MEMORANDUM

To: Ian Welsh, United Council; Associated Students of Madison; Student Services Finance Committee

From: Mark B. Hazelbaker, Attorney at Law

Date: July 11, 2007

Re: Segregated Fee Appeal – Off-Campus Rent For Student Organizations

You have asked me to respond to a memorandum written by UW Counsel Pat Brady concerning the issue of use of student fees to pay rent for off campus space of student organizations.

I write as an attorney who works on a volunteer basis with United Council because I am supportive of student involvement in the shared governance system on campus. I worked for United Council in 1980-81 as Legislative Affairs Director while I attended Law School at the University. Prior to that, as a reporter on the staff of The Daily Cardinal, I had occasion to observe personally many of the issues that emerged as the merger statute was implemented. Since the statute was adopted the year before I began attending the University in 1975, my experience with the process covers the history of the matter comprehensively. I also filed one of the amicus briefs in the Southworth case, so I am familiar with the First Amendment implications of the student fee issues as well.

Attorney Brady’s memorandum is very troubling. It is based on an unsound method of statutory “construction,” one which appears to be little more than a rationalization for the decision. It also leads inevitably to a conclusion that would violate the First Amendment rights of students and student organizations.

The memorandum recites a series of historical events since the adoption of the merger statute which Ms. Brady contends are probative of the intent of the statute. There are two problems with these assertions. First, as Ms. Brady noted at one point in her memorandum, sec. 36.09(5) is not ambiguous. She asserts that its plain meaning supports her position. If a statute is plain and unambiguous, it is impermissible under

In Harendra, the Wisconsin Department of Justice prosecuted an asbestos abatement contractor for violating DNR rules related to asbestos handling. The State contended that the applicable rule had to be construed in light of several subsequent actions which “clarified” the rule. The Court of Appeals rejected the State’s contention, holding that if the plain meaning of a statute or rule is evident, the language of the statute controls, even if the agency claims experience and expertise in administration of the statute:

Irrespective of what level of deference is appropriate, however, an agency interpretation may not trump a statute’s clear language. See id., 201 Wis.2d at 282 n. 2, 548 N.W.2d at 60 n. 2 (“The plain meaning of a statute takes precedence over all extrinsic sources and rules of construction, including agency interpretations. For example, even if an agency interpretation is accorded the highest level of deference by a court, great weight, it will not be upheld if the interpretation directly contravenes the clear meaning of the statute.”).


Even if one accepted the proposition that the statute is ambiguous, the opinion’s reliance on memoranda, events and decisions taken after the statute was adopted is an illegitimate way to interpret a statute. Legislative history, sometimes employed in construing an ambiguous statute, involves reviewing materials which were considered by the Legislature when it adopted a statute, or prepared by legislative agencies. Hence, history of the administration of the statute by the University after adoption of the statute has absolutely nothing to do with what the Legislature intended in adopting it. See, Juneau County v. Local 1312, et al., 221 Wis.2d 630, 647-648, 585 N.W.2d 587, 594 (1998). The materials cited in Ms. Brady’s opinion, such as a 1975 memorandum that was negotiated with the student government at that time, is not legislative history, and has nothing whatsoever to do with what the statute means.

If a statute is plain and unambiguous, then it is interpreted by reference to its plain language. It has always been my contention that sec. 36.09(5) is not ambiguous. The statute specifies that certain decisions are delegated to the students. They must make those decisions subject to the authority of the Board of Regents, the Chancellor, and the faculty, but within the sphere of decision making delegated to the students, the University, including the Chancellor, cannot constrain the discretion of the students elected to set student fees and allocate them.

I rely on personal recollection of the history to disagree with assertions in the memorandum that the distinction between allocable and non-allocable segregated University fees is, and has been, universally recognized and valid. In point of fact, the University administration came up with that distinction on its own in 1978. The assertion that the University can unilaterally designate certain fees as non-allocable, and that the students have no authority to modify them, was certainly quite controversial at the time. In fact, that issue probably would have eventually been litigated but for the fact that in
April 1978, the infamous Pail and Shovel Party was elected to run the Wisconsin Student Association. They dropped any pretense at pursuing merger, along with any serious interest in anything else. They were certainly fun, but they were not advocates for shared governance.

The central question is what the term "campus student activities" used in sec. 36.09(5) means. The Brady memorandum asserts that the statute's plain meaning makes it illegal for student fees to be used to pay for rent of student groups using off-campus facilities. The statutory language itself does not say that. It is not a reasonable construction of the words used. It misses the main point, which is, who determines what constitutes "campus student activities?" The language of the statute delegates that decision to students, not the chancellor.

