F I R E
601 Walnut Street, Suite 160
Philadelphia, PA 19106
T 215-717-3473 F 267-419-1635
www.thefire.org

March 13, 2009

Jane Radue
Assistant Director
UW System Office of Operations Review and Audit
780 Regent Street, Suite 210
Madison, Wisconsin 53715

Sent via U.S. Mail, Facsimile (608-262-5316), and Electronic Mail (admincodecomment@uwsa.edu)

Dear Ms. Radue:

As you can see from the list of FIRE's Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, due process, academic freedom, freedom of speech, and freedom of conscience on America's college campuses. Our website, www.thefire.org, will give you a greater sense of our identity and activities.

In collaboration with the Committee for Academic Freedom and Rights at the University of Wisconsin–Madison, FIRE writes today to comment on several of the proposed changes to Chapter UWS 17 of the Wisconsin Administrative Code.

The right to due process of law, guaranteed in federal actions by the Fifth Amendment and made applicable to the states by the Fourteenth Amendment, is a constitutional right enjoyed by every American citizen. As such, it applies fully to public universities like those in the University of Wisconsin (UW) System.

In accordance with the right to procedural due process, similar cases must be adjudicated similarly and the subjects of disciplinary rules, in this case students, must have a reasonably clear expectation of the rules of their hearing prior to the hearing. Offering wide discretion to the judge or judges of a case—here, the hearing examiner or hearing committee—is not in itself unconstitutional. Yet the changes proposed for UWS 17, which explicitly make various "legal privileges" for students subject to the discretion of the hearing examiner or committee and which inject considerable uncertainty into disciplinary cases in other ways, would make due process violations much more likely. This circumstance would open the UW System to due process lawsuits that otherwise could have been avoided with small amendments to the proposed changes.

Below, we enumerate the specific changes that FIRE finds problematic and describe why they are unwise and undesirable. FIRE prefers not to dictate specific language, but in each case the corresponding amendment would require changes involving no more than a sentence or two.

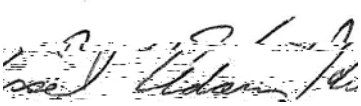
1. The proposal for s. 17.12(4)(b) would change the word “shall” to “may” in this sentence: “The hearing examiner or committee *may* observe recognized legal privileges.” (Emphasis added.) This one-word change takes away a huge swath of legal privileges that used to be (and should be) guaranteed to students. Under the new rule, the judge or judges would have all the discretion

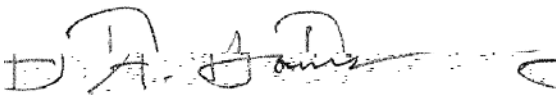
to a hearing committee to determine whether such punishments are appropriate. This rule is

7. Finally, students are particularly upset over the provision that explicitly gives a university the power to punish students for "misconduct occurring on or outside of university lands" (s. 17.08). Further, at the public hearing on March 5, 2009, it seemed that some of the nonstudent citizens of Milwaukee thought that this provision covered more municipal infractions than the plain language of s. 17.08 actually does. It also seemed that some of the student citizens of Milwaukee, not having carefully read the provision, had been persuaded that s. 17.08 did in fact cover more infractions than it does. In particular, student leaders have suggested that so-called noise violations, which they say are used to crack down on neighborhood parties, are said by nonstudent citizens of Milwaukee to be within the jurisdiction of UW schools under s. 17.08.

Please be advised, however, that some federal courts have noted that in determining whether rules such as s. 17.08 are impermissibly vague, they should be interpreted as a reasonable student would interpret them. As U.S. Magistrate Judge Wayne Brazil wrote in *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1015-16 (N.D. Cal. 2007), courts "must assess regulatory language in the real world context in which the persons being regulated will encounter that language. The persons being regulated here are college students, not scholars of First Amendment law." Any reasonable student reading s. 17.08 would *not* imagine that noise violations would be "serious" enough infractions that they would "seriously" impair the university's ability to fulfill its missions. Municipal noise violations that do *not* include, for instance, quantities of alcohol consumption that indicate "that the student presented … a danger or threat to the health or safety of himself, herself or others" (s. 17.08(2)(b)) are in themselves not punishable under the proposed s. 17.08. If UW schools are really intending to use this rule to prosecute students for noisy off-campus parties rather than truly dangerous activities, lawsuits may follow.

In addition, it is important to remember that if a student embarrasses UW through protected speech, such speech is never punishable, even if an administrator claims that such embarrassment "seriously impairs the university's ability to fulfill its teaching, research, or public serlt02 TcuTdo.00ous ac-29.2282stuaTw"rltantstco Municiph ac-2ching, resem-.0018 ng te(emeTw[(em-





cc:
Mark J. Bradley, Regent President
Michael J. Spector, Regent
Kevin Opgenorth, Regent
Michael Moscicke, University Affairs Director, United Council of UW Students