Current Issues

Counselor Educators’ Gatekeeping Responsibilities and Students’ First Amendment Rights

Neal Hutchens, Jason Block, and Marianne Young

In 2 recent legal cases, graduate counselor education students challenged the imposition of remediation plans as violating their First Amendment rights of freedom of speech and religion. With special emphasis on this recent litigation, the article examines the legal standards governing the authority of counselor educators at public colleges and universities, including professionalism and ethical rules as a part of curricular requirements to prohibit client discrimination based on sexual orientation.

Keywords: gatekeeping, First Amendment, sexual orientation, practicums, internships

In recent litigation, graduate students enrolled in counselor education programs at public universities challenged the legal authority of counselor educators to place remediation requirements on the students related to improving their professional competency to serve clients who are lesbian, gay, bisexual, transgender, or questioning (LGBTQ; [Keeton v. Anderson-Wiley, 2011; Ward v. Polite, 2012]). The students argued that imposition of the remediation plans violated their First Amendment rights related to freedom of speech and religion. In one case, a federal appeals court upheld a lower court ruling in favor of the university (Keeton v. Anderson-Wiley, 2011). However, in another decision, a federal appeals court, reversing a lower court, ruled in favor of the student and determined that her lawsuit should be allowed to proceed (Ward v. Polite, 2012).

Focusing on the recent court cases, the authors examine the legal authority of counselor educators, especially those at public colleges and universities, to enforce professionalism and ethical requirements incorporated into the curriculum in light of students’ First Amendment speech and religious rights. Although standards and policies adopted by private higher education institutions may often result in student speech protections equivalent to those at public ones, private institutions generally are not required to conform to the requirements of the First Amendment (Kaplin & Lee, 2006). Accordingly, counselor educators at public colleges and universities must navigate potential restrictions under the First Amendment related to enforcing professionalism and ethical standards that would not be applicable to their counterparts at private institutions.

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Using the *Keeton v. Anderson-Wiley* (2011) and *Ward v. Polite* (2012) decisions to frame the discussion, this article is intended to provide counselor educators with a sharper understanding of legal standards relevant to the enforcement of professionalism and ethical standards. Greater familiarity with these standards and with the specific legal controversies at play in recent litigation will assist faculty in reviewing policies and practices in their programs and in working with other members of the campus community, including institutional attorneys.

**Overview of Ward v. Polite and Keeton v. Anderson-Wiley**

**Ward v. Polite**

*Ward v. Polite* (2012) involved a graduate student, Ward, enrolled in a counselor education program at Eastern Michigan University who wanted to become a high school counselor. Students in the program, including those in practicum courses, were required to abide by the *ACA Code of Ethics* (American Counseling Association [ACA], 2005) and the American School Counselor Association’s Ethical Standards for School Counselors (2010).

While enrolled in a required practicum course, Ward learned that she was assigned to work with a client who had previously sought counseling regarding a homosexual relationship. Ward communicated to the practicum supervisor that the client’s sexual orientation prevented her from working with the individual in an affirming way, and she asked the supervisor to refer the client to another student or, alternatively, to let her work with the individual and then refer the client if the person sought assistance with relationship issues. Program faculty believed that Ward’s efforts to be able to refer the client on the basis of the individual’s sexual orientation violated ethical standards dealing with nondiscrimination in the treatment of clients. She was given the option of completing a remediation program, voluntarily leaving the counselor education program, or requesting a formal hearing to challenge the allegations of discrimination. She opted for a formal hearing, which resulted in a recommendation that Ward should be dismissed from the program based on a finding that her actions violated the *ACA Code of Ethics* (ACA, 2005).

Following her dismissal, Ward filed a lawsuit challenging the university’s decision. A federal district court sided with the university, determining that faculty had not violated Ward’s First Amendment rights (*Ward v. Wilbanks*, 2010). Ward appealed the ruling, and the U.S. Court of Appeals for the Sixth Circuit overturned the trial court’s judgment in favor of the university and held that her case should be allowed to proceed (*Ward v. Wilbanks*, 2010).

