

Kunkel, Mark

From: Schweitzer, Alicia
Sent: Wednesday, March 29, 2017 3:35 PM
To: Kunkel, Mark
Subject: RE: LRB-2408

Hi Mark,

I would like to keep the words "indecent, profane, boisterous" in the bill. I recognize the issue you addressed but I believe adding those words would bring the section closer to the legislative intent. I did take those words from the disorderly conduct statute. I am not sure if there is a better way to do that.

Also, if you do not think it adds anything but more restrictions, I am fine with taking intent out and continuing with the word interfere. I would also like to use "interfere" as the sole word as well.

Thank you again for your help!

Alicia Schweitzer

From: Kunkel, Mark
Sent: Wednesday, March 29, 2017 3:26 PM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

If you want to impose a requirement for intent, you could allow intent to be determined both subjectively (what did the actor actually intend) or objectively (what would a reasonable person conclude that the actor intended). What do you think of the following? I borrowed "reasonable person" from a Michigan law on cyberbullying, MCLS § 380.1310.

The [UW Board of Regents policy] required under par. (a) shall satisfy all of the following:

1. Include a range of disciplinary sanctions for anyone under the jurisdiction of the institution who engages in violent, abusive, unreasonably loud, or otherwise disorderly conduct that interferes is intended to interfere or that a reasonable person would know is likely to interfere with the free expression of others.

I deleted "indecent, profane, boisterous, obscene" because I think that, without defining them, they have broad or potential ambiguous meanings.

If you don't want to impose an intent requirement, you could refer to engaging in the conduct that interferes with free expression. I don't think you add a lot by specifying that the conduct results in or has the effect of interfering. I think it is probably sufficient to say that the conduct interferes.

Also, instead of using two words (infringe and interfere) in the bill, you might want to pick one. If you use both, a reader might conclude that they have different meanings.

From: Schweitzer, Alicia
Sent: Wednesday, March 29, 2017 10:13 AM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: RE: LRB-2408

Good Morning Mark,

I was thinking about the phrases within the bill draft again and was wondering if maybe adding the following would make it more clear.

Interferes with the expressive rights of others by engaging in violent, abusive, indecent, profane, boisterous, obscene, unreasonably loud and/or otherwise disorderly conduct with the intent to disturb or silence the free expression of others.

I am concerned that the word "intent" is too restrictive. Do you know of a better option? Such as "in order" or something else?

Thank you again for your help. Please let me know if you think this would hit the spot I am looking for.

Regards,

Alicia Schweitzer

From: Kunkel, Mark
Sent: Tuesday, March 28, 2017 4:33 PM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

You are correct – I think it would add to the potential broadness problem, so maybe it isn't a good solution.

Maybe you could tell the Board of Regents that the range of disciplinary sanctions must be based on the degree (or extent) of interference (or infringement), so that lesser degrees would be subject to lesser sanctions and greater degrees would be subject to greater sanctions. That approach might make it clear that you want the Board to penalize lesser interference/infringement, and you could direct the Board to specify what constitutes lesser and greater degrees.

From: Schweitzer, Alicia
Sent: Tuesday, March 28, 2017 4:24 PM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: RE: LRB-2408

Hi Mark,

Would adding that language cause greater issues due to the broadness or is it so broad that it is kind of all encompassing?

From: Kunkel, Mark
Sent: Tuesday, March 28, 2017 4:02 PM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

Regarding your concern about infringing and interfering, here is a possible solution. You could revise proposed s. 36.02 (4) (a) 4. to refer to infringing *in any way* on the expressive rights of others. Likewise, you could revise proposed s. 36.02 (4) (b) 1. to refer to interfering *in any way* with the free expression of others. That might accomplish the goal of getting the Board of Regents to interpret those words broadly.

From: Schweitzer, Alicia
Sent: Tuesday, March 28, 2017 1:19 PM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: RE: LRB-2408

Hi Mark,

Thank you for your response. The information you provided was extremely helpful.

I would like to specify the types of interference or infringement that are prohibited. My goal is to better define the terms but still have them encompass a variety of scenarios. Would you suggest using language from Black laws dictionary as well as adding in even more specifics?

Thank you,

Alicia Schweitzer

From: Kunkel, Mark
Sent: Tuesday, March 28, 2017 11:15 AM
To: Schweitzer, Alicia <Alicia.Schweitzer@legis.wisconsin.gov>
Subject: RE: LRB-2408

Alicia:

There are a handful of Wisconsin statutes that prohibit a person from interfering with or infringing on the rights of another. For example, s. 49.498 (3) (a) 8. requires a nursing facility to protect and promote the right of a resident to participate in social, religious and community activities that do not interfere with the rights of other residents. Section 707.52(1)(d) allows a campground operator to terminate the contract of a campground member who unreasonably infringes on the rights of other campground members. No published court decisions have considered what the words "interfere" and "infringe" mean under those statutes and, even if they did, they would not be helpful in determining what the words mean with respect to 1st Amendment rights.

