. at 124, 143) And, she further admits that the ACA and the ASCA "know better what its own code of ethics means and how to apply it," and "are in a better position to interpret what its own ethical standards mean" than she is. (*Id*. at 129, 151) Lastly, she agreed that "if the ACA disagrees with [her about referrals, she] will go with what the ACA says its own language means." (*Id*. at 229-230)

how to apply those rules in practice, is a legitimate means of advancing those goals and preparing counseling students for the counseling profession.

**b. Relevant Case Law Supports EMU's Right to Enforce Its Pedagogically-Based Curricular Requirements**

Relevant case law also supports EMU's right to require its students to show not only academic achievement, but also to demonstrate the ability to apply professional counseling skills, such as counseling clients without imposing the counselor's own values. The Sixth Circuit case *Kissinger,* 5 F.3d 177, is the most factually analogous case cited by any of the parties on this case-dispositive point.

In *Kissinger*, a university's graduate veterinary program had refused to grant the plaintiff an exception to the curricular requirement of performing surgery on healthy animals. The plaintiff had objected on religious grounds, but the Sixth Circuit held that compelling her to comply with its legitimate pedagogical curricular requirement did not violate her constitutional rights:

> [The plaintiff] was not compelled to attend Ohio State for her veterinary training. She matriculated there knowing that operations on live animals were part of the curriculum established by the College. She cannot now come forward and demand that the College change its curriculum to suit her desire. Courts have traditionally given public educational institutions, especially colleges and graduate schools, wide latitude to create curricula that fit schools' understandings of their educational missions. We would defeat that longstanding restraint if we ruled for [the plaintiff] today.

*Id*. at 180-181.[23]

Other relevant cases reached the same conclusion. For instance, in *Brown v. Li*, 308 F.3d 939, a graduate student's thesis originally contained a "Disacknowledgment" section that read: "I would like to offer special Fuck You's to the following degenerates for being an ever-present hindrance during my graduate career...." *Brown*, 308 F.3d at 943. When the university's thesis committee finally accepted a copy of the student's thesis, it did so without the Disacknowledgment section and did not add the thesis to its library, as it had done with other accepted thesis papers. The student sued, alleging a violation of the First Amendment. The district court granted summary judgment to the defendants, and the Ninth Circuit affirmed, holding that a public university can, consistent with the First Amendment, require that a student, even a master's-level one, comply with the terms of an academic assignment:

> …under the Supreme Court's precedents, the curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere. The Supreme

[23] Another hypothetical example drives home the point as to why a university has the right not only to teach its curriculum, but also enforce it. Imagine a devout Christian Scientist medical school student who refused to participate in any clinical rotations where she would be required to prescribe medicines or perform medical procedures because doing so would violate her religious beliefs. The medical school should not nevertheless be forced to confer upon her the degree of Medical Doctor, and all of the rights and implications that go along with such an honor. That would be a truly "absurd result."

> Court's jurisprudence does not hold that an institution's interest in mandating its curriculum and in limiting a student's speech to that which is germane to a particular academic assignment diminishes as students age. ***Indeed, arguably the need for academic discipline and editorial rigor increases as a student's learning progresses.***

*Id*. at 951 (emphasis added)(internal citations omitted); *see also*, *Axson-Flynn*, 356 F.3d at 1290-1291 (10th Cir. 2004)("[W]e hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum.... [W]e will uphold the [university's] decision to restrict (or compel) that speech as long as [its] decision was reasonably related to legitimate pedagogical concerns. We give 'substantial deference' to educators' stated pedagogical concerns.... That schools must be empowered at times to restrict the speech of their students for pedagogical purposes is not a controversial proposition.... By the same token, ***schools also routinely require students to express a viewpoint that is not their own in order to teach the students to think critically***[24]...")(emphasis added)(internal citations omitted); *Curry*, 513 F.3d at 579 (school did not violate First Amendment by refusing to allow student to distribute candy canes with a message about Jesus Christ: "It is only when the

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[24] The curricular nature of the challenged provisions, and the academic setting in which they apply, distinguish Appellant's case from "compelled speech" ones like *Wooley v. Maynard*, 430 U.S. 705 (1977) (license plate message) and *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (flag salute), which involved purely expressive speech.

decision to censor … student expression ***has no valid educational purpose*** that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights") (citing *Hazelwood*, 484 U.S. at 273); *Settle v. Dickson Cnty. Schl. Bd.*, 53 F.3d 156-158 (6th Cir. 1995) (public schools have "broad leeway . . .to determine the nature of the curriculum and the grades to be awarded to students . . . . [and] "[i]t is not for us to overrule the teacher's view that the student should learn to write research papers by beginning with a topic other than her own theology…This case is not about [the student's] First Amendment right to express her views, opinions or beliefs, religious or otherwise, in the classroom. This case is about whether [her] teacher may determine what topic is appropriate to satisfy a research paper assignment in that class.... ***The bottom line is that when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than that assignment and receive credit for it.")***(emphasis added); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995)("When the University determines the content of the 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 ..."); *Poling v. Murphy*, 872 F.2d 757, 758, 763 (6th Cir. 1989)(citing favorably to *Hazelwood*: "educators do not offend the First Amendment by exercising editorial control over the style and content of student

speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns…. [A] school must be able to set high standards for the student speech that is disseminated under its auspices"); *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, 1008 (9th Cir. 2000)(noting that the *Rosenberger* Court "appear[ed] to have recognized [that] the traditional discussions of viewpoint discrimination do not fit well into the analysis of a school's decision to prohibit student or teacher speech related to the curriculum"); *Bishop v. Aronov*, 926 F.2d 1066, 1074 and at n.7 (11th Cir. 1991)(applying *Hazelwood* to reject a professor's request to incorporate his religious ideology into course materials or classroom discussion: "[A]s a place of schooling with a teaching mission, we consider the University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time" and holding that the university has "authority … to request that he sequester the personal from the professional….").

The foregoing case law makes clear that EMU had a right to require its CITs to counsel clients without imposing their own values and without discriminating. Equally clear is that Appellant cannot claim a First Amendment or religious-based exemption to those legitimate pedagogical Curricular Requirements. As the district court properly held, Appellant "does not have a constitutional right to interfere with [EMU's] curriculum by demanding that she be allowed to set her

own standards for counseling clients under the faculty's State licensure in the University's clinic." (ECF 139, at 25).

