



Mayor Judith Flanagan Kennedy
Lynn City Hall and Memorial Auditorium
Office of the Mayor
Room 306
3 City Hall Square
Lynn, Massachusetts 01901

March 23, 2015

Dear Mayor Kennedy:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole.¹ I am writing to express my concern regarding the Lynn School Committee's decision to prohibit Gordon College students from volunteering in the school system.² I understand that you voted against severing ties with the College, for which I commend you. Some of your fellow Committee members, however, are in error.

As you know, the First Amendment prohibits the government from establishing a religion or infringing on the free exercise of religion. It also protects freedom of speech. The First Amendment applies only to the *government*, not to private actors. The Lynn School Committee is a governmental entity, and thus bound by the First Amendment. Religious institutions like Gordon College are permitted to discriminate on the basis of religion, which encompasses both belief and conduct. The Lynn School Committee is not so permitted.

The School Committee is Violating the First Amendment Rights of Gordon College, Gordon College Students, and President Michael Lindsay

Under the First Amendment, government entities may not discriminate against religious institutions or religious believers because of their faith. Yet the Lynn School Committee *is* discriminating against Gordon College and its students because of their faith. Committee member Charlie Gallo is quoted as saying, "Gordon needs to say, 'I'm sorry for the request in the letter'".³ The request to which he refers, of course, is a request

¹ The U.S. Commission on Civil Rights was established, among other things, to "make appraisals of the laws and policies of the Federal Government with respect to . . . discrimination or denials of equal protection under the laws of the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice." 42 U.S.C. § 1975(a).

² Oliver Ortega, *Lynn public schools sever relationship with Gordon College*, BOSTON GLOBE, Aug. 30, 2014, <http://www.bostonglobe.com/metro/2014/08/29/lynn-public-schools-sever-relationship-with-gordon-college/aw1KwO4RGVpn284rR1jTgO/story.html>.

³ *Id.*



for a religious exemption in an executive order.⁴ Gordon itself is not a federal contractor and therefore is unaffected by President Obama's executive order.⁵ Other comments by Committee members suggest they consider Gordon College's own religiously-based hiring practices and behavioral standards problematic.⁶

The Committee had full knowledge, due to the language of the policies and letter at issue, that these policies were based on Gordon College's interpretation of Christian teaching. The Code of Conduct is prefaced this way:

Gordon College is a Christian community, distinguished from other Christian communities by its primary commitment to provide a liberal arts education. As a Christian community it seeks to maintain itself by fostering those ideals and standards that are consistent with a Christian worldview. These ideals and standards are broadly moral; they would be characteristic of any community that was self-consciously Christian. This document is an attempt to specify those ideals and standards.⁷

The College's "Behavioral Standards" provide:

Those words and actions which are expressly forbidden in Scripture, including but not limited to blasphemy, profanity, dishonesty, theft, drunkenness, sexual relations outside marriage, and homosexual practice, will not be tolerated in the lives of Gordon community members, either on or off campus.⁸

The motion to sever ties with Gordon College claimed that "[it is] to sever any and all ties between Gordon College and the Lynn Public Schools on the basis of its intent to discriminate against the LGBTQ community in its hiring practices, but not on the basis of its religious beliefs or behavioral code of conduct."⁹ This is utterly disingenuous. Gordon College does not wish to hire people who are engaged in homosexual activity because its religious beliefs teach that homosexual practices are sinful. Discriminating against Gordon College on the basis of its hiring practices is

⁴ David French, *The Persecution of Gordon College*, NATIONAL REVIEW, Jan. 26, 2015, <http://www.nationalreview.com/article/397677/persecution-gordon-college-david-french>.

⁵ Kathy McCabe, *Gordon College president hopes to renew ties to Lynn schools*, BOSTON GLOBE, Feb. 22, 2015, <http://www.bostonglobe.com/metro/regionals/north/2015/02/22/gordon-college-president-hopes-renew-ties-lynn-schools/CAAt8E3NksABDwBpYLXTbrO/story.html>.

⁶ *Id.*

⁷ Gordon College, *Life & Conduct*, <http://www.gordon.edu/about/life&conduct>.

⁸ Gordon College, *Behavioral Standards*, http://www.gordon.edu/page.cfm?iPageID=380&iCategoryID=31&About&Behavioral_Expectations.

⁹ Lynn Public Schools Committee, Hearing on the FY 2015 Budget, Aug. 28, 2014, at 7, http://www.lynnschools.org/documents/school_committee/2014_minutes/2014%20-%20SC%20-%205th%20Special%20Meeting%20-%208-28-14%20Adopted%209-11-14.pdf.



discriminating on the basis of its religious beliefs and behavioral code of conduct, and it is dishonest to claim otherwise. Yet the Committee ended its relationship with Gordon College nonetheless.

