

**CASE NOS. 10-2100, 10-2145**

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

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JULEA WARD,  
Appellant,

v.

ROY WILBANKS, *et al.*  
Appellees.

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On Appeal From the United States District Court for the  
Eastern District of Michigan No. 09-11237  
Hon. George Caram Steeh, United States District Judge

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**AMICUS BRIEF OF PARENTS, FAMILIES AND FRIENDS OF LESBIANS  
AND GAYS ("PFLAG"), GAY, LESBIAN AND STRAIGHT EDUCATION  
NETWORK ("GLSEN"), AFFIRMATIONS, AND RUTH ELLIS CENTER  
IN SUPPORT OF DEFENDANT-APPELLEE FOR AFFIRMANCE**

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Dated: February 11, 2011

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2. Is there a publicly owned corporation, not a party to the appeal, that has financial interest in the outcome? **No.** If the answer is YES, list the identity of such corporation and the nature of the financial interest: N/A.

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## TABLE OF CONTENTS

	<u>Page(s)</u>
PFLAG’S CORPORATE DISCLOSURE STATEMENT .....	i
GLSEN’S CORPORATE DISCLOSURE STATEMENT .....	ii
AFFIRMATIONS’ CORPORATE DISCLOSURE STATEMENT .....	iii
RUTH ELLIS CENTER’S CORPORATE DISCLOSURE STATEMENT .....	iv
TABLE OF CONTENTS .....	v
TABLE OF AUTHORITIES .....	v
STATEMENT OF THE ISSUE TO BE ADDRESSED BY AMICI .....	xiii
FED. R. CIV. P. 26(C)(5) STATEMENT .....	xiii
STATEMENT OF INTEREST OF AMICI CURIAE AND AUTHORITY TO FILE .....	xiv
SUMMARY OF ARGUMENT .....	xvi
ARGUMENT .....	1
I. Ward’s Refusal to Counsel Clients in Need of Counseling Concerning Same-Sex Relationships Constitutes Discrimination Based on Sexual Orientation .....	1
II. Prohibiting Discrimination by Counselors in the Provision of Counseling Services Permissibly Limits Professional Behavior, Not Speech. ....	2
III. Ethical Rules Prohibiting Discrimination Based on Sexual Orientation Do Not Infringe Upon Ward’s Right to Free Exercise .....	3
IV. EMU’s Interests in Enforcing Ethical Rules Prohibiting Discrimination Based on Sexual Orientation in the Provision of Counseling Services Satisfy any Level of Review .....	6
CONCLUSION .....	25

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7) .....	26
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## TABLE OF AUTHORITIES

<b>CASES</b>	<b>Page(s)</b>
<i>Bill Johnson's Restaurants, Inc. v. National Labor Relations Board</i> , 461 U.S. 731, 742 (1983).....	21
<i>Board of Directors of Rotary International v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987).....	6
<i>Boy Scouts of America v. Wyman</i> , 335 F.3d 80, 92 n.5 (1987) .....	7
<i>Bray v. Alexandria Women's Health Clinic</i> , 506 U.S. 263 (1993).....	2
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954).....	8
<i>Bruff v. North Mississippi Health Services, Inc.</i> , 244 F.3d 495 (5 <sup>th</sup> Cir. 2001).....	22
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940) .....	2
<i>Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez</i> , 130 S.Ct. 2971 (2010) ("CLS") .....	1, 2, 5, 8
<i>Church of Lukumi Babalu Aye, Inc. v. Hialeah</i> , 508 U.S. 520 (1993).....	4
<i>Cruzan v. Dir., Mo. Dep't of Health</i> , 497 U.S. 261 (1990) .....	21
<i>EEOC v. Fremont Christian School</i> , 781 F.2d 1362 (9 <sup>th</sup> Cir. 1986) .....	7
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<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990) .....	2, 4
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<i>Gentile v. State Bar of Nevada</i> , 501 U.S. 1030, 1071 (1991).....	6
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968) .....	20



<i>Heart of Atlanta Motel v. United States</i> , 379 U.S. 241 (1964).....	8
<i>Henkle v. Gregory</i> , 150 F. Supp. 2d 1067 (D. Nev. 2001).....	23
<i>In Re Sawyer</i> , 360 U.S. 622, 646-47 (1959) .....	6
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<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	1
<i>Nabozny v. Podlesny</i> , 92 F.3d 446 (7th Cir. 1996).....	22
<i>National Ass’n for the Advancement of Psychoanalysis v. California Board of Psychology</i> , 228 F.3d 1043, 1054 (9 <sup>th</sup> Cir. 2000).....	21
<i>New York v. Ferber</i> , 458 U.S. 747 (1982) .....	20
<i>North Coast Women’s Care Medical Group, Inc. v. Benitez</i> , 189 P.3d 959 (Cal. 2008).....	5
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973) .....	8
<i>Nuxoll v. India Prairie Sch. Dist. #204</i> , 523 F.3d 668, 671 (7th Cir. 2008) .....	12
<i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984).....	8
<i>People v. Handzik</i> , 102 N.E.2d 340 (Ill. 1951).....	24
<i>People v. Pierson</i> , 68 N.E. 243 (N.Y. 1903.....	24
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944).....	20, 23
<i>Reynolds v. United States</i> , 98 U.S. 145 (1878).....	23
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	6
<i>Sable Commc’ns of Cal., Inc. v. FCC</i> , 492 U.S. 115 (1989).....	20
<i>Shultz v. Wells</i> , No. 2:09cv646-WKW, 2010 U.S. Dist. LEXIS 26984 **31-32 n.7 (M.D. Ala. Mar. 3, 2010).....	6
<i>Spratt v. Kent County</i> , 621 F. Supp. 594 (D.C. Mich. 1985).....	22

<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997) .....	20
<i>Winters v. Miller</i> , 446 F.2d 65 (2d Cir. 1971) .....	23

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**STATEMENT OF THE ISSUE TO BE ADDRESSED BY *AMICI***

What effects do the professional obligations imposed on school counselors, and the potentially grave consequences for their violation, have on the analysis of the First Amendment claims asserted by Appellant?