**c. Seeking to Refer Her Client to Another Student Counselor Was Not Consistent with the ACA Code of Ethics or the Curriculum's Teachings, and Did Not Negate EMU's Finding that She Had Violated the Curricular Requirements**

Appellant's assertion that in seeking to refer her Practicum client rather than counsel him, she "was following, not violating, a curricular requirement" fails to raise a material question of fact to defeat the Appellees' summary judgment motion. (Appellant's Brief, at 46).

**1. Appellant's "Referral" Violated the ACA Code of Ethics**

Appellant's claim that her conduct complied with the ACA's and Program's referral standards is indisputably factually incorrect. ***The ACA's unequivocal position*** is that Appellant's purported "referral" of her Practicum client violated its Code of Ethics:

> [R]efusing to counsel someone on issues related to sexual orientation is a clear and major violation of the 2005 *ACA Code of Ethics* just as it would be if a practicum student refused to counsel an assigned African-American client who wanted help with a multiracial relationship on the basis that the counselor's values do not allow her to accept mixed race relationships… [Appellant] did not have the prerogative [] to refer her assigned practicum client on the basis of discomfort with homosexuality. ***This was a clear and major violation of the ACA Code of Ethics…***

> [Appellant's] refusal to provide counseling services to an assigned client who wanted help with same-sex relationship issues is a clear imposition of values that is inconsistent with the counseling goals of nondiscrimination on the basis of sexual orientation…***it is the unequivocal position of the American Counseling Association***[25] ***that [Appellant] committed major and serious violations of the ACA Code of Ethics during her counseling practicum at [EMU].***

(ECF 82-9, at 5, 9, 19-20)(emphasis added) *See also* ECF 82-11, at 9, Expert report of Dr. Michael Kocet, former Chair of the ACA Code of Ethics Revision Taskforce ("This refusal to provide counseling regarding same sex relationship issues violates ACA Code of Ethics standard C.5. Discrimination"); ECF 82-10, Expert report of Dr. Barbara Herlihy and Mary A. Hermann.

Moreover, Appellant admits that the ACA is the best judge of how to interpret its Code of Ethics (ECF 82-3, Ward at 129), and she agreed that its interpretation of its own ethical codes is controlling. (*Id*. at 229-230) There is no material dispute of fact on this issue; Appellant's discriminatory "referral" violated the ACA Code of Ethics.

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[25] The quote comes from Dr. David Kaplan's expert report, which constitutes the ACA's position because, as he states: "As the Chief Professional Officer of the American Counseling Association (ACA), the world's largest association for professional counselors … I am authorized to speak on behalf of the association and our ethics code." (ECF 82-9, at 5)

### 2. Appellant's Referral Violated the Program's Curricular Teachings

Appellant's "referral" was also inconsistent with the Program's other curricular teachings, including the *Becoming a Helper*, 5th Edition textbook, by Marianne Schnieder Corey and Gerald Corey (the "Textbook"), that she says supports her position.

Appellant's argument fails to take into account that her refusal to counsel the client arose not in private practice, but in the Practicum setting, where the CIT's task is to learn to counsel diverse clients within their diverse value systems, including those falling outside of the counselor's own values. Appellant could not demonstrate proficiency in that skill (and therefore could not satisfy that curricular requirement) if she automatically referred clients with whom she claimed to have a "values conflict."

Also unavailing is Appellant's reliance on selective quotes from the Textbook, for the proposition that "EMU taught that referrals based on value conflicts are permissible." (Appellant's Brief, at 12; ECF 79-3). The Textbook actually taught that referral as a first and only resort (as Appellant utilized it) was *not* proper:

> ***Merely having a conflict of values does not necessarily imply the need for a referral***...We hope that you would not be too quick to refer and that you would consider a referral ***only as the last resort … Helpers who may work with lesbian, gay, and bisexual people are***

> ***ethically obligated not to allow their personal values to intrude into their professional work.***

(ECF 1-10, at 2-4) (emphasis added)

Lest there be any remaining dispute about the Textbook's meaning, its authors have definitively answered that question in EMU's favor:

> ***…Ward's referral of this particular client was improper and not in accordance with the standards of the various helping professions or the standards we endeavored to articulate in Becoming a Helper, Fifth Edition.***

(ECF 118-2, ¶10)[26]

Appellant's position also makes no practical sense and further shows her lack of understanding of the counseling profession. Although she did not meet with this particular client, it is very likely that she could begin to see a client about, for example, depression issues, and later learn, after multiple sessions of the counselor/client relationship, that the depression in some way relates to his homosexuality. Appellant's answer that she would refer him at that time, (ECF

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[26] Even if Appellant has identified a facial discrepancy between certain out-of-context Textbook language and the rest of the Program's curriculum, it would not create a material question of fact. Prior to her dismissal, Appellant was advised of the school's interpretation of the referral standards, was told why her referral as a first-resort was improper, and was offered a remediation plan to correct her behavior. Thus, well before her dismissal, Appellant was fully aware of Appellees' interpretation of the curriculum, and what was required of her to remain in the Program.

82-3, at 42-48), is no answer at all.[27] Dr. Francis and other faculty members explained why it is not possible, within the counseling profession's tenets, and without harming the client, to engage in that type of "selective" counseling:

> …To say I'm only going to counsel you about this, and not that, is to not understand that most things are connected to each other. If the plaintiff's attorney here goes home tonight to his wife, and his wife has a particular issue to talk about to him, that's going to affect him on several different levels and several different ways; to talk only about how it impacts one thing denies that it impacts several other things, as well. For example, if you imagine that a person is like a mobile in a baby's crib, when one issue is going off on that mobile [] all the other characters in that mobile begin to shake, and are impacted by [it].

(ECF 82-7, Francis at 96-97).

Similarly, Dr. Callaway explained:

> …we can't discriminate against giving service to clients, based on their sexual orientation, and we can't dissect people into parts…if a client comes in as a – as a homosexual person, I can't say, "Well, I'll talk to you about career, but not about relationships." Because counseling operates on a wholistic principle…in counseling, it's the whole person, [] it's so

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[27] In light of Appellant's stated unwillingness to accept the authority of the ACA or its Code of Ethics, and her "refusal to counsel an entire class of people," (*id*., ECF 139, at 15), the particular circumstances of her refusal to counsel this particular client are not paramount. However, further demonstrating that counselors cannot pick and chooses the issues on which they are willing to counsel, Appellant has acknowledged that this client was primarily seeking counseling on non-relationship "depression" issues (ECF 82-3, Ward at 210), and in response to hypothetical deposition questions developed around this particular Practicum client, she claimed that she ***would*** be able to counsel that "hypothetical" client. (*Id*. at 197-202)

> disrespectful to dissect people and say well, I'll deal with the rest of you, but this [i.e., being gay] is unacceptable.