The Committee is violating the constitutional rights of Gordon College students by discriminating against them based on their adherence to, or at least affiliation with, a particular set of religious beliefs. Based on media reports, there is no indication that any Gordon College student teacher was ever accused of discriminating against a public school student for any reason, or even making a statement to a student that expressed disapproval of homosexual conduct. It is unlikely that any *student* at Gordon College has the authority to hire or fire anyone, let alone to decide whether to hire or fire someone on a religious basis. The most that members of the Committee seem to be able to muster by way of an explanation is “This institution showed an intent to discriminate,”¹⁰ and “revisiting the issue could send the wrong message to Lynn students, particularly those who may be gay.”¹¹ In *Employment Division v. Smith*, arguably a low point for the United States Supreme Court’s protection of religious liberty, the Court wrote:

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes ‘all governmental regulation of religious beliefs as such. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma [citations omitted]’¹²

Thus, even in a Supreme Court decision that upheld the state’s right to limit religiously-motivated *conduct*, the Court stated that religious *beliefs* are absolutely protected. Yet in banning Gordon College students from student teaching positions, the School Committee is discriminating against these students on the basis of their assumed religious beliefs, not their conduct. As noted above, no one has claimed that a Gordon College student teacher has discriminated against a Lynn public school student on the basis of their sexual orientation, or even made a comment about sexual orientation. The Committee is discriminating against these college students purely on the basis of their association with Gordon College and their imputed religious beliefs. This the Constitution forbids.

¹⁰ Kathy McCabe, *Gordon College president hopes to renew ties to Lynn schools*, BOSTON GLOBE, Feb. 22, 2015 (quoting Committee member Charlie Gallo), <http://www.bostonglobe.com/metro/regionals/north/2015/02/22/gordon-college-president-hopes-renew-ties-lynn-schools/CAt8E3NksABDwBpYLXTbrO/story.html>.

¹¹ *Id.* (“John Ford, another School Committee member, said revisiting the issue could send the wrong message to Lynn students, particularly those who may be gay.”).

¹² *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).



If Gordon College students are either explicitly or de facto barred from student teaching, this is a situation analogous to that in *Widmar v. Vincent*,¹³ *Rosenberger v. Rector*,¹⁴ *Zobrest v. Catalina Foothills School District*,¹⁵ and *Witters v. Wash. Dept. of Services for the Blind*.¹⁶ In those cases, government officials cited the Establishment Clause in an effort to bar religious believers from receiving generally available benefits. In *Widmar*, the University of Missouri at Kansas City sought to prevent believers from holding worship meetings in generally available university facilities. In *Rosenberger*, the University of Virginia refused to disburse generally available funds for a Christian student newspaper. In *Zobrest*, a school district refused to provide a sign language interpreter under the IDEA [Individuals with Disabilities Education Act] for a student who attended a parochial high school. And in *Witters*, a state commission refused to allow a student to use vocational rehabilitation funds to train to become a pastor or missionary. The state actors lost every one of these cases.

Zobrest and *Rosenberger* are illustrative. The Court dismissed the Catalina Foothills School District's argument, writing, "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge".¹⁷ In *Rosenberger*, the Court wrote, "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."¹⁸ In *Rosenberger*, the University of Virginia refused to allow a Christian student newspaper to avail itself of generally available funds that were available to non-religious student newspapers. The School Committee's behavior is similar to that displayed by Catalina Foothills and the University of Virginia. This is an obvious attempt to deny participation in a generally available government program because of religious beliefs and because of the content of the college president's speech.

These cases are apposite even though they are Establishment Clause cases. The plaintiffs in the earlier cases sued because state actors refused them access to widely-available benefits. No third party sued alleging that the state actor was violating the Establishment Clause by providing these benefits. The state actors' initial act was to deny individuals the ability to participate in these programs. The Establishment Clause was likely just a handy fig leaf, as evidenced by the Catalina Foothills School District's claim that even if it was not barred from providing a sign language interpreter, it was not *required* to provide a sign language interpreter.¹⁹ The district simply did not want to

¹³ 454 U.S. 263 (1981).

¹⁴ *Rosenberger v. Rector*, 515 U.S. 819 (1995).

¹⁵ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 9 (1993).

¹⁶ *Witters v. Wash. Dept. of Services for the Blind*, 474 U.S. 481 (1986).

¹⁷ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 9 (1993).

¹⁸ *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995).

¹⁹ *Zobrest* at 6.



provide a sign language interpreter for a student who attended a parochial high school. Furthermore, the Court noted, attempts to claim that it violated the Establishment Clause to have a public employee in a religious school “smack[s] of antiquated notions of ‘taint’”.²⁰ The Lynn School Committee seems to have a similarly antiquated notion, as if its schools will be tainted if student teachers hold orthodox Christian views on homosexual conduct.