**FED. R. CIV. P. 29(C)(5) STATEMENT**

No party's counsel has authored this brief in whole or in part, and no party or party's counsel has contributed money intended to fund the preparation or submission of this brief. No person, other than the *amici curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

**STATEMENT OF INTEREST OF *AMICI CURIAE* AND AUTHORITY TO  
FILE**

*Amici curiae* have authority to file this brief pursuant to Fed. R. App. 29(a) because all parties have consented to its filing.

*Amici curiae* PFLAG, GLSEN, AFFIRMATIONS, and RUTH ELLIS CENTER are organizations that seek to ensure that young people have affirming and accepting environments in which to flourish. *Amici* have dedicated their efforts to creating settings for youth in which those who are lesbian, gay, bisexual, transgender, and those who are questioning their sexual orientation or gender identity (“LGBTQ”), are supported and provided accurate information in counseling situations. As a result of their collective academic and first-hand experiences, *amici* understand the critical role of counselors in creating an environment where all young people, regardless of sexual orientation or gender identity and expression, feel safe and accepted at school and in the world. Those experiences also have helped them understand the harmful role that counselors who do not follow the American Counseling Association’s (“ACA”) ethical standards can play in undermining LGBTQ students’ self-esteem, self-worth and overall mental health.

PFLAG is a national, nonprofit family organization, founded in 1973 by heterosexual mothers and fathers, with a grassroots network of over 200,000 members and supporters, with chapters in all 50 states and 15 chapters in Michigan. PFLAG’s

members are the parents, families and friends of lesbian, gay, bisexual and transgender persons (“LGBT”) who celebrate diversity and envision a society that embraces everyone, including those of diverse sexual orientations and gender identities. The mission of PFLAG is to promote the health and well-being of LGBT persons, their families and friends.

The Gay, Lesbian and Straight Education Network (“GLSEN”) is the leading national education organization focused on ensuring safe schools for all students. Established nationally in 1995, GLSEN envisions a world in which every child learns to respect and accept all people, regardless of sexual orientation or gender identity/expression. GLSEN seeks to develop school climates where difference is valued for the positive contribution it makes to creating a more vibrant and diverse community. As an advocate for fair treatment and protection against discrimination for young people in public schools, GLSEN joins this *amicus* brief to stress the importance of ethical counseling professionals who adhere to governing professional standards of care in creating a healthy and positive school climate.

AFFIRMATIONS is Metro Detroit’s community center for LGBT people and their allies. Open since 1989, AFFIRMATIONS provides a welcoming space where people of all sexual orientations, gender identities & expressions, and cultures can find support and unconditional acceptance, and where they can learn, grow, socialize, and have fun. AFFIRMATIONS has operated its counseling program since early 2009, which supports individuals facing the environmental challenges associated with



acknowledging their sexual orientation and/or gender identity. Since launching the program, AFFIRMATIONS has trained over 42 counseling students from local colleges and universities – providing direct training in counseling clients who identify as LGBT – and currently has 11 students in practicum. AFFIRMATIONS is committed to ensuring that LGBT people seeking counseling are provided with culturally competent care offered in a safe setting that is free from social stigma or discrimination.

RUTH ELLIS CENTER (“CENTER”), incorporated in 1999, is a youth social services agency that serves the needs of runaway, at risk and homeless youth. The CENTER’s mission is “to provide short-term and long-term residential safe space and support services for runaway, homeless, and at-risk gay, lesbian, bi-attractional, transgender and questioning youth.” The CENTER operates both a Drop In Center as well as a State of Michigan licensed Child Caring Institution, and provides on-site short and long term mental health services. The CENTER is committed to insuring the availability of professionals with the knowledge, skills, and attitudes to provide quality mental health care to LGBTQ youth for the early identification of risk behaviors, mental health disorders and substance abuse.

### **SUMMARY OF ARGUMENT**

*Amici* agree with Eastern Michigan University (“EMU”) and the District Court that courts should not second-guess curricular requirements that are reasonably related to legitimate pedagogical interests, where, as here, the school

imposing the curriculum is not discriminating against a student based on her status, or trying to censor the student or her viewpoint. *Kissinger v. Board of Trustees of Ohio St. Univ.*, 5 F.3d 177, 181 (6<sup>th</sup> Cir. 1993). Moreover, *amici* agree with EMU that Ward properly faced dismissal for her failure to meet EMU's curricular requirement (mandated by ethical rules, state regulations, and the relevant accrediting agency) that counselors provide counseling services based on the client's values instead of their own. (Defendants-Appellees' Brief at 14.) Consequently, this Court can affirm the ruling of the District Court without addressing whether EMU was justified in dismissing Ward because she also violated ethical rules prohibiting discrimination based on sexual orientation.