(ECF 82-5., Callaway at 77-78). The case law is in accord. *CLS*, 130 S.Ct. at 2990; *Bruff v. North Mississippi Health Services, Inc.*, 244 F.3d 495, 497-98 (5th Cir. 2001).

There simply is no material dispute of fact that Appellant's purported "referral" was inconsistent with EMU's curricular teachings.[28]

**d. Appellant Was Dismissed Due to Her Behavior, Not Her Beliefs**

At every step of the way, EMU made clear that the issue was not that Appellant held certain religious beliefs, but rather was her refusal to counsel her clients in a manner consistent with the ACA Code of Ethics, *e.g.*, without imposing those beliefs on her clients. *See, e.g.*, (ECF 80-2) (informal review took place due to a "serious concern about [Appellant's] performance in practicum" related to her "unwillingness to set aside [her] own value system and work within the value

[28] The district court also was correct to point out that the Program did not have a "particularized system of exemptions" that "allows students to graduate without meeting the curriculum requirements." (ECF 139, at 30) Appellant and her *amici* are simply wrong in asserting otherwise. Nor was the Program required to create an individualized exemption for Appellant that would allow her to refer clients with whom she perceived a "values conflict." Such an exemption is clearly distinguishable from a one-time *client*-driven decision of the *clinic* not to assign a grief-stricken client to a similarly grieving CIT. As the district court noted, Appellant "wants to always refer all clients who seek counseling for sexual relationship issues she believes to be against the teachings of the Bible. This is not a limited accommodation…" (*Id.*)

systems of [her] clients."); (ECF 1-4) (formal review hearing "initiated" due to "behavior in one discrete episode that is a violation of law or of the ACA Code of Ethics…The specific ethical code violations are: [the No Imposing Values and No Discrimination Curricular Requirements,]"); (ECF 1-5, at 1-2) (formal review hearing held "***because of Ms. Ward's… stated intention to violate and to continue violating the American Counseling Association's code of ethics…based on her stated unwillingness to intentionally and competently provide counseling services concerning relationship issues to clients who identify as gay***."); (ECF 1-7) (informing Appellant that she was dismissed because "***by your behavior***, you have violated the [No Imposing Values and No Discrimination Curricular Requirements]" and was "unwilling to change ***this behavior***.") (emphasis added). Additionally Appellees testified unequivocally that they acted due to Appellant's behavior, not her beliefs. *See e.g.*, (ECF 82-4, Ametrano, at 75-76); (ECF 82-5, Callaway, at 93); (ECF 82-6, Dugger, at 104); (ECF 82-7, Francis, at 96, 101); (ECF 82-8, Polite, at 37) The undisputed evidence showed that "[Appellees] were at all times concerned with [Appellant's] refusal to counsel an entire class of people whose values she did not share," and that Appellant's "dismissal was entirely due to [her] refusal to change her behavior, not her beliefs." (ECF 139, at 21, 28)[29]

[29] Appellant implies a "belief"-based motivation based on an out-of-context email

But rather than addressing those facts forthrightly, Appellant continues to "distort[] the facts in this case to support her position that defendants dismissed her due to her religious beliefs." (*Id*., at 28) For example, to support her claim that EMU "targeted [her] because of her expression and religious views regarding homosexual behavior,"Appellant claims that Dr. Dugger's letter memorializing the informal review meeting advised her that (1) "her religious views were homophobic and that, ***on account of these views***, EMU was likely not a 'good fit' for her," and (2) "her ***religious views 'communicated bias'*** against homosexuals." (Appellant's Brief, at 46-47) (emphasis added) A review of the letter reveals the distortions:

> During the meeting, Dr. Callaway expressed a serious concern ***about your performance in practicum***. Specifically, she indicated that ***you have communicated***[30] ***bias against [gay] clients***…and that ***you have refused to accept a gay person as a client in practicum*** with the explanation that counseling gay

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excerpt in which Dr. Dugger recounted that she stated to Appellant during the informal review that she did not consider Appellant to be "incompetent." (Appellant's Brief at 15-16) But the full context of the email demonstrates that Dr. Dugger's concerns were solely about Appellant's willingness to abide by the ethical standards and her "competence/skill" to do so. (ECF 80-6 at 3 of 6)("I was simply pointing out that ethical behavior requires both an intention to behave in accordance with the ethical standards and the competence/skill necessary to do so. I explained that, in her case, it was hard to tell whether she had the skill because she was very clear about her lack of intention/motivation to put aside her personal religious beliefs.")

[30]The letter indicated that it was ***Appellant*** who "communicated bias," not her "religious views."

> people about relationship issues violates your religious beliefs. Dr. Calloway explained that the EMU counseling program, in accordance with the [ACA Code of Ethics] requires that students demonstrate in practicum the ***ability to consistently set aside their personal values or beliefs [sic] systems and work within the value system of the client***. She stated that ***your refusal to see a client*** presenting with concerns about his gay relationship ***signified an unwillingness or inability on your part to meet this expectation***.
>
> Dr. Callaway explained that the two of you [had previously] discussed the ***importance of working within the client's value system and putting your own value system aside***…The catalyst for this discussion was your professional disclosure statement and the need to remove from it a descriptor of you as a Christian counselor…She recalls suggesting to you at that time that you carefully consider whether the EMU counseling program was a good fit[31] for you.
>
> * * * *
>
> …she spoke at length with you about the ethical standards of the profession and her ***expectation that you demonstrate an ability to avoid discrimination and work within the value system of your clients***…
>
> You communicated your belief that your personal religious beliefs are in conflict with the ethical standards[32] of the

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[31] The letter indicated that ***Appellant*** should "carefully consider" whether the Program was a good fit for her. EMU would not purport to make that assessment, as many other students had successfully completed the Program, while holding views similar to Appellant's, and were able to meet their professional obligations. (ECF 82-6, Dugger, at 104)

[32] Appellant's position that she could not meet the Curricular Requirements when it came to counseling clients with values different than her own, (ECF 82-3, Ward at 149), simply conflates her personal beliefs with her professional counseling duties. Appellant and her *amici* present a false choice: Appellant need not compromise her religious beliefs in order to satisfy the Curricular Requirements. As in many professions (like lawyers and judges, for instance), counselors are taught to put

> counseling profession and agreed that this conflict is irreconcilable.
>
> As such, the three of us agreed that the development of a remediation plan would not be possible ***given your unwillingness to set aside your own value system and work within the value systems of your clients.***

(ECF 80-2) The letter dealt with Appellant's "religious views" only insofar as she had asserted them as basis to justify her unethical, discriminatory ***behavior***, which was clearly the letter's central concern.

