Foundation for Individual Rights in Education
601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106
T 215-717-3473 • **F** 215-717-3440 • fire@thefire.org • 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 when it comes to the legal privileges that are not already specified in UWS 17. The judges may, or they may not, observe the legal privileges that used to protect students' rights. Since the optional "legal privileges" are not spelled out, accused students are likely to have no idea, *until they actually arrive at the hearing*, what the rules of their hearing will be. The proposed change provides no guarantee that students will receive prior notification of the rules that will be made up at the discretion of the judges.

Further, this change opens the door to the due process violation of treating similar cases differently, which could lead to litigation against the UW System. Moreover, it is especially a problem for a hearing committee composed of faculty members and students who have little or no actual training in the law or even in campus judicial proceedings, and who may not realize the vital importance of certain legal privileges—for example, of being allowed to keep a copy of the record of a hearing in order to prepare an appeal. Absent clear rules and guidelines, this change is a recipe for due process disaster.

Accordingly, please let us suggest that the change from "shall" to "may" not be made. Please also consider adding to UWS 17 a requirement that prior to the hearing of each case, both the accused student and the judge or judges be apprised of the legal privileges that will be applied in their case and all similar cases.

2. Under the proposed s. 17.12(4)(a), students no longer will have the right to have a lawyer or another advisor speak on their behalf. This in itself is problematic, for the real-time cross-examination of witnesses could be crucial to a case, and a student might have no real hope of demonstrating that a witness is not credible if a lawyer is not present to do what is necessary. Students whose first language is not English, younger students who are not yet critical readers and thinkers, and any student who faces a complex, nuanced case might especially be in need of someone to provide a key point at a key time in a hearing. Waiting for the nuances to be explained to the student by his or her advisor may not be feasible. As the Committee for Academic Freedom and Rights has pointed out, there are many cases in which a lawyer can ask the kinds of probing questions that a student does not have the training or wisdom to ask. Furthermore, when a case could lead to expulsion, the case is far from the realm of a simply "educational" process, as much as one might hope it would be educational.

But the problem with the proposed rule is worse. Whether or not a student gets the benefit of a lawyer speaking on his or her behalf is again *left to the discretion of the judge or judges*. Please let us suggest an amendment: In cases where the punishment is severe and not simply educational, such as cases that could lead to suspension or expulsion—or indeed, in all cases where a substantial liberty or property interest is at stake—UWS 17 should explicitly state that a

student may have an attorney or other advisor speak on the student's behalf. Other special situations, like those mentioned above, might also be named as situations where this privilege is enjoyed. Leaving all of this up to the discretion of the judge or judges, however, opens the door to due process violations—either because of treating similar cases differently, or because of the failure to provide this element of due process when it is necessary for the hearing to be fair. I should note that providing for this additional due process protection entails virtually no cost to the UW System.

3. The proposed s. 17.16 requires that the university *must* withhold a student's degree if he or she is "subject to a disciplinary sanction" or is under charges for *anything at all*. A student under punishment, however minor, would not be able to receive a degree. Thus, a student will be denied his or her degree if he or she is facing punishment for even the most minor of offenses. These include failing to register one's bicycle, "molest[ing]" any "bird, animal, or fish life," or letting go of one's dog while it is on a leash on university property. If an investigating officer passes the student's case on to a hearing examiner or hearing committee, the degree will be withheld until the matter is resolved.

While a university may legally choose to withhold a degree during the time when a student is subject to nonacademic discipline, the express language of "subject to a disciplinary sanction" seems to apply unreasonably to cases where the disciplinary sanction is permanent, such as an open-ended "denial of specified university privileges" (one of the possible punishments). A plain reading of s. 17.16 suggests that so long as a student is subject to such a punishment—forever—the degree must be withheld. We suggest that UWS 17 direct that certain ongoing punishments automatically end upon one's regularly scheduled graduation. In addition, it might not actually have been the intention of the Regents to demand that degrees be withheld for very minor infractions. Thus, we suggest another small amendment: Students who are charged with minor infractions (that is, when the expected punishment is minor) should be given every expectation that their hearing will be expedited so that they can graduate on time.