However, even if EMU's dismissal of Ward could be characterized as discipline solely because she discriminated based on sexual orientation in the provision of counseling services, EMU's actions still would pass constitutional muster easily. Ward's claim – that she is exempt from generally applicable ethical rules and nondiscrimination requirements that govern how counselors practice their profession – is contrary to controlling U.S. Supreme Court and other precedent. Her claim, if allowed to proceed, would have damaging consequences that reach far beyond this case. Nondiscrimination requirements governing healthcare providers regulate conduct, not speech, and constitute neutral rules of general applicability that do not target anyone based on belief.

*Amici* also write to clarify that the state has an interest in insuring that counselors meet their professional obligation not to discriminate based on sexual orientation, especially in light of the harm that a counselor could cause to LGBTQ youth if a counselor expressed disapproval of or refused to counsel such a student in a school setting. Ward was pursuing a degree that would allow her to become a high school counselor. Abundant empirical research attests to the vulnerability of LGBTQ youth in school and the potentially devastating consequences – including youth suicide – that may result from repudiation and rejection by school officials and mental health professionals. Thus, EMU’s interest in enforcing its curricular requirements in this case is compelling whether viewed as a pedagogical interest in ensuring that counseling students understand their professional obligations, which include the primacy of promoting the patient’s welfare, or as a governmental interest in protecting youth from psychological and physical harm caused by school officials.

## ARGUMENT

### **I. Ward's Refusal to Counsel Clients in Need of Counseling Concerning Same-Sex Relationships Constitutes Discrimination Based on Sexual Orientation.**

Ward erroneously attempts to distinguish her behavior from sexual orientation-based discrimination. Specifically, she claims that she would counsel lesbian or gay clients “on any issue that did not require her to affirm or validate homosexual relationships or behavior,” and that therefore her conduct does not constitute discrimination based on the status of being lesbian or gay. Appellant’s Brief at p. 49, fn. 7; *see also* fn 5. This is a false distinction and courts uniformly have recognized it as such. The U.S. Supreme Court expressly has “refused to distinguish between status and conduct” in this context. *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S.Ct. 2971, 2990 (2010) (“*CLS*”), quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination” (italics in original)). As Justice O’Connor explained in her concurrence in *Lawrence*, “[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.” 539 U.S. at 583; *cf.*

*Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews"). To refuse to counsel gay people about their relationships or identity as gay people *is* discrimination based on sexual orientation.

## **II. Prohibiting Discrimination by Counselors in the Provision of Counseling Services Permissibly Limits Professional Behavior, Not Speech.**

The U.S. Supreme Court draws a firm distinction between expression, which is protected, and conduct, which "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). "While the freedom to *believe* is absolute, freedom to *act* pursuant to one's religious beliefs cannot be." *Cantwell, supra*, 31 U.S. at 303-304 (italics added).

A professional requirement of nondiscrimination in the provision of counseling services is not a restriction on speech. A counselor's refusal to provide services to gay and lesbian clients is conduct; it is not an expression of opinion about gay or lesbian people. To implicate the free-speech guarantee, a religious freedom case must involve some challenge to "communicative activity." *Employment Division v. Smith*, 494 U.S. 872, 885-86 (1990); *see also CLS, supra*, at 2994 (a law school's rule prohibiting student groups from adopting exclusionary membership policies "aims at the *act*" of exclusion rather than student speech, pointing out that "[a]lthough registered student groups must conform their conduct

to the Law School's regulation by dropping access barriers, they may express any viewpoint they wish – including a discriminatory one”) (emphasis in original), citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (statute penalizing universities that bar military recruiting regulates universities' conduct, not speech).

That Ward's discriminatory conduct was religiously motivated does not exempt her from compliance with governing ethical rules and treatment standards for her profession. Compliant conduct is not speech. Otherwise, then by extension, filing an accurate income tax return would be an expression of agreement with the size of one's tax bill. Complying with a highway speed limit likewise would amount to a statement that going faster is unwise, and an employer's compliance with minimum wage laws would be an expression of support for such laws. Yet nobody may refuse to file a tax return, nor obey speed limits, nor pay the minimum wage, simply as a matter of free expression. Ward simply cannot mold an inquiry into her professional conduct as a damper on her right to self-expression.

### **III. Ethical Rules Prohibiting Discrimination Based on Sexual Orientation Do Not Infringe Upon Ward's Right to Free Exercise.**

Requiring nondiscrimination in the provision of mental health services is a neutral rule of general applicability that does not target religious belief or practice. Such rules are to be enforced as long as they serve a legitimate state purpose in a

rational manner. *Emp. Div. v. Smith*, 494 U.S. at 885-86. Neutral and generally applicable laws “need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice,” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

Ward mistakenly contends that her religious motivation for discriminating against LGBT clients places her beyond the reach of rules prohibiting such discrimination. The U.S. Supreme Court in *Employment Division v. Smith* rejected an almost identical claim. 494 U.S. at 885-86. There, the respondents argued “that their religious motivation for using peyote place[d] them beyond the reach of a criminal law that is not specifically directed at their religious practice.” 494 U.S. at 878. The U.S. Supreme Court disagreed, in language equally applicable here: “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.” *Id.* at 878-79.

Moreover, the Court continued, “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious belief.” *Id.* at 879 (citation omitted). The “right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general

applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Id.* at 879, quoting *United States v. Lee*, 455 U.S. 252, 263 (1982), fn. 3.

A “regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *CLS*, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Thus, the First Amendment’s protection of the free exercise of religion does not exempt health care providers from laws prohibiting discrimination based on sexual orientation “even if compliance poses an incidental conflict with religious beliefs.” *North Coast Women’s Care Medical Group, Inc. v. Benitez*, 189 P.3d 959, 967 (Cal. 2008) (no First Amendment exemption from nondiscrimination law for physician with religious objection to treating lesbian patients).