Under their dictionary meanings, the words have broad definitions. (See below.) If the bill by itself prohibited interfering with or infringing on the expressive rights of another, a court might conclude that the prohibition is so broad that the prohibition itself violates the 1st Amendment. For example, in *Milwaukee v. Wroten*, 160 Wis.2d 207 (1991), a Milwaukee City ordinance prohibited interfering with police officers in the discharge of their duties. The Wisconsin Supreme Court found that the prohibition was unconstitutional under the "overbreadth doctrine." Under that doctrine, a court will invalidate an ordinance or statute that is worded so broadly that it has the effect of chilling or inhibiting speech that is otherwise protected by the 1st Amendment. If your bill directly prohibited a person from interfering with or infringing on another's rights, a court might find that the prohibition is overbroad and therefore violates the expressive rights of the person doing the interfering or infringing.

However, your bill does not by itself impose that prohibition. Instead, the bill directs the Board of Regents to adopt a policy that makes it clear that protests and demonstrations that infringe on the expressive rights of others are not permitted and subject to sanction. See proposed s. 36.02 (4) (a) 4. The bill also requires the Board of Regents to include in the policy a range of disciplinary sanctions for interfering with the free expression of others. See proposed s. 36.02 (4) (b) 1. As a result, the Board of Regents will have to fill in the details and specify the types of infringement and interference that are prohibited.

Under 1st Amendment case law, universities are allowed to promulgate and enforce rules that prohibit disruptive groups or individual protests. See W. Kaplan and B. Lee, *The Law of Higher Education*, vol. 2 at s. 9.5.3 (4th ed. 2006), citing

Healy v. James, 408 U.S. 169 (1972). The U.S. Supreme Court has held that student conduct is not protected by the 1st Amendment if it materially and substantially interferes with appropriate discipline in the operation of the school, or if the conduct materially disrupts classwork or involves substantial disorder or invasion of the rights of others. See *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503, 513 (1969).

The policy adopted by the Board of Regents will have to comply with 1st Amendment case law. I don't think it is necessary to require the Board of Regents to ensure that the 1st Amendment rights of all parties are protected, but if you want to do so, I could add some language. Alternatively, if you want to specify the types of interference or infringement that are prohibited, let me know.

Please call me if you want to discuss these issues further.

--Mark

Dictionary definitions. The bill does not define "infringe" or "interfere," so the Board of Regents would be bound by the dictionary-definition of those words. Current law would also allow the Board of Regents to promulgate rules interpreting the meaning of those words, as long as the interpretation does not "exceed the bounds of correct interpretation." Section 227.11 (2) (a) (intro.). Unfortunately, dictionary definitions do not help to narrow the meaning of the words. Merriam Webster defines "infringe" as "to encroach upon in a way that violates law or the rights of another." Black's law dictionary defines "infringement" to include a violation of right. As for "interfere," Merriam Webster's definition includes "to interpose in a way that hinders or impedes" and Black's law dictionary's definition includes "to check; hamper; hinder; infringe; encroach; trespass; disturb; intervene; intermeddle; interpose."

From: Schweitzer, Alicia
Sent: Tuesday, March 28, 2017 9:16 AM
To: Kunkel, Mark <Mark.Kunkel@legis.wisconsin.gov>
Subject: LRB-2408

Good Morning,

I wanted to check in and see if you had any information regarding the terms "infringing upon the expressive rights of others" or "interferes with the free expression" and their meaning in the state of Wisconsin.

My hope is to complete my draft changes and have them to you by today or tomorrow morning at the latest.

Thank you for all of your help.

Alicia Schweitzer
Office of Assembly Speaker Robin Vos
PH 608-237-9163
alicia.schweitzer@legis.wi.gov

1 also award the actual damages caused by the violation or \$1,000, whichever is
2 greater.

3 (c) A person specified in par. (a) 2. shall bring an action for a violation of this
4 subsection within one year after the date the cause of action accrues. For the purpose
5 of calculating the one-year limitation period, each day that the violation persists or
6 each day that a policy in violation of this subsection remains in effect constitutes a
7 new violation of this subsection and shall be considered a day that the cause of action
8 has accrued.

9 **SECTION 2.** 36.35 (1) of the statutes is amended to read:

10 36.35 (1) POWER TO SUSPEND; RULES. The board may delegate the power to
11 suspend or expel students for misconduct or other cause prescribed by the board.
12 Subject to sub. (4) and s. 36.02 (4)(b), the board shall promulgate rules under ch. 227
13 governing student conduct and procedures for the administration of violations.

14 **SECTION 3.** 227.01 (13) (Lo) of the statutes is created to read:

15 227.01 (13) (Lo) Adopts the policy required under s. 36.02 (4) (a).

16

(END)