**Keeton v. Anderson-Wiley**

In *Keeton v. Anderson-Wiley* (2011), a graduate student, Keeton, seeking a master’s degree in school counseling at Augusta State University was required to complete a remediation program before being allowed to participate in the program’s clinical practicum. On the basis of her religious beliefs, Keeton...
expressed the view to professors and fellow students—both in and out of class—that LGBTQ populations suffer from identity confusion. She stated an intention to convert individuals from being homosexual to heterosexual. In addition, Keeton discussed that it would be difficult to separate her views on sexual orientation from her work with clients.

In answering a hypothetical question from a professor, Keeton stated that if working with a high school student in crisis who was questioning his sexual orientation, she would tell the student that it was not acceptable to be gay. She also told a classmate that if she encountered a client who was gay, she would inform the individual that his or her sexual orientation was morally wrong and would attempt to change it (Keeton v. Anderson-Wiley, 2011).

Faculty members and university officials determined that Keeton’s statements showed an intention to violate multiple standards of the ACA Code of Ethics (2005), including those related to promoting clients’ welfare and not engaging in discrimination on the basis of sexual orientation. They developed a remediation plan that Keeton was required to complete as a condition of continued enrollment in the program. In response, Keeton initiated a lawsuit in federal court claiming that any actions taken against her by university faculty or officials would infringe on her First Amendment rights.

In the course of litigation, Keeton claimed that in previous meetings with faculty, she was told that she could not be a teacher or counselor because of her views and that she had to choose between adherence to the Bible or to the ACA Code of Ethics (2005). University officials disputed this version of events, asserting that they had informed Keeton that she could retain her religious beliefs and still become an effective counselor. Both a federal district court and the U.S. Court of Appeals for the Eleventh Circuit rejected Keeton’s efforts to block her expulsion from the counselor education program (Keeton v. Anderson-Wiley, 2011).

Gatekeeping Functions of Counselor Educators

The Keeton v. Anderson-Wiley (2011) and Ward v. Polite (2012) cases involved the legal authority of counselor educators to determine whether a student or potential student has the capability or willingness to uphold ethical standards of the counseling profession. Such determinations have been referred to as gatekeeping (Bodner, 2012; Foster & McAdams, 2009; Frame, 1995; Gaubatz & Vera, 2002; Kerl, Garcia, McCullough, & Maxwell, 2002; McAdams, Foster, & Ward, 2007). Scholarship related to gatekeeping has documented both its importance to counselor education programs (e.g., Bodner, 2012; Foster & McAdams, 2009; Gaubatz & Vera, 2002; Kerl et al., 2002; McAdams et al., 2007) and effective methods for implementing gatekeeping procedures (e.g., Foster & McAdams, 2009; McAdams et al., 2007; Ziomek-Daigle & Christensen, 2010).

On the basis of counselors’ ethical duty not to harm their clients, counselor educators perform a critical role in ensuring that individuals who earn a counseling credential do not seek to impose their personal beliefs or values on clients (Gaubatz & Vera, 2002). Counselors who establish trust with a
client and then refuse to treat the individual because of personal biases or beliefs risk harming the client (Hermann & Herlihy, 2006). Professional guidelines, including the rules promulgated by the professional organizations that govern counselors and accredit counselor education programs, mandate that counselors be able to set aside their personal feelings for the good of the client (e.g., ACA, 2005). Along with a duty not to cause harm to a client because of failure to follow ethical standards, another rationale discussed in the counseling literature to support the gatekeeping role of counselor educators is the possibility of legal repercussions (Frame, 1995). Exposing a client to a counselor who is unable or unwilling to integrate ethical standards into his or her practice could result in a negligence lawsuit.