Consequently, even if EMU’s actions in dismissing Ward were not subject to deference because of her failure to meet legitimate pedagogical curricular requirements, but instead were based solely upon her violation of professional nondiscrimination requirements, EMU’s actions are subject to rational basis analysis, which it easily satisfies. *See* Point IV, below.



#### IV. EMU's Interests in Enforcing Ethical Rules Prohibiting Discrimination Based on Sexual Orientation in the Provision of Counseling Services Satisfy any Level of Review

*Amici* agree with EMU that it need not demonstrate a compelling interest to justify either its curricular requirements in this case, or its dismissal of Ward from its counseling program.<sup>1</sup> Nonetheless, given the compelling nature of the interests served by EMU's actions in this case, the university's actions surpass any constitutional test the Court could apply. The state has a compelling interest not only in ensuring that students in a public university's counseling program meet the criteria required by accrediting entities, and are familiar with and capable of practicing within the ethical rules established by the relevant professional bodies, but also in preventing the significant harm that would result to LGBTQ youth by school counselors who discriminate on the basis of sexual orientation or gender identity.

States have a compelling interest in deterring discrimination. *See, e.g., Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also id.* at 628

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<sup>1</sup> Indeed, Ward's disregard for her ethical obligations, and the potential resulting harm to prospective clients, render her First Amendment analysis irrelevant. "[O]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991), *quoting In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart J., concurring); *Shultz v. Wells*, No. 2:09cv646-WKW, 2010 U.S. Dist. LEXIS 26984 \*\*31-32 n.7 (M.D. Ala. Mar. 3, 2010)

(concluding that “acts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent”)<sup>2</sup>; *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1364-65 (9<sup>th</sup> Cir. 1986) (finding a compelling governmental interest in eradicating gender discrimination where federal law prohibited an employer from relying on religious views about gender roles within marriage to offer health insurance to only some employees); *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 32 (D.C. App. 1987) (government’s interest in ending sexual orientation discrimination held compelling where anti-discrimination statute placed all forms of discrimination on equal footing and compelling interest in ending other forms of discrimination already was well established). Health care professionals’ ethical rules prohibiting

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<sup>2</sup> As recognized in *Roberts*, the government interest in eradicating discrimination against classes of persons can be “compelling” even if the government’s own discrimination based on that characteristic has not been found to trigger strict scrutiny. 468 U.S. at 623 (holding that prohibition of sex discrimination is a compelling interest, even though sex-based classifications had not been held to require strict scrutiny). See also *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987) (holding that prohibition of sexual orientation discrimination is a compelling interest); *Boy Scouts of America v. Wyman*, 335 F.3d 80, 92 n.5 (1987) (noting that a government body “that has adopted a policy of equal protection with respect to a specific group may have a compelling interest in the enforcement of that policy”) (Calabresi, J., concurring); *EEOC v. Miss. College*, 626 F.2d 477, 488 (5<sup>th</sup> Cir. 1980) (“the government has a compelling interest in eradicating discrimination in all forms.”).

discrimination, and enforced within the context of a public university's training program, protect the right of all individuals to participate in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society[,]" *Romer*, 517 U.S. 620, 631 (1996), and also protect basic human dignity. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964); *Benitez*, 189 P.3d at 968 (state has a compelling interest in "ensuring full and equal access to medical treatment irrespective of sexual orientation").

EMU's interest in preventing the furtherance of sexual orientation-based discrimination by students who counsel patients in a university-run clinical setting is grounded in the serious and substantial harm discrimination causes, especially when supported by government imprimatur. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Norwood v. Harrison*, 413 U.S. 455, 463 (1973) ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (finding that the impact of segregation "is greater when it has the sanction of law") (internal quotation marks omitted)); *CLS, supra*, at 2991 (in finding that a public university's policy against exclusionary student clubs was reasonable and credit-

worthy, the Court noted that the university properly could consider the harm to those excluded).

Further, Michigan has a compelling interest in ensuring that students in EMU's counseling program are capable of adhering to their professional obligation not to discriminate based on sexual orientation *after they graduate*, become licensed, and begin providing counseling services in a school setting. School counselors are highly likely to encounter LGBTQ students in need of counseling. Estimates show that there are nearly three million LGBT students in the United States.<sup>3</sup> Many of these students may seek counseling, and their sexual orientation may not be evident to a counselor at the outset of a counseling session. As the court below noted, "In a high school setting, a counselor can expect to be presented with all sorts of issues, including homosexuality." District Court Opinion, ECF 139 at 26. "Counseling is not an exact science; rather it is unpredictable and personal at its core. A client may seek counseling for depression, or issues with their parents, and end up discussing a homosexual relationship." *Id.*

A school counselor who is unwilling to assist such students, or worse – a counselor who expresses disapproval of a student's status as LGBT – is both incapable of doing her job, and likely to cause significant harm. LGBT students

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<sup>3</sup> Connif Callahan, *Schools That Have Not Worked With Gay and Lesbian Students Have Been Sanctioned By the Courts*, 121.12 Education 313-326 (2001).

face a range of issues in the school environment and often seek help from school professionals and, in particular, school counselors.<sup>4</sup>