The evidence also establishes that Appellant's views were not "targeted" in the classroom. To the contrary, she vocally expressed her opposition to homosexuality in virtually "every class" she took over a two-year period at EMU – and yet she received "A"s in all of those classes. (ECF 82-3, Ward at 59-60, 75-76; ECF 82-4, Ametrano at 72) Dr. Ametrano succinctly explained why Appellant received "A" grades despite expressing fervent opposition to homosexuality in class discussions: "I do not grade students based on their beliefs." (*Id*., at 72)

Appellant's partial quote (Appellant's Brief, at 48) purportedly describing her "attitudes" as not being "condoned" in professional counseling is also misleading. The full quote shows that Dr. Callaway was not condemning any

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their personal beliefs aside and perform their professional duties. Appellant simply chose not to learn this skill.

***values*** (Appellant's or anyone else's), but rather discriminatory ***conduct*** in the rendering of counseling services:

> And I stated very plainly, at that point, that it [i.e., professional counseling] requires, um, ***a non-discrimination approach*** and that ***we service*** all clients competently and professionally based on those clients [sic] goals and outcomes ***without regard to sexual orientation*** and that was a position I saw as untenable and non-negotiable and that professional counseling was not the place where such [discriminatory] attitudes would be condoned.

(ECF 1-5, at 3)(emphasis added)

Appellant's suggestion (Appellant's Brief, at 48) that a remediation plan was aimed at "making changes" to her "belief system" is also flawed. The needed "changes" were to Appellant's "unwillingness to ***set aside [her] own value system*** and ***work within the value systems of [her] clients***." (ECF 80-2) In context, the alleged offensive quote makes clear that Dr. Dugger's reference to Appellant's "belief system" related back to her immediately preceding reference to Appellant's expression of "***a belief that she could not set aside her religious values*** in order to effectively counsel non-heterosexual clients…" (ECF 1-5, at 6, 8 (lines 4-7)) Appellant also omitted from the partial quote Dugger's express reference to Appellant needing to change her "behaviors." (ECF 1-5, at 8, line 7)

The district court had it right; the undisputed evidence shows that Appellant's dismissal was due entirely to her conduct which violated the ACA

Code of Ethics, not her beliefs. Accordingly, granting summary judgment to Appellees on her constitutional claims was proper and should be affirmed.

## II. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S CLAIMS AGAINST EMU'S REGENTS AND PRESIDENT

Appellant also appeals the district court's dismissal (ECF 75, February 1, 2010 Order; ECF 152, January 28, 2010 Hearing Transcript) of her "official capacity" claims against EMU's Regents and President, notwithstanding the absence of any evidence that they had any "substantial role" or "personal involvement" in the matters underlying Appellant's claim. Relying solely on *Leach v. Shelby County Sheriff,* 891 F.2d 1241, 1246 (6th Cir. 1989), Appellant contends that she need only show that the allegedly unconstitutional action was "based on a policy or custom" of the entity (EMU), and that she has met this test simply by virtue of the EMU Regents' constitutional role of "general supervision" of the university, and the EMU President's role as "principal executive officer" of the university. (Appellant's Brief, at 58)

But this would be tantamount to holding the Regents and President accountable on a *respondeat superior* theory of liability, which is not permitted under the law. *See Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1948 (2009), ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior"), citing *Monell v. New*

*York City Dept. of Social Services*, 436 U.S. 658, 691 (1978)(finding no vicarious liability for persons under § 1983); *Thompson v. L.A. Steele*, 709 F.2d 381, 382 (5th Cir. 1983)("Certainly § 1983 does not give a cause of action based on the conduct of subordinates. ***Personal involvement is an essential element of a civil rights cause of action.***")(emphasis added).

Appellant's argument also ignores that the so-called "policy" in question was ***not*** a university-wide policy (with which the Regents and/or the President conceivably might have a role), but rather was part of the curriculum of a particular departmental program – the Graduate Counseling Program. The curriculum (and its incorporation of the ACA Code of Ethics) was developed solely by Program faculty, without any input or involvement of the Regents or President of the university. As the Program Coordinator, Dr. Irene Mass Ametrano, explained:

> The content of the Program's curriculum, including its incorporation of the ACA Code of Ethics and the ASCA Ethical Standards, as well as the Handbook and the Practicum Manual, was ***developed and approved, and is enforced, by the Program's faculty…Neither the EMU Board of Regents, nor the EMU President, nor the Dean of the EMU College of Education have played any role in developing, approving, or enforcing the content of the Program's curriculum*** (except to the extent that the Handbook provides a student with a right of appeal to the Dean and vests in the Dean the authority to "accept, reject or modify the decision of the committee"

(ECF 44-3, Ametrano Decl., ¶9).

Appellant alleged ***no*** facts to show that that Regents, President, or Dean developed or approved (or even knew about) the Program's curriculum.[33]

Appellant wrongly implies that ***any*** state official is personally accountable whenever there is a state "policy" (or, in this case, a curriculum) regardless of the official's role with respect thereto.[34] But the Sixth Circuit has expressly found that where a "policy" results in a constitutional violation, a governmental entity (much less a state "official") is liable "only for those deprivations resulting from the decisions of its duly constituted legislative body or of *those officials whose acts may fairly be said to be those of the county*." *Gregory v. Shelby County, Tennessee,* 220 F.3d 433, 441 (6th Cir. 2000), *citing, Monell,* 436 U.S. at 690, 694 (describing a governmental entity's "policy" as being "officially adopted and promulgated by that body's officers").