Ziomek-Daigle and Christensen (2010) noted four phases of the gatekeeping process: (a) preadmission screening, (b) postadmission screening, (c) remediation plan, and (d) remediation outcome. Furthermore, it may not become apparent to program faculty that a student is unable or unwilling to satisfy applicable ethical standards until professors have had a substantial opportunity to observe and interact with the student (Kerl et al., 2002). In a survey that represented 67 programs, in which 118 faculty responded out of 253 surveyed, respondents reported that 10.4% of their master’s-level students were poor matches for the counseling field (Gaubatz & Vera, 2002).

There are four primary concerns when counselor educators develop gatekeeping procedures. First, counselor education programs by their very nature have a responsibility to support their students. Second, counselor educators need to recognize and appreciate the subjective nature of clinical supervision. Third, educators need to place the interests of future clients in the forefront of how they evaluate students during the clinical and academic phases of their programs. Finally, an effective gatekeeping process needs to provide students with the opportunity to respond to and address concerns (Frame, 1995).

To ensure that students receive an adequate opportunity to address deficiencies, many programs have created a review process in which remediation plans are developed to help students correct problems (Foster & McAdams, 2009; Frame, 1995; Kerl et al., 2002; McAdams et al., 2007; Ziomek-Daigle & Christensen, 2010). As part of the process, mechanisms are established for counselor educators to raise concerns regarding a particular student and hold meetings with identified students to share concerns once a certain threshold is met. Often, the student and the counselor educator work out a remediation plan to address the identified issue(s). In many programs, if the remediation agreement is not completed to the counselor educator’s satisfaction, a committee then evaluates the student’s fitness to remain in the counselor education program. If a decision is made that the student should not continue, there is generally an appeals process to either a department chair or a dean (Frame, 1995; Kerl et al., 2002; Ziomek-Daigle & Christensen, 2010).

Remediation plans can vary in scope and content. Some plans require further study, which may include repeating a course, to address an identified deficiency. Others may call for intensified supervision of a student by a
faculty member. In some circumstances, program faculty may ask a student to take a leave of absence, enter counseling, or take time to reflect on whether a program represents an appropriate academic and professional fit for the student. Summary expulsions of students made without affording them the opportunity to remediate or to address concerns should be avoided if possible (Ziomek-Daigle & Christensen, 2010).

In carrying out gatekeeping functions, programs should adhere to policies and practices that are both documented and respectful of students’ legal rights (Foster & McAdams, 2007; Frame, 1995; Kerl et al., 2002; Ziomek-Daigle & Christensen, 2010). In the Keeton v. Anderson-Wiley (2011) and Ward v. Polite (2012) cases, students challenged faculty gatekeeping authority on First Amendment grounds. Before returning specifically to discussing these cases, it is helpful to consider the general contours of legal standards germane to gatekeeping activities in relation to students’ constitutional speech and religious rights.

Students’ First Amendment Rights and Judicial Deference to Curricular Decisions

U.S. Supreme Court decisions have established that public college and university students possess the First Amendment rights of free speech and religion (e.g., Healy v. James, 1972; Rosenberger v. Rector and Visitors of the University of Virginia, 1995). How a court construes a student’s First Amendment rights often depends on the context in which the speech occurs. In some instances, a college or university’s authority over student speech is heightened. For example, court decisions have tended to support greater control over student speech taking place in a class-related environment in comparison to student speech outside of a formal instructional context. As shown in the Keeton v. Anderson-Wiley (2011) case, which dealt at least in part with a student’s out-of-class comments, this can be far from a tidy judicial fault line in certain circumstances. Both Keeton v. Anderson-Wiley (2011) and Ward v. Polite (2012) dealt with courts considering how to strike an appropriate legal balance between students’ First Amendment rights and the judicial deference generally shown to academically based decisions.

Independent student speech taking place outside of a class setting often receives greater First Amendment protection based on the standards announced in Tinker v. Des Moines School District (1969). Although Tinker v. Des Moines School District dealt with high school students, courts have also applied the decision’s standards to cases involving higher education (e.g., Axson-Flynn v. Johnson, 2004). The Axson-Flynn v. Johnson (2004) case involved students wearing armbands to school to protest military involvement in Vietnam. In Tinker v. Des Moines School District, the Supreme Court held that school officials are not permitted to restrict independent student speech unless it substantially interferes with the educational environment or impairs the rights of other students.