For example, LGBT students may seek counseling because of bullying. Bullying, which involves repeated physical, psychological, social, or verbal attacks by an aggressor against a victim in an uneven power dynamic, “fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”<sup>5</sup> Victims of bullying commonly experience declines in academic performance, loss of self-esteem, absences from school, disruption of relationships with family members indifferent to or unaware of students’ plight, and in some serious cases, they may

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<sup>4</sup> Diane E. Elze, *Gay, Lesbian, and Bisexual Youths’ Perceptions of their High School Environments and Comfort in School*, 25.4 *Children & Schools* 225 (2003) (study showing that 57% of LGBT students surveyed sought help from a school professional—42% from a school counselor); Janet Fontaine, *Evidencing A Need: School Counselors’ Experiences With Gay and Lesbian Students*, *Professional School Counseling*, Vol. 1.3 (1998) (more than 51% of high school counselors who responded reported that they had experience working with at least one student who was confused about sexual identity issues—42% had worked directly with at least one self identified gay or lesbian student. Twenty-one percent of elementary school counselors reported that they knew of students in their schools who were either identifying as gay or lesbian and/or questioning their sexual identity).

<sup>5</sup> Xin Ma, Len Stewin, and Deveda Mah, *Bullying in School: Nature, Effects, and Remedies*, 16.3 *Research Papers in Education* 247 (2001); Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dept. of Ed., *Dear Colleague Letter Harassment and Bullying* (Oct. 26, 2010).

even run away or commit suicide.<sup>6</sup> Michigan students are no strangers to such tragedies. Over the last decade, at least eight Michigan students are known to have committed suicide as a direct result of bullying.<sup>7</sup>

LGBT students are at least as likely to feel unsafe in school as members of other minority groups.<sup>8</sup> Because of fears about safety at school, LGBT students are eight times more likely to miss school than their heterosexual counterparts.<sup>9</sup>

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

<sup>7</sup> Heywood, Todd, *Students, Community Gather to Oppose Bullying, Homophobia* THE MICHIGAN MESSENGER, Oct. 10, 2010, at <http://michiganmessenger.com/42435/students-community-gather-to-oppose-bullying-homophobia>; see also, AP, *Michigan Teen's Suicide Prompts Family Campaign Against Bullying*, CLEVELAND.COM, Apr. 26, 2010, at [http://www.cleveland.com/nation/index.ssf/2010/04/michigan\\_teens\\_suicide\\_prompts.html](http://www.cleveland.com/nation/index.ssf/2010/04/michigan_teens_suicide_prompts.html).

<sup>8</sup> See, e.g., Pearson J., Muller C., & Wilkinson L., *Adolescent Same-sex Attraction and Academic Outcomes: The Role of School Attachment and Engagement*, 54.4 Social Problems 523 (2007). In one study, over 73% of LGBT students in grades K-12 heard homophobic remarks frequently. Joseph G. Kosciw, et al., *The 2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, at xii (2007) ("Climate Survey"), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1290-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1290-1.pdf). Over 86% had been harassed or bullied and 44% had been physically harassed (such as being pushed or shoved) at school because of their sexual orientation. *Id.* at xii-xiii. Over 22% of LGBT youth had experienced serious physical attacks (such as being punched, kicked or injured with a weapon) at school because of their sexual orientation. *Id.* at xiii.

<sup>9</sup> Stuart Biegel & Sheila James Kuehl, *Williams Institute Report, Safe at School: Addressing the School Environment and LGBT Safety through Policy and Legislation* (September 2010), <http://www.law.ucla.edu/williamsinstitute/pdf/>



Not only do LGBT students' grades suffer, but also the percentage of LGBT students who do not plan to pursue a post-secondary education is almost twice that of the national average for students generally.<sup>10</sup>

The most devastating consequence is LGBT youth suicide.<sup>11</sup> The suicide rate for LGBT students continues to be three to four times higher than for their heterosexual counterparts.<sup>12</sup> A recent survey of transgender and gender-nonconforming individuals revealed a much higher attempted suicide rate than the general population (41% vs. 1.6%), but the differential is still greater for those

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Biegel LGBT.pdf. Of the LGBT students surveyed, 32.7% missed a day of school because of feeling unsafe compared with only 4.5% of a national sample of secondary school students. *See generally Nuxoll v. India Prairie Sch. Dist.* #204, 523 F.3d 668, 671 (7th Cir. 2008) (citing suggestive evidence "that adolescent students subjected to derogatory comments about such characteristics may find it even harder than usual to concentrate on their studies and perform up to the school's expectations.").

<sup>10</sup> *Id.*

<sup>11</sup> Max Harrold, *Bullying affects gays' health: Study*, Montreal Gazette, Feb. 3, 2011, [www.montrealgazette.com/news/Bullying+affects+gays+health+Study/4216993/story.html](http://www.montrealgazette.com/news/Bullying+affects+gays+health+Study/4216993/story.html) (study demonstrates that bullying is linked to lesbian and gay youth suicide).