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[33] It is precisely this type of "formulaic recitation of the elements of a cause of action," "devoid of further factual enhancement," that the Supreme Court has rejected. *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 555 (2009); *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009).

[34] Appellant would turn the law on its head, making it ***easier*** to establish "official capacity" liability than "individual capacity" liability, under § 1983. (Appellant's Brief at 58; ECF 37 at 1, 8) But Appellant's own case law establishes the opposite. *Leach v. Shelby County Sheriff,* 891 F.2d 1241, 1245 (6th Cir. 1989), *quoting, Kentucky v. Graham,* 473 U.S. 159, 166 (1985) ("On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.... *More* is required in an official-capacity action, however, for a *governmental entity* is liable under § 1983 *only* when the entity itself is a "moving force" behind the deprivation…" (emphasis added and in original)

"'A court's task is to identify those who speak with final policymaking authority for the local governmental actor *concerning the action alleged to have caused the violation at issue*.'" *Brown v. Shaner*, 172 F.3d 927, 930 (6th Cir. 1999), *quoting, McMillian v. Monroe County, Ala.*, 520 U.S. 781, 784-84 (1997)(emphasis added). Liability can extend only to "the official or officials responsible for establishing final policy ***with respect to the subject matter in question***.'" *Shorts v. Bartholomew,* 255 Fed. Appx. 46, 2007, WL 3037268 at **10 (6th Cir. 2007) (emphasis added) (ECF 44-8), *quoting, Fairley v. Luman,* 281 F.3d 913, 918 (9th Cir. 2002).

Appellant asks that the Court skip that important task. But liability cannot be imposed on the Regents or the President when they played no role in developing or approving the content of the curriculum that Appellant challenges. Even the dated case law relied on by Appellant make clear that a state official is not liable under § 1983 for alleged consequences of a governmental policy unless the official personally played an actionable role with regard to that policy. *See, Leach,* 891 F.2d at 1247-48.

Since Appellant's challenge here is to the content of a program curriculum that was developed and approved by the Program's ***faculty***, not by the Regents or the President, they are not proper defendants to this action.

The district court's dismissal of the unsupported claims against the Regents and President should be affirmed.

## III. IF THIS COURT GRANTS RELIEF TO APPELLANT, THEN IT SHOULD REVERSE THE DISTRICT COURT'S DENIAL OF APPELLEES'/CROSS-APPELLANTS' QUALIFIED IMMUNITY MOTION

Appellees have filed a conditional cross-appeal of the district court's March 24, 2010 Order (ECF 109) denying their dispositive motion based on qualified immunity.[35] This court need not reach that conditional cross-appeal unless it grants relief to Appellant on this appeal.

The doctrine of qualified immunity provides that "[g]overnment officials who perform discretionary functions are generally protected from liability for civil damages as long as their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sallier v. Brooks*, 343 F.3d 868, 878 (6th Cir. 2003) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982)). *See also, Pearson v. Callahan,* 129 S.Ct. 808, 815 (2009). When a "defendant raises qualified immunity as a defense, the ***plaintiff*** bears the burden of demonstrating that the defendant is not entitled to qualified immunity." *Everson v. Leis*, 556 F.3d 484, 493 n. 3 (6th Cir. 2009)(emphasis added).

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[35] The defense of qualified immunity applies only to bar Appellant's claims for ***damages*** against Appellees in their ***individual*** capacities. *Everson v. Leis*, 556 F.3d 484, 493 (6th Cir. 2009).

The Sixth Circuit uses a two-part test to determine whether a plaintiff can defeat qualified immunity. First, the Court must determine whether "a constitutional right has been violated." *Everson*, 556 F.3d at 494. Second, if the Court determines that a right has been violated, the Court must then consider "whether it involved clearly established constitutional rights of which a reasonable person would have known." *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996). In conducting this two-part analysis, the Court must consider the following:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular … conduct. ***The doctrine protects all but the plainly incompetent or those who knowingly violate the law***.

*Everson*, 556 F.3d at 494 (emphasis added; internal citations omitted).

To defeat qualified immunity, ***Appellant*** must therefore show ***both*** that Appellees violated her constitutional rights by dismissing her from the Program ***and*** that a reasonable university official would have known that Appellant's rights were being violated. Appellant cannot clear these hurdles because the Supreme Court and the Sixth Circuit have ***never*** held that a student has a constitutional right to refuse to follow a university's curricular requirements. To the contrary, the courts have repeatedly affirmed that a university may – without violating the Constitution – dismiss a student (like Appellant here) who failed to satisfy the curricular requirements of her academic program.

### A. The Evidentiary Record Indisputably Disposed of the "Questions of Fact" Found by the District Court in Initially Denying Qualified Immunity

In initially denying qualified immunity (without analyzing the record evidence that was primarily developed after the filing of Appellees' qualified immunity motion), *see supra*, fn. 2, the district court found that four material questions of fact existed: (1) whether Appellant's act of seeking to refer a homosexual client "was consistent with the ACA Code of Ethics, as well as a course textbook"; (2) whether Appellant, by seeking such a referral "acted to avoid imposing her religious beliefs on the homosexual client"; (3) whether Appellant, by allegedly refusing to counsel the homosexual client only "on issues that would 'affirm' his homosexual behavior," engaged in sexual orientation discrimination; and (4) "whether she was retaliated against for expressing her religious views about homosexual conduct outside of the Practicum course…" (ECF 109 at 15, 17) Each of those questions has now been answered, unequivocally and as a matter of law, in favor of Appellees.

Appellees incorporate the positions set forth above and in their renewed qualified immunity summary judgment motion (ECF 134), which demonstrate that Appellant violated the curriculum and the ACA Code of Ethics; could not properly "refer" a Practicum client in the manner she chose; engaged in discrimination; and was not retaliated against for expressing her religious views. Appellant thus failed

to raise a material question of fact about whether her dismissal from the Program was a genuinely academic decision, and Appellees were entitled to qualified immunity.

That analysis actually ***understates*** Appellant's burden on the qualified immunity issue because the above evidence, including the documentary record, Appellees' testimony, the expert reports of Dr. Kaplan and others, and the Coreys' Declaration, all support a finding that Appellees were anything but "plainly incompetent" in reaching their conclusions about Appellant's violation of the Curricular Requirements. *Everson*, 556 F.3d at 494. At a minimum, there is certainly enough evidence that one cannot reasonably conclude that they "knowingly violated the law" in dismissing Appellant from the Program. *Id*.