The Committee is also violating the First Amendment rights of Dr. D. Michael Lindsay, the president of Gordon College. The Committee is impermissibly discriminating against Dr. Lindsay by punishing Gordon College because he exercised his First Amendment right to free speech. This is particularly egregious because the Committee is punishing Dr. Lindsay and Gordon College based on the *content* of his speech. It is highly unlikely that the School Committee would have severed ties with Gordon College if President Lindsay had signed a letter urging President Obama to issue the executive order *without* a religious exemption. As the Supreme Court has noted, “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.” [citations omitted]²¹ It is incontestable that the School Committee is engaged in content discrimination, which it may not do.

The letter for which Dr. Lindsay is being castigated agreed with the overall goal of President Obama’s executive order. It merely asked for an exemption for religious entities, recognizing that we will never all agree on what constitutes proper behavior and a righteous life.²² This is not an extreme position, unless you consider Barney Frank, who cosponsored the 1994 version of the Employment Non-Discrimination Act, the legislation that Executive Order 13672 is intended to resemble²³ and sponsored the 2007 version,²⁴ or the late Senator Ted Kennedy, who sponsored the 1994 Senate version of ENDA,²⁵ or Sen. Jeff Merkley, who sponsored the 2013 version,²⁶ to hold extreme anti-LGBT views. Each of those versions of ENDA included an exemption for religious entities. Even if Dr. Lindsay’s opinion was extreme, the First Amendment protects him from government censure. But Dr. Lindsay’s request for an exemption was not extreme. It is the School Committee that is outside the mainstream of even those who support ENDA.

²⁰ *Id.* at 13.

²¹ *Rosenberg v. Rector*, 515 U.S. 819, 830-31 (1995).

²² Letter from Dr. Joel C. Hunter, et al., to President Barack Obama, July 1, 2014, *available at* <http://www.scribd.com/doc/232327567/Religious-Exemption-Letter-to-President-Obama>.

²³ H.R. 4636 (1994).

²⁴ H.R. 2015 (2007).

²⁵ S. 2238 (1994).

²⁶ S. 815 (2013).



Gordon College Has the Right to Require Students and Employees to Adhere to Particular Religious Beliefs and Conduct

Respectfully, the Committee misunderstands the First Amendment, and it also misunderstands anti-discrimination law. Secular colleges and universities are free to require students to abide by their codes of conduct.²⁷ However, Gordon College has the right to require both employees and students to adhere to its religious beliefs and religiously-based code of conduct.

The Gordon College employment page asks, “What makes Gordon College a great place to work?” And it answers: “Our employees consistently cite the inspiration provided by our exceptional students, [and] the supportive community of coworkers who share a common faith”²⁸ Gordon College is not attempting to deceive prospective employees. It includes a shared faith as a reason to work at Gordon College. Most people who would consider themselves to share that faith would understand that there are often certain behavioral requirements that go along with it.

Religious entities like Gordon College are specifically exempted from Title VII’s prohibition on religious discrimination in employment.²⁹ This exemption allows religious institutions (which includes Gordon College) to terminate employees whose beliefs or *conduct* is inconsistent with the religious identity of the institution. Thus, a Catholic nursing facility may discharge a nursing assistant whose religious attire is inconsistent with that expected in a Catholic facility³⁰; a Southern Baptist college may discharge a staffer who assumes a leadership position in a gay and lesbian advocacy organization³¹; and a Christian humanitarian organization may discharge employees who disavow the Trinity.³² Courts have repeatedly upheld a religious school’s right to fire employees who have engaged in behavior contrary to the school’s religiously-based moral principles.³³

²⁷ University of Virginia, The Honor Committee, <http://www.virginia.edu/honor/>.

The University of Virginia’s Honor Code is at once an injunction and an aspiration. The injunction is simple: students pledge never to lie, cheat, or steal, and accept that the consequence for breaking this pledge is permanent dismissal from the University. It is for its aspirational quality, however, that the Honor Code is so cherished: in leading lives of honor, students have continuously renewed that unique spirit of compassion and interconnectedness that has come to be called the Community of Trust.

²⁸ <http://www.gordon.edu/jobs>

²⁹ 42 U.S.C. § 2000e-1.

³⁰ Kennedy v. St. Joseph’s Ministries, 657 F.3d 189 (4th Cir. 2011).

³¹ Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) (“The decision to employ individuals ‘of a particular religion’ under §2000e-1 and §2000e-2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.”).

³² Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011).

³³ Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000); Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (1996); Henry v. Red Hill Evangelical Lutheran Church of Tustin, 134 Cal.