<sup>12</sup> *Id.*; Steven A. Safren and Richard G. Heimberg, "Depression, Hopelessness, Suicidality, and Related Factors in Sexual Minority and Heterosexual Adolescents," 67 *Journal of Consulting and Clinical Psychology* 859, 861 (1999) (noting that because of the isolation and rejection they face, youth who are lesbian, gay or bisexual experience higher rates of suicide, substance abuse, depression and other mental health problems).

transgender and gender non-conforming people who suffered bullying, harassment, and violence in school (51%).<sup>13</sup>

Bullying is widespread. While 1 in 5 elementary school and 1 in 10 middle school students in the United States report being bullied, bullying is also grossly underreported.<sup>14</sup> Since the majority of bullying incidents occur at school, school staff has a vital role to play in reducing bullying, in the form of more rigorous intervention and discipline, intensive supervision, counseling for students, and effective training for teachers.<sup>15</sup>

A school counselor plays an integral role in creating an environment where all students, regardless of sexual orientation or gender identity/expression, feel safe and accepted. In her chosen field of school counseling, Ward would be at the

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<sup>13</sup> Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, with Jody L. Herman, Jack Harrison, and Mara Keisling, *National Transgender Discrimination Survey Report on Health and Health Care* (NCTE/NGTLF, Washington D.C. October 2010). Of the respondents, 88% identify as either male-to-female transgender (MTF), also referred to as transgender women, or female-to-male transgender (FTM), also referred to as transgender men. Twelve percent (12%) of the sample identify as gender queer or as gender non-conforming.

<sup>14</sup> Stephen L. Brown, David A. Birch, Vijaya Kancharla, *Bullying Perspectives: Experiences, Attitudes, and Recommendations of 9 to 13 Year Olds Attending Health Education Centers in the United States*, 75.10 J. of Sch. Health 384 (2005); Xin Ma, Len Stewin, and Deveda Mah, *Bullying in School: Nature, Effects, and Remedies*, 16.3 Research Papers in Education 247 (2001) (citing victims' experience of inadequate support from adults and adults' lack of knowledge regarding proper responses).

<sup>15</sup> *Id.*



intersection of the “[t]hree venues for providing services to youth [that] can make vital differences in the lives of LGBT youth—schools, mental health and social services, and health care services – by increasing safety and inclusion.”<sup>16</sup> While various school administrators and teachers have obligations to know of and protect against threats to student safety, school counselors stand out. They have specialized training intended to prepare them to recognize warning signs and to appreciate negative consequences from inaction, ethical obligations to act to prevent harm to at-risk students, and unique access to information from students who trust that their counselors will act in accordance with professional standards.<sup>17</sup>

In addition to seeking help regarding bullying and safety concerns, LGBTQ students may seek counseling for a host of other issues, including depression and low self-esteem.<sup>18</sup> For example, youth of every sexual orientation or gender identity may require counseling to deal with the emotional turmoil they experience as they enter adolescence, begin to experience attraction to others, and enter dating

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<sup>16</sup> Suicide Prevention Resource Center, *Suicide risk and prevention for lesbian, gay, bisexual, and transgender youth* (2008) [http://www.sprc.org/library/SPRC\\_LGBT\\_Youth.pdf](http://www.sprc.org/library/SPRC_LGBT_Youth.pdf)

<sup>17</sup> Thomas J. Hernandez and Susan R. Seem, *A Safe School Climate: A Systemic Approach and the School Counselor*, 7.4 Professional School Counseling 256 (2004).

<sup>18</sup> Janet Fontaine, *Evidencing A Need: School Counselor’s Experiences With Gay and Lesbian Students*, 1.3 Professional School Counseling 8 (1998).

relationships. Additionally, LGBTQ youths may face conflict at home, perhaps in the context of the coming out process or when they are outed at home, school, or places of worship.<sup>19</sup>

LGBTQ students often turn to counselors due to a lack of other alternatives: “[T]he experience of gay, lesbian, and bisexual teenagers is often one of isolation, fear of stigmatization, and lack of peer or familial support.”<sup>20</sup> According to the American Academy of Pediatrics’ Committee on Adolescence, “[i]t is critical that schools find a way to create safe and supportive environments for students who are or wonder about being non-heterosexual.”<sup>21</sup>

A counselor who cannot keep her personal values out of a client interaction and expresses disapproval of a patient’s sexual orientation has great potential to harm her client. In response to numerous studies describing the harm suffered by lesbian and gay individuals as a result of societal prejudices against them, the U.S.

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<sup>19</sup> Caitlin Ryan, et al., “Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults,” 123 *Pediatrics* 346, 350 (2009) (lesbian and gay young people frequently suffer rejection and conflict at home resulting from their sexual orientation).

<sup>20</sup> Just the Facts Coalition, *Just the facts about sexual orientation and youth: A primer for principals, educators, and school personnel*, Washington, DC: American Psychological Association (2008) Retrieved from [www.apa.org/pi/lgbcc/publications/justthefacts.html](http://www.apa.org/pi/lgbcc/publications/justthefacts.html). (hereinafter “Just the Facts”).

<sup>21</sup> Barbara Frankowski and the Committee on Adolescence, *Sexual Orientation and Adolescents*, 133 *Pediatrics* 1827 (2004).

Surgeon General has stated that “our culture often stigmatizes homosexual behavior, identity and relationships . . . . These anti-homosexual attitudes are associated with psychological distress for homosexual persons and may have a negative impact on mental health, including a greater incidence of depression and suicide, lower self-acceptance and a greater likelihood of hiding sexual orientation[.]”<sup>22</sup> The American Psychological Association similarly has recognized that “sexual stigma, manifested as prejudice and discrimination directed at non-heterosexual sexual orientations and identities, is a major source of stress for sexual minorities” and “a factor in mental health disparities found in some sexual minorities.”<sup>23</sup> Lesbian and gay people who feel compelled to conceal their sexual orientation tend to report more frequent mental health concerns than those who are openly gay, and are also at greater risk for physical health problems.<sup>24</sup> In contrast, lesbian and gay people manifest better mental health when

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<sup>22</sup> David Satcher, Surgeon General, U.S. Dep’t of Health & Human Servs., *The Surgeon General’s Call to Action to Promote Sexual Health and Responsible Sexual Behavior* 4 (July 9, 2001) (internal citations omitted), available at [www.surgeongeneral.gov/library/sexualhealth/call.pdf](http://www.surgeongeneral.gov/library/sexualhealth/call.pdf).