### B. Appellant Has Not Shown and Cannot Show That a Constitutional Violation Occurred

For the reasons discussed above, Appellant cannot show that her constitutional rights were violated. She simply had no constitutional right to refuse to adhere to the Program's legitimate pedagogical Curricular Requirements, even based on a religious objection. *See supra* at 42-47.

### C. Appellant Has Not Shown and Cannot Show A Clearly Established Constitutional Right Of Which A Reasonable Person Would Have Known

Even if the Court were to conclude that Appellees violated any of Appellant's constitutional rights, they still are entitled to qualified immunity unless

Appellant proves that a reasonable university official in Appellees' position would have known that dismissing Appellant from the Program for refusing to comply with the Curricular Requirements would violate her established constitutional rights.

In the Sixth Circuit, "a finding of a clearly established constitutional right must generally be supported by precedent from the Supreme Court or this circuit, or in the alternative, by decisions from other circuits." *Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir. 1993). "If officials of reasonable competence objectively could disagree on the law, immunity should be recognized." *Cameron v. Seitz*, 38 F.3d 264, 272 (6th Cir. 1994). Based on these standards, the Court must determine whether reasonable officials standing in Appellees' shoes should have known that dismissing Appellant from the Program for refusing to adhere her behavior to the Curricular Requirements violated her First Amendment rights.

Appellant, by her conduct, violated the Program's curriculum, and the Supreme Court and the Sixth Circuit have ***never*** held that a student has a constitutional right to refuse to follow a university's legitimate pedagogical curricular standards based on the student's religious beliefs. In fact, they have held just the opposite. *See e.g., Hazelwood*, 484 U.S. at 266-267 ("A school need not tolerate student speech that is inconsistent with its "basic educational mission"); *Kissinger*, 5 F.3d at 180-181 ("colleges and graduate schools [have] wide latitude

to create curricula that fit [their] understanding of their educational mission" such that plaintiff could not "demand that the College change its curriculum to suit her [religious objection to performing surgery on healthy animals for instruction purposes.]")

Appellant cannot show that no reasonable university official standing in Appellees' shoes would believe that dismissing Appellant for refusing to comply with the curriculum would violate the Constitution. The Court, if it reaches this issue, should therefore reverse the district court's initial denial of Appellees' qualified immunity motion, and should order the dismissal of Appellant's claims for damages against Appellees in their individual capacities.

## CONCLUSION

For the reasons stated above, Appellees respectfully request that the Court affirm the district court's award of summary judgment to Appellees. However, if the Court does grant her relief, Appellees respectfully request that the Court grant

them qualified immunity in their individual capacities on Appellant's damage claims.

Respectfully submitted,

Dated: February 4, 2011 By: s/ David R. Grand

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(A)(7)(B). The foregoing brief, including footnotes, contains 16,397 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

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Attorneys for Defendants-Appellees/Cross-Appellants

CASE NO. 10-2100/10-2145

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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JULEA WARD,

Plaintiff-Appellant/Cross-Appellee,

v.

POLITE, AMETRANO, FRANCIS, MARX, STANIFER, CALLAWAY, DUGGER,

Defendants-Appellees/Cross-Appellants,

WILBANKS, CLACK, HAWKINS, INCARNATI, OKDIE, PARKER, SIDLIK, STAPLETON, and MARTIN,

Defendants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Docket No. 09-11237
The Honorable George Caram Steeh

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**CERTIFICATE OF SERVICE**

This certifies that on February 4, 2011, Defendants-Appellees/Cross-Appellants' Brief was served using the Sixth Circuit Court of Appeals' electronic case filing system upon:

Jeremy Tedesco
Steven M. Jentzen
David A. French

s/ David R. Grand
David R. Grand

# ADDENDUM

## Designation of Record

| Record Entry No. | Description | Date Filed |
|---|---|---|
| ECF 1 | Verified Complaint for Injunctive and Declaratory Relief and Damages<br><br>ECF 1-3 - Exhibit 1 - Excerpt from EMU's Counseling Student Handbook<br>ECF 1-4 - Exhibit 2 - 02/19/09 letter from Dugger to Ward informing Ward of the date set for the formal review hearing<br>ECF 1-5 - Exhibit 3 - Transcript of 03/10/09 formal review hearing<br>ECF 1-6 - Exhibit 4 - 02/09/09 email and letter from Ward to Dugger requesting a formal review hearing<br>ECF 1-7 - Exhibit 5 - 03/12/09 letter from Ametrano to Ward dismissing Ward from the School Counseling Program<br>ECF 1-8 - Exhibit 6 - 03/20/09 letter from Ward to Polite appealing her dismissal from the School Counseling Program<br>ECF 1-9 - Exhibit 7 - 03/26/09 letter from Polite to Ward denying Ward's appeal<br>ECF 1-10 - Exhibit 8 - Excerpt from Corey & Corey, *Becoming a Helper* | 4/2/09 |
| ECF 9 | Plaintiff's Motion for Preliminary Injunction; Memorandum in Support<br><br>ECF 9-5 - Exhibit 3 - Affidavit of Julea Ward | 4/21/09 |
| ECF 14 | Defendants' Brief in Opposition to Plaintiff's Motion for Preliminary Injunction<br><br>ECF 14-3 - Exhibit 1 - Declaration of Dr. Suzanne M. Dugger, May 14, 2009 | 5/15/09 |