Courts have also upheld schools' right to require students to abide by religiously-based standards of behavior.³⁴

It is also worth noting that the College's policy does not prohibit students and employees with homosexual inclinations from studying and working at Gordon. It merely prohibits homosexual *practice*. The College's policy does not say that it will not tolerate students who experience homosexual inclinations. It merely prohibits homosexual activity, just as heterosexual students are prohibited from engaging in sexual intercourse outside of marriage. President Lindsay has confirmed this to be true.³⁵ If unmarried heterosexual students (who likely comprise the majority of the student body) are expected to remain chaste while at Gordon College, why shouldn't homosexual students adhere to the same standard? This is very similar to other religiously-based behavioral standards that the courts have upheld against legal challenges under antidiscrimination statutes.³⁶

Rptr.3d 15 (Cal. App. 4th Dist. 2011); *Manno v. St. Felicitas Elem. Sch.*, 831 N.E.2d 1071 (Ohio. App. 8th Dist. 2005).

³⁴ *Doe v. Cal. Lutheran High School Ass'n*, 88 Cal. Rptr. 3d 475, 485 (Cal.App. 4th Dist. 2009) (“[T]he complaint of Mary Roe and Jane Doe [who were expelled for engaging in a lesbian relationship] isn’t that they were excluded from purchasing a sweatshirt or going to a football game, but their dismissal from the school goes to the very heart of the reason for the [] existence of the school....”).

³⁵ D. Michael Lindsay, *Questions Regarding the Letter to President Obama*, July 16, 2014, <http://www.gordon.edu/article.cfm?iArticleID=1625>.

Be assured that nothing has changed in our position regarding admission or employment. We have never barred categories of individuals from our campus and have no intention to do so now. We have always sought to be a place of grace and truth, and that remains the case. As a Christian college, we are all followers of Christ. As long as a student, a faculty member, or a staff member supports and lives by our community covenant documents, they are welcome to study or work at Gordon.

³⁶ *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 134 Cal. Rptr.3d 15, 22 (Cal. App. 4th Dist. 2011).

The trial court found the church terminated Henry's employment [as a preschool teacher] because she violated a church precept. According to the church, Henry's employment was terminated not because she had a baby out of wedlock, and not because she remained unmarried, but because she continued to live with her boyfriend in a sexual relationship while unmarried. The evidence introduced at the trial supports the church's position. . . . Had Henry decided to marry her boyfriend, the church would have been satisfied. But the church would also have been satisfied and Henry would have kept her job even if she decided against marrying him. She could have moved out of their shared residence. In fact, after Henry explained to the school board her hesitancy to remarry, one of the school board members specifically asked her, “Why do you have to live with him?” What the church could not allow was to have Henry, its face and representative to the students and parents of the students who attended its school, to continue living in what it considered a sinful manner. In other words, if Henry stopped living with her boyfriend she could continue in her job. That being the case, the evidence at trial indicates her employment was terminated based upon a matter of religion, not her sex and not her having had a baby out of wedlock.



Members of the School Committee have claimed that allowing Gordon College students to student-teach would send the wrong message to Lynn students.³⁷ It is respectfully submitted that it is the School Committee that is sending the wrong message to Lynn students. Committee members, consciously or not, sent a message to Lynn students that the United States Constitution means little in Lynn. In Lynn, First Amendment protections for freedom of religion and of speech are worth nothing compared to secular orthodoxy regarding sexual behavior. It teaches students that those who dissent from secular orthodoxy, even based on sincerely-held religious beliefs – beliefs that have been held and taught by all three of the great Abrahamic religions for millennia – will find agents of the government proclaiming them to be “*hostes humanis generis*, enemies of the human race.”³⁸ And in so doing, it teaches them to abjure the religion of their fathers, ignore centuries of debate about questions of sexual morality, and most importantly, to never, ever openly question reigning orthodoxy. Otherwise they may find themselves unable to even obtain the necessary student teaching hours to graduate from college.

I hope the School Committee will soon reverse its decision and re-establish ties with Gordon College. If you have any questions or concerns, you may contact my special assistant, Carissa Mulder, at cmulder@usccr.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter Kirsanow', with a long horizontal stroke extending to the right.

Peter Kirsanow
Commissioner

Cc: President D. Michael Lindsay, Gordon College

³⁷ Kathy McCabe, *Gordon College president hopes to renew ties to Lynn schools*, BOSTON GLOBE, Feb. 22, 2015 (quoting Committee member Charlie Gallo), <http://www.bostonglobe.com/metro/regionals/north/2015/02/22/gordon-college-president-hopes-renew-ties-lynn-schools/CAt8E3NksABDwBpYLXTbrO/story.html>.

³⁸ U.S. v. Windsor, 133 S.Ct. 2675, 2709 (2013)(Scalia, J., dissenting).