<sup>23</sup> Am. Psychol. Ass’n, Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (hereinafter “APA Report”) 1 (2009), available at [www.apa.org/pi/lgbt/resources/therapeutic-response.pdf](http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf).

<sup>24</sup> See Steve W. Cole, *Social Threat, Personal Identity, and Physical Health in Closeted Gay Men*, in *Sexual Orientation and Mental Health: Examining Identity*

they hold positive feelings about their own sexual orientation, have developed a positive sense of personal identity based on it, and have integrated it into their lives by disclosing it to others.<sup>25</sup> As with other historically stigmatized groups, the impact of social prejudice is especially pronounced among the young, who experience self-hatred when they internalize societal prejudice against same-sex relationships.<sup>26</sup>

Two overriding principles of the counseling profession – avoiding harm to the patient and not imposing a counselor’s views on the patient – have led every major professional mental health organization to inveigh against therapy intended to “convert” LGBTQ patients to heterosexuality.<sup>27</sup> There is no empirical basis to

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and Development in Lesbian, Gay, and Bisexual People 245, 245-51 (Allen M. Omoto & Howard S. Kurtzman, eds., 2006); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674, 676-85 (2003) (“Meyer”).

<sup>25</sup> See Gregory M. Herek & Linda D. Garnets, Sexual Orientation and Mental Health, 3 Ann. Rev. Clin. Psychol. 353, 362 (2007); John E. Pachankis, The Psychological Implications of Concealing a Stigma: A Cognitive-Affective-Behavioral Model, 133 Psychol. Bull. 328, 334, 339 (2007).

<sup>26</sup> Meyer at 680-85.

<sup>27</sup> Just the Facts, at 5-9 (citing positions of American Psychiatric Association, American Psychological Association, American Counseling Association, American Academy of Pediatrics, American School Counselor Association, and National Association of Social Workers). Additionally, the American Medical Association has at least two dozen rules and policy statements prohibiting sexual orientation discrimination and calling for culturally-appropriate care for LGBT patients. See American Medical Association, LGBT Advisory Committee, *GLBT*

believe conversion therapy can be successful; meanwhile, attempts to alter sexual orientation have been associated with “loss of sexual feeling, depression, suicidality, and anxiety.” APA Report at 3; *see also, e.g.*, 1993 American Academy of Pediatrics Policy Statement on Homosexuality and Adolescence (“[Therapy aimed at] changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation.”).<sup>28</sup>

As a matter of principle, conversion therapy is improper because sexual orientation is not a mental health problem. Thus, the desire to change it is based on a motivation not recognized as proper in the counseling context.<sup>29</sup> Indeed, a

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*Policy Compendium*, Retrieved from [www.ama-assn.org/ama1/pub/upload/mm/16/glb-t-policy.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/16/glb-t-policy.pdf) (last retrieved February 5, 2011).

<sup>28</sup> Even outside the counseling relationship, there are devastating consequences to LGBTQ youth from rejection by individuals in authority. Notably, the already high rates of suicide among transgender and gender non-conforming people who suffered bullying, harassment, and violence in school (51%) balloons to even high levels when teachers – rather than fellow students – were the reported perpetrators: 59% for those harassed or bullied by teachers, 76% among those who were physically assaulted by teachers and 69% among those who were sexually assaulted by teachers. Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, with Jody L. Herman, Jack Harrison, and Mara Keisling, *National Transgender Discrimination Survey Report on Health and Health Care* (NCTE/NGLTF Washington, D.C. October 2010) at 16.

<sup>29</sup> “Just the Facts” at 7 (“Therefore, the American Psychiatric Association opposes any psychiatric treatment, such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that the patient should change his/her sexual homosexual

scientific consensus has emerged that there is nothing abnormal or unhealthy about same-sex sexual orientation. The APA has recognized that “[s]ame-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality.” APA Report at 2. The American Psychiatric Association and the American Psychological Association accordingly have removed “homosexuality” from their lists of mental disorders.<sup>30</sup> The American School Health Association (“ASHA”) specifically cautions its members to understand “their own personal feelings and attitudes concerning sexuality topics so personal life experiences do not intrude inappropriately into the educational experience.”<sup>31</sup>

Because of potentially tragic consequences, the need to prevent unprofessional counseling of LGBTQ youth or exclusion of such youth from school mental health services invokes the state’s strong interest in promoting youth

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orientation.”); *accord* American Medical Association House of Delegates, Resolution H-160.991 *Health Care Needs of the Homosexual Population* (1985), available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisory-committee/ama-policy-regarding-sexual-orientation.shtml> (also opposing conversion therapy, citing the assumptions of a mental disorder and the need to change).

<sup>30</sup> Am. Psychol. Ass’n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975); Am. Psychiatric Ass’n, *Position Statement on Homosexuality and Civil Rights* (1973), printed in 131 Am. J. of Psychiatry 497 (1974).

<sup>31</sup> ASHA Resolutions, *Quality Comprehensive Sexuality Education* (available at <http://www.ashaweb.org/pdfs/resolutions/Qualcompsexed.pdf>)



welfare. The Supreme Court repeatedly has held that the government has a deeply compelling interest in promoting the physical and psychological well being of minors:

It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, *supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity.