Moines School District, the Hazelwood School District v. Kuhlmeier case arose in a secondary school context, but courts have also applied this decision’s standards to public colleges and universities (e.g., Hosty v. Carter, 2005). In Hazelwood School District v. Kuhlmeier, the Supreme Court held that a school principal could censor articles appearing in a student newspaper produced as part of a journalism course. It determined that the Tinker v. Des Moines School District standards were inapplicable because the student speech at issue represented school-sponsored speech connected to the curriculum rather than expression determined to come independently from students outside of a curricular setting. The opinion stated that school officials could regulate such school-sponsored student speech “so long as their actions are reasonably related to legitimate pedagogical concerns” (Hazelwood School District v. Kuhlmeier, 1988, p. 273).

Along with recognition in Hazelwood School District v. Kuhlmeier (1988) of educators’ authority over student speech occurring in instructional settings, the Supreme Court has also articulated the principle that courts should show deference to the academic decisions of colleges and universities, for example, in Board of Curators of the University of Missouri v. Horowitz (1978) and Regents of the University of Michigan v. Ewing (1985). In both cases, students claimed that public universities had violated their constitutionally protected due process rights by not providing them with a sufficient opportunity to challenge their dismissals from medical programs for poor academic performance.

In Board of Curators of the University of Missouri v. Horowitz (1978), the Supreme Court—assuming that the student possessed a constitutionally protected due process interest related to continued enrollment—determined that the university had provided “at least as much due process” as required in giving the student a reasonable chance to correct deficiencies and providing her with the opportunity to appeal a decision to dismiss her from the program (Board of Curators of the University of Missouri v. Horowitz, 1978, p. 952). The opinion discussed that the same types of due process requirements associated with student disciplinary cases, such as the opportunity for a formal hearing, were not necessarily required in the context of an institution taking action against a student on academic grounds. Although the opinion did not include a specific legal standard, it noted that a number of lower court opinions had discussed that an academic decision might be subject to judicial intervention if institutional officials acted arbitrarily or capriciously in their treatment of a student.

Echoing the sentiments found in Board of Curators of the University of Missouri v. Horowitz (1978), in Regents of the University of Michigan v. Ewing (1985), the Supreme Court stated that courts should “show great respect for the faculty’s professional judgment” when reviewing a truly academic decision (p. 224). The judiciary, therefore, should intervene in academic decisions only on the basis of a “substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment” (Regents of the University of Michigan v. Ewing, 1985, p. 224).
Courts have generally afforded educators considerable authority to place limitations on student speech in curricular or instructional settings and have also shown substantial deference to colleges and universities when reviewing academic decisions. At the same time, the Supreme Court has recognized that the First Amendment protects students’ independent speech and religious beliefs. The legal issues presented in Keeton v. Anderson-Wiley (2011) and Ward v. Polite (2012) rest at the intersection of these standards.


**Ward v. Polite (2012)**

In the *Ward v. Polite* (2012) case, the university initially prevailed, because a federal district court determined that the institution had not violated Ward’s First Amendment rights. In ruling against Ward, the district court rejected arguments that the university’s actions were subject to the legal standards used to review student disciplinary decisions. Instead, the district court relied on cases such as *Board of Curators of the University of Missouri v. Horowitz* (1978) and *Regents of the University of Michigan v. Ewing* (1985), noting that courts have “traditionally given public colleges and graduate schools wide latitude” in curricular matters (Ward v. Wilbanks, 2010, p. 11). In relation to the professionalism standards applied to Ward, the trial court opinion discussed how counseling “relies on a uniquely personal and intimate relationship between the counselor and client. . . . Educating counselors to provide such services is clearly within the expertise of the universities that provide such programs” (Ward v. Wilbanks, 2010, p. 12).

