WISCONSIN LEGISLATURE

P.O. BOX 8952 · MADISON, WI 53708

February 7, 2006

Kevin P. Reilly, President
University of Wisconsin System
1720 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

Dear President Reilly:

We wanted to weigh in on your ongoing dialogue, discussion, and effort to come up with a uniform, written, and defensible UW System policy regarding RA's and their First Amendment rights.

First, we want to applaud you for testifying before the Assembly Colleges and Universities Committee about UW-Eau Claire RA Lance Steiger's voluntary Bible Study sessions held in the basement of his dormitory that drew the attention and unspecified discipline from a UW Housing official. In the wake of an international firestorm that ensued, you clearly recognized, as did we, that this issue had become a public relations nightmare for the UW System. Your decision to form a task force to bring uniformity and consistency to this issue has, for now, defused the controversy. But we are getting concerned that you have not yet reached a decision, nearly three weeks after the deadline you had set. Moreover, the principles outlined in the Resident Assistant Working Group Final Report that you forwarded for public comment are vague, and do nothing to protect RA's religious freedoms on UW campuses. Nor do they clarify when a RA is considered on or off-duty, whether RA's are considered state employees and whether labor protections apply to them. In short, if those recommendations become your new policy, we will be back to square one on Mr. Steiger's case.

Enclosed is a copy of Attorney General Lautenschlager's November 21, 2005 letter with the 11 questions that your Working Group was going to use as a guide, as indicated in your testimony before the Committee.

We're respectfully asking you to include in your final decision exactly what you told the Colleges and Universities Committee back in December: that as long as the activity was safe, legal, voluntary, an RA could freely do as they please in the confines of their own room, or dormitory. We are interested in "protecting" First Amendment rights on our public university campuses, and nothing in the Report seems to ensure that. Failure to clearly protect an RA's rights will only lead to more litigation and more negative national publicity.

We'd like to put this matter to rest, and move on to more unifying issues that improve our state's economy. We felt it was important to put our thoughts in writing so you know exactly where we stand prior to reaching your final written policy – which we hope will be forthcoming soon.

Best wishes,

Rob Kreibich
State Representative
93rd Assembly District

Samantha Kerkman
State Representative
66th Assembly District

Debi Towns
State Representative
43rd Assembly District

Stephen Nass
State Representative
31st Assembly District

Terry Moulton
State Representative
68th Assembly District

Robin Vos
State Representative
63rd Assembly District

Suzanne Jeskewitz
State Representative
24th Assembly District

Andy Lamb
State Representative
29th Assembly District

David Zien
State Senator
23rd Senate District

Joan Ballweg
State Representative
41st Assembly District

cc: U.S. Representative Mark Green

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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November 21, 2005

President Kevin Reilly
University of Wisconsin System
1720 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

Dear President Reilly:

You have written a letter asking for the Attorney General's opinion whether the University of Wisconsin-Eau Claire (UWEC) may enforce a policy prohibiting resident assistants (RA's) from leading, organizing or recruiting students for certain activities in their dormitory rooms and in the residence halls in which they work. In particular, you referenced concerns that this policy might implicate the First Amendment rights of RA's if it restricts their ability to conduct Bible studies in dormitory rooms, even though other campus facilities are available for that purpose. You also indicated that there is no uniform UW System policy on this matter, that the UWEC policy has not been reduced to writing, but that the policy is explained to RA's in training sessions held at the beginning of each academic year.

Your letter and the accompanying materials raise a host of questions and concerns, the first of which is in regard to the nature of the inquiry in light of the statutory obligations of the Attorney General and Department of Justice. As you know, it is the duty of the Attorney General to represent the State, generally, and the duty of this department to represent the University of Wisconsin in the event of litigation. Were the Attorney General to address substantively the issue presented and conclude that the UWEC policy likely violates, and has violated the constitutional rights of those affected, in effect we would be conceding liability on behalf of the State. At the very least this department would be unable to defend any lawsuit brought against the University and/or the State of Wisconsin, even though a viable argument in defense of the policy might exist. As there is no state civil rights statute affording us the authority to protect the rights of citizens impacted by this policy, no conflict would inure in this circumstance other than that potentially created by an opinion adverse to the policy.

Without presaging the results of any legal analysis, I think it imprudent to put this department, and the Attorney General, in the position of being unable to perform our representational functions on behalf of the State by acceding to your request for a written opinion. As always, our legal staff is available to assist yours, if desired, in analyzing the policy and correcting it, if necessary. I am

concerned that that approach appears not to have been contemplated, or if it was considered, not pursued.

Were we to honor your request for a written opinion on the issue presented, a number of questions would have to be addressed before any definitive legal conclusion could be offered. I raise these now as the letter written by the University's legal counsel, an attachment to your letter, reflects that UWEC intends to develop a written policy in regard to the activities of RA's. The following tenets and questions may guide their approach.

As you may be aware, the United States Supreme Court has stated that a public university's regulation restricting speech must be necessary to serve a compelling state interest and narrowly tailored to achieve that purpose. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). At the same time, the Supreme Court has recognized that a public university may prohibit certain activities constituting speech if those activities substantively interfere with reasonable campus rules or the opportunity of other students to obtain an education. *Healy v. James*, 408 U.S. 169, 188-89 (1972). In the context of UWEC's policy, these precepts raise the following questions:

1. If the policy is needed in order to safeguard students, why is it limited to a single campus?
2. What is the justification, and foundation therefore, for restricting the policy to dormitories?
3. How does this policy compare with other activities allowed or prohibited in University owned or operated facilities, and in particular residential facilities?
4. Are there any specific contractual terms implicated by the policy?
5. Are other university employees subject to similar restrictions?
6. Who has reviewed/approved/objected to this policy, and in particular what administrative or legal approval or review has been conducted?
7. What facts suggest or refute the notion that students feel compelled to participate in RA-led activities in dormitories?
8. Since UWEC allows Bible study and other religious activities to occur in university facilities, is there any concern that permitting Bible study in dormitories might violate the Establishment Clause of the First Amendment?
9. What alternatives to the policy has UWEC considered that would enable it to protect the interests of its students, including the rights of those wishing to conduct activities currently prohibited by this policy?
10. How long has the policy been in effect?
11. As an institution dedicated to the exchange of ideas with the objective of enhanced understanding, what effort has UWEC made toward a satisfactory compromise?

Frankly, I don't see how a proper legal analysis of the constitutional question raised may be done without answers to most if not all of the above questions. I would urge University officials to consider

how the answers to these questions tend to support or refute the need for the policy, in light of the standards expressed by the Supreme Court.

Very truly yours,

Daniel P. Bach
Deputy Attorney General

DPB: tmw