*New York v. Ferber*, 458 U.S. 747, 756-757 (1982); accord *Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968) ("the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"), quoting *Prince*, 321 U.S. at 165; see also *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The Court also has held that the state has an interest in preventing suicide, not only generally, but especially as a result of victimization and marginalization. *Washington v. Glucksberg*, 521 U.S. 702, 730, 732 (1997) ("all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups" for which the government has an interest in protecting them "from prejudice, negative and inaccurate stereotypes, and

‘societal indifference’” that might lead to suicide); *see also Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990) (“Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest.”).<sup>32</sup>

A school counselor who refuses to counsel youth in same-sex relationships, or who makes clear during the counseling process that she disapproves of an LGBTQ youth’s sexual orientation, is simply incapable of performing her job. The ACA’s ethical rules forbidding discrimination and requiring counselors to put aside their own values in favor of a client-centered approach are consistent with a large body of empirical research demonstrating that in order to achieve a positive therapeutic outcome, counselors must work vigilantly to convey a respectful,

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<sup>32</sup> Courts also have identified a compelling state interest in ensuring access to and quality of health care, which has particular resonance in the context of young people in need of mental health services. *See, e.g., Bill Johnson’s Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 742 (1983) (government has compelling interest in protecting people’s health and well being); *National Ass’n for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043, 1054 (9<sup>th</sup> Cir. 2000) (upholding constitutionality of licensing scheme for psychoanalysts and describing state’s interest in protecting mental health as “even more compelling” than state’s interest in regulating in-person solicitation by attorneys); *Fremont Christian School, supra*, 781 F.2d at pp. 1364-65 (compelling state interest in eradicating discrimination in employee health benefits program). The state’s general commitment to public health also supports EMU’s interest in preventing mental health patients from being excluded from counseling services based on their sexual orientation.



flexible, accepting, and responsive attitude toward their patients.<sup>33</sup> Courts are in accord. *Bruff v. North Mississippi Health Services, Inc.*, 244 F.3d 495, 497-98 (5<sup>th</sup> Cir. 2001) (employer was not required under Title VII to accommodate a counselor-employee by excusing her from counseling patients on subjects that conflicted with her religious beliefs; the court noted that, in contrast to the typical religious accommodation request, the plaintiff counselor who refused to counsel patients about their nonmarital relationships “determined that she would not perform some aspects of the position itself.”); *Spratt v. Kent County*, 621 F. Supp. 594, 600-02 (W.D. Mich. 1985) (holding that a public employer was justified in terminating a social worker for including religious practices in counseling inmates). Ward’s lack of professional competence has even greater significance in light of the vulnerability of the patient group that Ward intended to serve.

Indeed, schools have an affirmative obligation to protect youth from discriminatory bullying and to offer resources for youth in need. This includes an obligation to prevent students from being bullied based on their sexual orientation, and to respect LGBTQ students’ decisions to be open about who they are. *See Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding that a student subjected

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<sup>33</sup> Steven J. Ackerman & Mark J. Hilsenroth, A Review of Therapist Characteristics and Techniques Negatively Impacting the Therapeutic Alliance, 38.2 *Psychotherapy* 171 (2001).

to anti-gay bullying by peers in school could pursue federal equal protection claims against the principal and other school officials as a result of the school's discriminatory handling of the student's complaints; after a jury verdict of liability, case settled for almost \$1 million); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1076 (D. Nev. 2001) (denying a school's motion to dismiss a gay student's discrimination claims because it is so clearly established that high school students' rights of freedom of speech and expression include the right to be open about sexual orientation in school settings). A public school counselor who refuses to counsel LGBTQ students about anything that might touch upon relationships or sexual identity would abandon these students, leaving them bereft of protections and resources on a discriminatory basis, in contravention of well-established federal law.

Courts frequently "have held that the state's interest outweighs any First Amendment rights" where there is a "clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his 'free exercise' rights." *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir. 1971), *cert denied*, 404 U.S. 985 (1971), *citing Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (violation of the child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy);

*People v. Handzik*, 102 N.E.2d 340 (Ill. 1951) (criminal prosecution of faith healers who practice medicine without a license); *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (serious illness of a child).

Consequently, no matter what the test, EMU can justify dismissing Ward based on her conduct in practicum for two synergistic reasons: 1) she failed to comply with ethical standards requiring that she put aside her own values in favor of working within the client's; and 2) she discriminated based on sexual orientation, which could cause harm to future patients, particularly in school settings. EMU's actions in dismissing Ward from the program after her repeated refusals to comply with curricular nondiscrimination requirements in practicum was a narrowly tailored and justifiable response to the potential harm that her conduct could cause.

**CONCLUSION**

The District Court's decision should be affirmed for the reasons stated in that court's opinion and for the reasons stated herein.

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)**

The undersigned hereby certifies that the brief complies with Fed. R. App. P. 32(a)(7)(B) as having 6,932 words, fewer than one-half the 14,000 words that the rules allow for a principal brief.

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**CERTIFICATE OF SERVICE**

THE UNDERSIGNED HEREBY CERTIFIES THAT ON THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2011, A TRUE AND CORRECT COPY OF THE FOREGOING **AMICUS BRIEF OF PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS ("PFLAG")**, **GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK ("GLSEN")**, **AFFIRMATIONS**, AND **RUTH ELLIS CENTER IN SUPPORT OF DEFENDANT-APPELLEE FOR AFFIRMANCE** WAS SERVED ON ALL COUNSEL OF RECORD BY USING THE SIXTH CIRCUIT ECF SYSTEM.

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