Reversing the trial court’s decision, the U.S. Court of Appeals for the Sixth Circuit held that Ward’s case, based on the facts she alleged, should have been allowed to proceed. According to the court, although program faculty had the legal authority to require all students to work with any assigned client, they appeared to have followed a policy or practice that permitted some students to make client referrals based on a student’s values.

The Sixth Circuit opinion discussed the view that program officials had determined that Ward’s actions violated two standards of the *ACA Code of Ethics* (2005): (a) Standard A.4.b.’s restriction on imposing values that are inconsistent with counseling values and (b) Standard C.5.’s prohibition on discriminating against clients, including on the basis of sexual orientation. The court determined, however, that a “reasonable jury could find” that Ward’s actions did not actually violate these standards (Ward v. Polite, 2012, p. 737). Instead, according to the opinion, a jury could conclude that the program attempted to use the standards as a pretext to engage in religious discrimination against Ward.

In offering its assessment of Ward’s actions, the court stated that her efforts to refer the client appeared, in fact, to demonstrate an acceptance of the *ACA Code of Ethics* (2005) and a recognition that she should not seek to impose her values on clients. The opinion noted that the Code permits
values-based referrals in certain circumstances, such as when a terminally ill client desires to consider end-of-life options. In addition, the court discussed statements by an expert witness for Ward, a former chair of the American Mental Health Counselors Association’s ethics committee, asserting that Ward’s referral efforts complied with the Code. The opinion also stated that even the university’s own expert offered contradictory statements on the permissibility of referrals under the ACA standards for values-based reasons.

The university argued that no matter how the ACA Code of Ethics should be interpreted, the counselor education program maintained a rule that prohibited practicum students from refusing to serve potential clients. However, the court rejected this assertion, determining that a jury could determine that such a policy represented an “after-the-fact invention” (Ward v. Polite, 2012, p. 736). The court found it significant that program officials could not document any such formal rule or policy in course materials, student handbooks, or other materials provided to students. It also discussed that program faculty had appeared to grant special consideration regarding client selection and referral in previous circumstances, such as permitting one student who had experienced a significant personal loss not to be assigned to work with clients dealing with grief issues.

The opinion also discussed that even if the university’s interpretation of the ACA Code of Ethics (ACA, 2005) were correct on the issue of referrals, the standards would arguably violate Ward’s First Amendment religious rights. That is, according to the court, if the ACA Code of Ethics in fact permits certain types of values-based referrals for secular reasons but prohibits them on religious grounds, then the program could arguably not rely on such standards without violating Ward’s First Amendment speech and religious rights.

Keeton v. Anderson-Wiley (2011)

In the Keeton v. Anderson-Wiley (2011) case, the student contended that the university violated her First Amendment rights of speech and religion, including assertions that she was forced to express beliefs with which she disagreed as a condition of staying enrolled in the counselor education program. In considering these arguments, the court discussed that, rather than being some type of open forum for expression like a public park, the counselor education program existed for a much different purpose. It had been created as “‘a supervised learning experience,’ connected in this case to the requirements of a professional association whose accreditation is required for the school to offer a degree that allows its students to become licensed as professional counselors” (Keeton v. Anderson-Wiley, 2011, pp. 871–872). As such, the university could impose restrictions on speech (i.e., the remediation plan) that were reasonable and viewpoint-neutral and served legitimate pedagogical goals.

The court held that the faculty did not require Keeton to complete a remediation plan as a result of objections to her religious beliefs or as an effort to compel her to alter such views as a condition of staying enrolled in the counselor education program. Instead, the plan, which dealt with
enforcement of standards applied uniformly to all students in the program, was intended to “teach her how to effectively counsel GLBTQ clients in accordance with the ACA code of ethics” (Keeton v. Anderson-Wiley, 2011, p. 872). The court looked to Hazelwood School District v. Kuhlmeier (1988) and Regents of the University of Michigan v. Ewing (1985) as legal precedent supportive of the faculty’s authority to impose the remediation plan.