A contention that student activities are confined to campus is untenable. This is particularly true for a university which proudly asserts that its boundaries are those of the State. Certainly, the University campus is not to narrowly confined to official University buildings. The University has activities which go on all over the State of Wisconsin. Students participate in University-funded activities that occur off campus all the time.

If the University wishes to assert that University funds cannot be expended for student activities that take place outside of campus buildings, does this mean that the UW Marching Band will no longer be allowed to accompany the football team to away games, which involve paying for lodging or involve performances in stadiums owned by Purdue or Illinois?

Does it mean that graduate students will no longer be allowed to do grant-funded work where the grant fund flows through University funds when they do the work outside of University buildings? If students cannot spend money for off campus facilities, how is it possible for the University to fund, for example, field work by Sociology Department researchers in the Brazilian States of Rio Grande do Sul and Santa Catarina on popular resistance to government dam-building projects?

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1 It is interesting to note in light of the professed concern about allowable costs that during the two-year tenure of the Pail and Shovel party, the University administration had no problem allowing the then-Wisconsin Student association to spend segregated University fees on many interesting things: the purchase of several hundred pink flamingos which were planted on Bascom Hill, at a cost of several thousand dollars in 1979; construction of a papier-mâché Statue of Liberty, estimated to have cost more than ten thousand dollars in 1979; rental of a crane which was used to lower a 3-foot high replica of the Washington Monument onto the State Street Mall in 1978; a dedicated voice phone line in the WSA office used to operate a "dial-a-joke" service in 1978-79; publication of a spurious University tabsheets in late August 1979 purporting to be official university registration guidebook. The University's attention to monitoring allowable costs is commendable, if belated. Certainly, when the student government was throwing money away on obviously ridiculous uses, the administration did nothing to stop it on the ground that allowable cost policies were being violated.

And, I also wish to inquire: does University itself rent any space anywhere? I have a feeling, somehow, that somewhere the University is leasing at least some of the space it uses for its activities. In other words, I am suggesting that the University may be imposing a limit on students which it does not impose on itself.

The Legislature, in adopting the merger statute, intended to delegate a certain amount of political authority and discretion on the students. Within that discretion, only the students can decide what constitute campus student activities. I do not dispute that the University has the right, provided it applies rules consistently, to apply allowable cost policies to all activities that occur under the auspices of the University. But, allowable cost policies must not be used as a pretext for reigning in students or controlling the exercise of student discretion.

I also wish to point out that the University's attempt to adopt the policy involved here may be invalid for the reason that the University has failed to follow the procedure for adopting this policy as an administrative rule. This rule, as is obvious from the way in which the University is attempting to enforce it, has impact on the substantive rights and interests of students, not just on the internal operations of the University itself. Therefore, the policy appears to be a rule within the meaning of sec. 227.01 (3), Wis. Stats., since it is clearly a statement of policy which is intended to make specific a statute administered by the University. If so, it may need to be promulgated as an administrative rule and forwarded through the clearing house process before it becomes effective. See, Schoolway Transportation vs. Department of Transportation, 72 Wis. 2d 223, 240 N.W.2d 403 (1976).

Assuming that the University adopted an allowable cost policy which it applies consistently to student activities and University academic and other programs, there is another problem posed by the proposal which the Chancellor has advanced. Since the University does not have sufficient campus facilities to house the programs that the students have indicated a desire to offer, the policy would effectively ban a substantial number of activities. Inevitably, application of the policy will curtail expression of First Amendment-protected activity by students.

However, the University may not impose prior restraints on the exercise of First Amendment rights of the students. By telling students that they can fund activities, but only those that can be conducted within University facilities, the University is effectively denying a substantial portion of the activities of the students. Since there is no space available for these activities to occur, forbidding the payment of rent will effectively prevent the programs from being offered at all.

It is a well-settled doctrine under the First Amendment that if the government acts in a way which burdens the exercise of speech, there must be a compelling state interest. Absent a compelling state interest, regulations that restrict the opportunity of individuals to speak are unconstitutional. Further, once it is shown that a restriction burdens the exercise of First Amendment rights, the restriction is presumed to be unconstitutional and the burden of demonstrating its constitutionality shifts to the government. I suggest that this is such an instance, and that it is the University's burden to demonstrate that a regulation which undeniably will completely preclude the expression of a substantial
portion of ideas and programs which the students wish to fund, does not, therefore, violate the First Amendment. This burden, the University will simply be unable to meet.

The University cannot effectively deny the exercise of First Amendment rights by placing restrictions on the permissible forum within which those rights may be exercised which has the effect of denying all opportunity to express the quantity of opinion which the students would like to express. It is certainly permissible to impose time, place and manner restrictions, but those restrictions may not have the effect of preventing completely the expression of some ideas.