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| | ECF 14-4 - Exhibit 2 - Declaration of Dr. Yvonne L. Callway, May 14, 2009<br>ECF 14-5 - Exhibit 3 - Declaration of Dr. Perry C. Francis, May 13, 2009<br>ECF 14-6 - Exhibit 4 - EMU 2005-2007 Graduate Catalog excerpt<br>ECF 14-7 - Exhibit 5 - The Counseling Student Handbook<br>ECF 14-8 - Exhibit 6 - Counseling Practicum I<br>ECF 14-9 - Exhibit 7 - Practicum Manual<br>ECF 14-10 - Exhibit 8 - Evaluation of Counselor Development Skills and Dispositions<br>ECF 14-11 - Exhibit 9 - Informed Consent & Disclosure signed by Julea Ward<br>ECF 14-12 - Exhibit 10 - CACREP Accreditation of EMU counseling programs<br>ECF 14-13 - Exhibit 11 - CACREP Accreditation Description<br>ECF 14-14 – Exhibit 12 - CACREP – 2001 Standards<br>ECF 14-15 - Exhibit 13 - ACA Description<br>ECF 14-16 - Exhibit 14 - ACA Divisions<br>ECF 14-17 - Exhibit 15 - 2005 ACA Code of Ethics<br>ECF 14-18 - Exhibit 16 - ACA Ethics Committee Position Statement<br>ECF 14-19 - Exhibit 17 - Excerpt of April 12-13, 1999, ACA Governing Council Minutes<br>ECF 14-20 - Exhibit 18 - Ethical Standards for School Counselors<br>ECF 14-21 - Exhibit 19 - The Professional School Counselor and LGBTQ Youth<br>ECF 14-22 - Exhibit 20 - Michigan School Counselor Association, Ethical Standards<br>ECF 14-23 - Exhibit 21 - Association for Spiritual Ethical and Religious Values in Counseling<br>ECF 14-24 - Exhibit 22 - Description, Michigan Board of Counseling, Michigan Department of Community Health<br>ECF 14-25 - Exhibit 23 - Department of Consumer and Industry Services- Director's Office- Counseling-General Rules<br>ECF 14-26 - Exhibit 24 - EMU College of Education | |

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| | Master of Arts Programs in Counseling - School Counseling Program<br>ECF 14-27 - Exhibit 25 - Michigan Administrative Rules, School Counselors<br>ECF 14-28 - Exhibit 26 - Michigan Comprehensive Guidance and Counseling Program<br>ECF 14-29 - Exhibit 27 - *Christian Legal Society Chapter of University of California, Hastings College of the Law, a/k/a Hastings Christian Fellowship v. Mary Kay Kane, et. al.* 2006 WL 997217 (N.D. Cal. 2006) | |
| ECF 16 | Defendants' Answer and Affirmative Defenses | 5/28/09 |
| ECF 23 | Defendants' Motion To Dismiss (Filed By Defendants Wilbanks, Clack, Hawks, Incarnati, Okdie, Parker, Sidlik, Stapleton, Martin, And Polite) Or, In The Alternative, For Summary Judgment; Brief in Support<br><br>ECF 23-3 - Exhibit 1- Declaration of Hon. Roy Wilbanks<br>ECF 23-4 - Exhibit 2 - Declaration of Hon. Floyd Clack<br>ECF 23-5 - Exhibit 3 - Declaration of Hon. Gary Hawks<br>ECF 23-6 - Exhibit 4 - Declaration of Hon. Philip Incarnati<br>ECF 23-7 - Exhibit 5 - Declaration of Hon. Mohamed Okdie<br>ECF 23-8 - Exhibit 6 - Declaration of Hon. Francine Parker<br>ECF 23-9 - Exhibit 7 - Declaration of Hon. Thomas Sidlik<br>ECF 23-10 - Exhibit 8 - Declaration of Hon. James Stapleton<br>ECF 23-11 - Exhibit 9 - Declaration of Dr. Susan Martin<br>ECF 23-12 - Exhibit 10 - Declaration of Dr. Vernon Polite<br>ECF 23-13 - Exhibit 11 - Letter Dated February 2, 2009<br>ECF 23-14 - Exhibit 12 - *Davis v. Arkansas Valley,* 99 Fed. Appx. 838, 2004 WL 1119941 (10th Cir. 2004) | 10/7/09 |
| ECF 28 | Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, on All Claims for Damages, Due to Qualified Immunity and the Eleventh Amendment; Brief in Support | 10/16/09 |

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| | ECF 28-3 - Exhibit 1 EMU 2005-2007 Graduate Catalog excerpt | |
| ECF 37 | Plaintiff's Response to Defendants' Motion To Dismiss (Filed By Defendants Wilbanks, Clack, Hawks, Incarnati, Okdie, Parker, Sidlik, Stapleton, Martin, And Polite) Or, In The Alternative, For Summary Judgment | 11/2/09 |
| ECF 44 | Defendants' Reply in Support of Defendants' Motion To Dismiss (Filed By Defendants Wilbanks, Clack, Hawks, Incarnati, Okdie, Parker, Sidlik, Stapleton, Martin, And Polite) Or, In The Alternative, For Summary Judgment<br><br>ECF 44-3 - Exhibit 13 - Declaration of Dr. Irene Mass Ametrano<br>ECF 44-4 - Exhibit 14 - Declaration of Dr. Perry C. Francis<br>ECF 44-5 - Exhibit 15 - Declaration of Dr. Gary Marx<br>ECF 44-6 - Exhibit 16 - Declaration of Dr. Yvonne L. Callaway<br>ECF 44-7 - Exhibit 17 - Declaration of Dr. Suzanne M. Dugger<br>ECF 44-8 - Exhibit 18 - *Shorts v Bartholomew*, 255 Fed. Appx. 46, 2007 WL 3037268 (6th Cir. 2007) | 11/18/09 |
| ECF 51 | Plaintiff's Response to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, on All Claims for Damages, Due to Qualified Immunity and the Eleventh Amendment | 11/20/09 |
| ECF 64 | Reply Brief in Support of Defendants' Motion (Dkt. 28) to Dismiss or, in the Alternative, for Summary Judgment, on All Claims for Damages, Due to Qualified Immunity and the Eleventh Amendment | 12/18/09 |
| ECF 75 | Order Granting in Part Defendants Wilbanks', Clack's, Hawks', Incarnati's, Okdie's, Parker's, Sedlik's, Stapleton's, Martin's, and Polite's Motion to Dismiss or in the Alternative for Summary Judgment (#23) and Denying Plaintiff's Rule 56(f) Motion for Relief from Defendants' Motion for Summary Judgment | 2/1/10 |
| ECF 79 | Plaintiff's Motion for Summary Judgment; Memorandum of Law in Support<br><br>ECF 79-3 - Exhibit 1 - (part 1 of 2) Excerpts from Corey | 2/2/10 |