An issue to note in comparing Keeton v. Anderson-Wiley (2011) with Ward v. Polite (2012) relates to student speech occurring in practicums or internships or other clinical situations. While Keeton v. Anderson-Wiley did not deal directly with student speech taking place in such a setting, discussion in the opinion suggests that the Eleventh Circuit followed different legal standards in such contexts than those followed by the Sixth Circuit. The Ward v. Polite court applied legal standards dealing with student speech, such as those derived from the Hazelwood School District v. Kuhlmeier (1988) decision. These standards, while recognizing considerable authority on the part of educators, provide some degree of First Amendment protection for student speech deemed to take place in an instructional context. In contrast, the court in Keeton v. Anderson-Wiley (2011), in referring to a previous Eleventh Circuit decision, Watts v. Florida International University (2007), signaled that much different legal standards should apply to student speech claims arising in practicums, internships, or other clinical settings. The Watts v. Florida International University decision involved a student who was dismissed from a practicum by supervisors for inappropriately raising religious issues with clients. The dismissal meant that the student could not satisfy degree requirements. The student argued that the student speech standards from cases such as Tinker v. Des Moines School District (1969) should guide the court’s analysis of his First Amendment claims against the university.

Rather than Tinker v. Des Moines School District (1969) or even the Hazelwood School District v. Kuhlmeier (1988) standards followed in Ward v. Polite (2012), the court in Watts v. Florida International University (2007) looked to the legal rules governing public employees’ speech rights, because the court determined that the student was performing duties akin to an employee in completing the practicum. Under these rules, a public employee’s speech or expression that occurs as part of carrying out official employment duties is ineligible for First Amendment protection (Garcetti v. Ceballos, 2006). Reliance on the public employee speech standards meant that the student in Watts v. Florida International University, unlike the student in Ward v. Polite, could not look to the First Amendment to challenge the actions taken against him.

In considering lessons to derive from Keeton v. Anderson-Wiley (2011) and Ward v. Polite (2012), along with significant areas of legal agreement, counselor educators should also be aware of important differences in how the two circuit courts appeared to interpret legal standards governing student speech rights in practicums and internships and other clinical settings. Keeping in mind both the areas of legal convergence and disagreement, implications emerge for counselor education policy and practice.
Practice and Policy Lessons and Unanswered Questions

Examining the legal overlap and disagreement in the Keeton v. Anderson-Wiley (2011) and Ward v. Polite (2012) decisions provides counselor educators an opportunity to review their program policies and practices in relation to the intersection of ethical standards and students’ speech and religious rights. In terms of legal agreement, the courts in both cases accepted that counselor education programs are permitted to impose ethical mandates on students requiring them to work in an affirming way with clients in relation to their sexual orientation. Keeton v. Anderson-Wiley is especially instructive regarding the reach of counselor educators’ gatekeeping authority in this area. The fact that the student consistently expressed an intention, including in nonclass settings, to disregard ethical standards sufficed for the faculty to take action.

Similarly, the court in Ward v. Polite (2012) did not question the existence of significant authority for counselor educators to enforce requirements that students should respect clients’ values and not discriminate against them on the basis of sexual orientation. Legal contention in the case centered on the issue of the permissibility of referrals under the ACA Code of Ethics (2005) and program rules. Accordingly, the court did not sanction counselor education students being able to impose their values on clients in blatant contravention of the ACA Code of Ethics or program standards. The court, for example, did not acknowledge any type of First Amendment protection that would permit students to try to subject clients to conversion therapy in disregard of professionalism and ethical standards.