4. Another troubling grant of discretion that is found in the existing policy is being left unchanged in the proposed revision. According to the proposed s. 17.13(2), appeals to the president (the "chief administrative officer") threaten to throw the entire process into yet more confusion. According to this rule, if the president decides that "established procedures were not followed," he or she "may invoke an appropriate remedy of his or her own." (Let us presume that "established procedures" encompasses, at the least, all legally binding requirements of due process, although that is not quite the same thing.) The president can decide that no new hearing is required and can use his or her discretion to end the case and decide a punishment then and there. Once again, this unsettlingly wide discretionary latitude opens the door widely to failures of due process. As you know, presidents are extremely busy and do not have a great deal of time to properly assess a disciplinary case and set an appropriate punishment.

5. The proposed s. 17.12 also provides that in cases where the possible punishment is not dire, such as suspension or expulsion, students will be entitled not to a hearing committee (which includes a student peer) but to just a single hearing examiner. Disciplinary probation and mandatory conditions for remaining a student are serious consequences that involve significant liberty and property interests for a student, but under the new rules a student will not have access

to a hearing committee to determine whether such punishments are appropriate. This rule is especially troubling in cases where the hearing examiner is not a neutral party in the case. At the very least, FIRE suggests that UWS 17 mandate that hearing examiners should have as little prior involvement in the case as possible. In addition, we ask that you reconsider whether some other levels of punishment, while not as serious as suspension or expulsion, might deserve the additional due process protection of having a hearing committee. This reconsideration may legally weigh the likely due process benefits against the cost to the System of providing the additional protection.

6. The proposed s. 17.12(4)(e)(3) relies, in sexual harassment and sexual assault cases, on a "preponderance of the evidence" standard—basically a 51% standard of proof. The reason given in the Regents' explanatory document, "Recommended Revisions to Chapters UWS 17 and 18, Wis. Admin. Code," for changing this evidentiary standard is that "The U.S. Department of Education (DoE) has held that in cases of sexual harassment and sexual assault, the disciplinary standard of proof must be a preponderance of evidence." It seems that the Regents are relying on a letter from the DoE dating to 2003, which draws on an earlier letter from 1995. This letter rather clearly states that a school is not in compliance with Title IX if it uses the higher "clear and convincing" standard rather than a "preponderance" standard for professor-to-student sexual harassment cases.

It is not entirely clear, however, that this standard applies to peer-to-peer harassment cases where the alleged misconduct arises from student speech. First Amendment protections of student speech are very strong. For instance, the DoE letter referenced above argues that someone could be found guilty of harassment simply for seeming to have had the "purpose" of harassment—even if the person failed to succeed in harassing someone. Intent is notoriously difficult to prove. Indeed, the United States Court of Appeals for the Third Circuit, in the case of *DeJohn v. Temple University*, 537 F.3d 301, 317 (3d Cir. Pa. 2008) found that a public university may not, consistent with First Amendment rights, punish student speech for merely seeming to have the "purpose" of harassment. While not legally binding on UW, the Third Circuit's decision highlights the constitutional infirmities presented by relying on "purpose" or "intent" in determining whether speech constitutes harassment.

Additionally, the fact that the DoE (or the EEOC, which also uses "purpose" in its harassment guidelines) has created a policy does not mean that the policy may trump a student's constitutional rights. Indeed, on July 28, 2003, the Office for Civil Rights sent an open letter of clarification about harassment regulations and the First Amendment to colleges around the country in which former Assistant Secretary Gerald A. Reynolds wrote, "No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights." Even the uninformed will begin to question the justice of UW's disciplinary system when sexual harassment and sexual assault cases are given special treatment among the many offenses for which a student may be suspended or expelled. It may well be that student-to-student speech must reach a higher, "clear and convincing evidence" evidentiary standard before it can be punishable as sexual harassment. All of this is complex, and we encourage the Regents and the UW System to thoroughly reconsider this issue before sending UWS 17 up to the state legislature.

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 service missions" (s. 17.08(2)(c)). Likewise, a pattern of minor conduct infractions that merely embarrasses UW in, for example, a Milwaukee neighborhood is not enough, by any reasonable student's plain reading of the provision, to constitute a serious impairment of the university's ability to fulfill its missions. Embarrassment of the university is not a serious enough result for which a student may be punished.

FIRE would be pleased to discuss these points further with you. Thank you for the invitation to submit comments on the proposed revisions.

Sincerely,

Adam Kissel
Director, Individual Rights Defense Program

Cosigned, Donald A. Downs
Committee for Academic Freedom and Rights

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