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| | & Corey, *Becoming a Helper* (2007)<br>ECF 79-4 - Exhibit 1 - (part 2 of 2) Excerpts from Corey & Corey, *Becoming a Helper* (2007)<br>ECF 79-5 - Exhibit 2 - Excerpts from Cormier & Nurius, *Interviewing and Change Strategies for Helpers* (2003)<br>ECF 79-6 - Exhibit 3 - Excerpts from Sue & Sue, *Counseling the Culturally Diverse* (2008)<br>ECF 79-7 - Exhibit 4 - Excerpts from Logan, *Counseling Gay Men and Lesbians* (2002)<br>ECF 79-8 - Exhibit 5 - APA Guidelines<br>ECF 79-9 - Exhibit 6 - ALGBTIC Competencies<br>ECF 79-10 - Exhibit 7 - Extended Entry # 1, Ward's class paper from COUN 502<br>ECF 79-11 - Exhibit 8 - Personal and Professional Development Paper<br>ECF 79-12 - Exhibit 9 - Course Syllabus, COUN 580<br>ECF 79-13 - Exhibit 10 - Course Syllabus, COUN 502<br>ECF 79-14 - Exhibit 11 – Plaintiff's Academic Transcript from EMU | |
| ECF 80 | Continued Exhibits to ECF 79<br><br>ECF 80-2 - Exhibit 14 - 02/02/09 Letter from Dugger to Ward<br>ECF 80-3 - Exhibit 15 - 01/29/09 Letter from Dugger to Ward<br>ECF 80-6 - Exhibit 19 - 02/04/09 Email communications between Callaway, Dugger and Tracy<br>ECF 80-7 - Exhibit 20 - 03/11/09 emails regarding revisions to first draft of dismissal letter | 2/2/10 |
| ECF 82 | Defendants' Motion for Summary Judgment Pursuant to Fed.R.Civ. P. 56; Brief in Support<br><br>ECF 82-3 – Exhibit 1 - Deposition Transcript- Julea Cara Ward, December 22, 2009<br>ECF 82-4 - Exhibit 2 - Deposition Transcript – Dr. Irene Mass Ametrano, December 18, 2009<br>ECF 82-5 - Exhibit 3 - Deposition Transcript – Dr. Yvonne Callaway, December 17, 2009<br>ECF 82-6 - Exhibit 4 - Deposition Transcript – Dr. | 2/2/10 |

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| | Suzanne Dugger, December 16, 2009<br>ECF 82-7 - Exhibit 5 - Deposition Transcript – Dr. Perry Clark Francis, December 17, 2009<br>ECR 82-8 - Exhibit 6 – Deposition Transcript – Dr. Vernon Polite, December 21, 2009<br>ECF 82-9 - Exhibit 7 - Defendants' Rule 26(a) Expert Disclosure of Dr. David Marshall Kaplan<br>ECF 82-10 - Exhibit 8 - Defendants' Rule 26(a) Expert Disclosure of Dr. Barbara Herlihy and Dr. Mary A. Hermann<br>ECF 82-11 - Exhibit 9 - Defendants' Rule 26(a) Expert Disclosure of Dr. Michael M. Kocet | |
| ECF 97 | Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment | 2/26/10 |
| ECF 99 | Plaintiff's Response to Defendants' Motion for Summary Judgment | 2/26/10 |
| ECF 103 | Reply Brief in Support of Defendants' Motion for Summary Judgment Pursuant to Fed.R.Civ. P. 56 (ECF 82) | 3/15/10 |
| ECF 105 | Reply in Support of Plaintiff's Motion for Summary Judgment | 3/15/10 |
| ECF 109 | Order Denying Defendants' Motion to Dismiss or for Summary Judgment on All Claims for Damages Due to Qualified Immunity and the Eleventh Amendment (#28) and Denying As Moot Plaintiff's Rule 56(f) Motion (#52) | 3/24/10 |
| ECF 111 | Brief *Amicus Curiae* of Grand Valley State University, Lake Superior State University, Northern Michigan University, Oakland University, Saginaw Valley State University, and Wayne State University in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment | 3/26/10 |
| ECF 118 | Brief in Support of Motion for Reconsideration of, and Relief from, Order Denying Defendants' Qualified Immunity Summary Judgment Motion (ECF 28) and/or for Clarification of the Court's Order Denying That Motion (ECF 109)<br><br>ECF 118-2 - Exhibit A, Declaration of Dr. Gerald Corey and Marianne Schneider Corey<br>ECF 118-3 - Exhibit A-1, Resume of Dr. Gerald Corey | 4/12/10 |

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| | ECF 118-4 - Document Continuation A-1, Resume of Dr. Gerald Corey<br>ECF 118-5 - Exhibit A-2, Resume of Marianne Schneider Corey<br>ECF 118 -6 - Exhibit B, Declaration of Mark T. Boonstra<br>ECF 118 -7 - Exhibit B-1, ACA 2010 Keynote Address, Dr. Gerald Corey<br>ECF 118 -8 - Exhibit B-2, Keynote Address Handout<br>ECF 118 -9 - Exhibit B-3, Excerpts From the Program Guide of the 2010 ACA Conference<br>ECF 118 - 10 - Document Continuation B-3, Excerpts From the Program Guide of the 2010 ACA Conference<br>ECF 118 - 11 - Exhibit B-4, *Becoming a Helper*, Fifth Edition, "About the Authors"<br>ECF 118 - 12 - Exhibit C, Article dated November 3, 2009 from CNN.com | |
| ECF 119 | Motion for Reconsideration of, and Relief from, Order Denying Defendants' Qualified Immunity Summary Judgment Motion (ECF 28) and/or for Clarification of the Court's Order Denying That Motion (ECF 109) | 4/13/10 |
| ECF 125 | Order Denying Defendants' Motion for Reconsideration and Granting Motion for Clarification (#119) | 5/4/10 |
| ECF 134 | Defendants' Renewed Motion for Summary Judgment on All Claims for Damages Due to Qualified Immunity | 6/30/10 |
| ECF 138 | Order Denying Plaintiff's Motion for Judgment on the Pleadings as Moot [Doc. #53], Denying Plaintiff's Motion to Vacate as Moot [Doc. #131] and Denying Defendant's Renewed Motion for Summary Judgment as Moot [Doc. #134] | 7/26/10 |
| ECF 139 | Opinion and Order Denying Plaintiff's Motion for Summary Judgment [Doc. #79] and Granting Defendants' Motion for Summary Judgment [Doc. #82] | 7/26/10 |
| ECF 140 | Judgment | 7/26/10 |
| ECF 152 | Transcript of Motion Hearing held on January 28, 2010 | 10/22/10 |
| ECF 154 | Transcript of Motion Hearing held on June 24, 2010 | 10/26/10 |