In considering the gatekeeping authority recognized in both decisions, the cases provide counselor educators an opportunity to reflect on the importance of distinguishing between students’ ability to uphold ethical requirements versus their right to express views regarding such standards. In Keeton v. Anderson-Wiley (2011), the court focused on faculty authority to impose the remediation plan because of legitimate concerns that Keeton would not uphold the ACA Code of Ethics (2005) in working with clients. Had she limited herself solely to expressing disagreement with these standards, such speech would have been protected. Instead, Keeton evinced a clear intention to disregard applicable ethical standards related to working with LGBTQ populations in an appropriate manner. A separate opinion by one of the judges in Keeton v. Anderson-Wiley (2011) cautioned educators to be careful in recognizing the important distinction between a student disagreeing with ethical rules as opposed to a refusal to follow such standards in working with clients.

Amid the substantial agreement between the Keeton v. Anderson-Wiley (2011) and Ward v. Polite (2012) decisions, the cases reveal apparent disagreement regarding the First Amendment standards applicable to student speech occurring during internships and practicums. Further litigation involving the limits of educators’ authority in this area, including in relation to the issue of values-based referrals, is likely. At some point, the U.S. Supreme Court
may well have to step in to settle questions related to the legal standards that should govern student speech and religious rights in such settings.

In response to ambiguity regarding the legal standards governing student speech during practicums and internships, counselor educators may find it prudent to consult with institutional legal counsel regarding the most appropriate course for their programs to follow. As part of this process, program faculty may need to help educate institutional attorneys, as noncounseling professionals, regarding relevant ethical and professionalism rules, including standards pertaining to the issue of client referrals.

Contention in the *Ward v. Polite* (2012) case regarding the appropriate interpretation of the *ACA Code of Ethics* (ACA, 2005) in relation to client referrals during practicums and internships also suggests that counselor education programs and their associated professional organizations should develop guidance regarding this issue. Such guidance could address, for instance, the merits and pitfalls of following a no-referral policy along the lines of what the counselor education program in *Ward v. Polite* argued that it had adopted. Another issue would be to develop clarification regarding whether the student’s actions in *Ward v. Polite* were in alignment with or contravention of applicable professionalism standards. The *Ward v. Polite* decision also serves to prompt consideration of whether permitting some types of values-based referrals while denying others violates the First Amendment. Counselor educators will have to determine appropriate responses for their programs to this potential legal dilemma, especially in jurisdictions where courts are likely to apply similar legal standards as followed by the court in *Ward v. Polite*. Professional organizations can play an important role in helping counselor educators remain aware of legal developments in the *Ward v. Polite* litigation and of new legal disputes that may emerge.

Along with the aforementioned policy and practice questions, the *Keeton v. Anderson-Wiley* (2011) and *Ward v. Polite* (2012) cases serve to highlight the following issues related to ensuring legal compliance with gatekeeping policies and procedures:

- Although counselor educators are undoubtedly aware of the need to make standards clear to students and apply them fairly and consistently, the legal issues arising in *Ward v. Polite* (2012) help to demonstrate how periodic policy reviews may prove useful in helping program faculty adhere to such a commitment. The decision reveals how various degrees of policy drift or ambiguity may occur in any program, even when faculty members are aware of best practices suggested in the scholarly literature. Accordingly, periodic reviews of policies and procedures, along the lines of the kind of continual assessment suggested by Foster and McAdams (2009), are warranted, including consideration of the degree of faculty fidelity in following and implementing applicable standards.

- The courts in *Keeton v. Anderson-Wiley* (2011) and *Ward v. Polite* (2012) reviewed the treatment of the students by program faculty in those cases as part of ascertaining whether the students had been dealt with
in a legally permissible manner. The interest by the courts regarding the details of the students’ treatment in these cases underscores the need for a “documented record of actions” detailing concerns identified and remediation efforts undertaken when working with a student identified as professionally deficient, as well as demonstrating that the student was permitted sufficient time to accomplish remediation goals (McAdams et al., 2007, p. 222).

- The *Keeton v. Anderson-Wiley* (2011) and *Ward v. Polite* (2012) cases serve to demonstrate the potential value of the suggestion in previous scholarship of having students sign statements acknowledging that they have received and read applicable program rules and policies as a way to help document that such standards were clearly communicated to students (McAdams et al., 2007).

- In applying ethical standards, as noted, program faculty should make sure that requirements distinguish between a student’s ability or willingness to uphold applicable rules versus their right to express views regarding such standards.

- The decisions reinforce recommendations in previous scholarly literature that standards should be well documented and consistently followed (e.g., Foster & McAdams, 2009; Kerl et al., 2002; McAdams et al., 2007; Ziomek-Daigle & Christensen, 2010). The court in *Ward v. Polite* (2012) discussed that the referral policy followed by the program appeared not to have been applied in a uniform fashion and was not officially documented in such places as the student handbook or course syllabi. These circumstances created skepticism on the part of the court that the policy was actually being applied in a neutral way and spurred speculation by the court that the policy was fabricated only after action was taken against the student.

- As with admitted students, counselor educators possess the legal authority to make determinations regarding whether a potential student appears to possess the ability or willingness to work in a competent manner with future clients (Kaplin & Lee, 2006). Ways to help assess a potential student’s suitability for the counseling profession include interviews, use of role-play, and observing individuals during informal discussions with faculty and current program students (Ziomek-Daigle & Christensen, 2010). Just as with current students, faculty should be careful to distinguish a potential student’s disagreement with or questioning of professionalism rules from the issue of whether an individual appears unable or unwilling to comply with such standards.

- The *Keeton v. Anderson-Wiley* (2011) and *Ward v. Polite* (2012) cases serve to highlight an issue addressed in prior scholarship that program faculty should consider putting procedures in place that standardize the gatekeeping process to the extent possible throughout a student’s experience with a program and that document deficiencies (e.g., Kerl et al., 2002; McAdams et al., 2007). In *Ward v. Polite* (2012), a failure to identify concerns with student performance during course work,
Despite the student’s expression of her views on working with LGBTQ populations in class, appeared to undercut the court’s support for the actions taken by program faculty.

- The decisions illustrate the value of suggestions by previous authors that programs should provide multiple opportunities for students to become knowledgeable of applicable professional and ethical standards, including how their out-of-class activities and expressions can implicate such standards (e.g., Foster & McAdams, 2009). Educational activities in this area, representative of the “bottom-up” type of student–faculty communication advocated by Foster and McAdams (2009, p. 276), could extend to asking students to contribute their own ethical or professional questions or concerns. These types of interactions could also help educators identify students who may not be ready for the practicum experience and offer remediation opportunities in alignment with a program’s gatekeeping policies and procedures.

**Conclusion**

In many respects, the Keeton v. Anderson-Wiley (2011) and Ward v. Polite (2012) cases reaffirm practices and policies that counselor education programs already have in place, and both cases largely support the gatekeeping authority of counselor educators. At the same time, the decisions reveal that programs at public institutions face a degree of legal ambiguity over students’ First Amendment rights, specifically in the area of practicums and internships, including in relation to the issue of client referrals. As counselor educators wait for further legal clarification, they may benefit from working with professional associations and with their institutional attorneys in reviewing and crafting rules applicable to practicums and internships or other clinical settings, including rules for client referrals. More generally, the two legal decisions examined in this article reinforce the value of counselor educators engaging in periodic assessment of their program rules and procedures to make sure that faculty members are in agreement on policies and their implementation, that standards are applied uniformly to students, and that rules and procedures are well documented and readily available to students.

In terms of future research, analysis of new legal decisions dealing with the gatekeeping authority of counselor educators represents one area of further study. Such cases could result in legal clarification regarding permissible client referral policies and the legal standards applicable to student speech in practicums and internships. Future research might also explore the extent to which counselor educators are conversant with the legal standards implicating their gatekeeping authority. This line of research could help identify specific areas where enhanced legal knowledge might prove beneficial to counselor educators in working with students or supervisees identified as having significant professional deficits, such as in the design of program policies or remediation plans that are better able to withstand possible legal challenges.
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