1999 DRAFTING REQUEST

Assembly Amendment (AA-ASA1-AB133)

Received: **06/22/99**

Received By: **kenneda**

Wanted: **As time permits**

Identical to LRB:

For: **Assembly Republican Caucus 266-1452**

By/Representing: **Dake**

This file may be shown to any legislator: **NO**

Drafter: **kenneda**

May Contact:

Alt. Drafters:

Subject: **Health - abortion**

Extra Copies: **TAY**

Pre Topic:

ARC:......Dake - Am #84,

Topic:

Prohibit use of public employes and public property for activities relating to abortion

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Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/1	kenneda 06/22/99	jgeller 06/22/99	kfollet 06/22/99	_______ _______	lrb_docadmin 06/22/99		
/2	kenneda 06/23/99	chanaman 06/24/99	jfrantze 06/24/99	_______ _______	lrb_docadmin 06/24/99		

FE Sent For:

<END>

LRBb0859

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Subject: **Health - abortion**

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Pre Topic:

ARC:......Dake - Amdt. No. 84,

Topic:

Prohibit use of public employes and public propety for activities relating to abortion

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See Attached

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Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/1	kenneda 06/22/99	jgeller 06/22/99	kfollet 06/22/99	_______ _______	lrb_docadmin 06/22/99		

FE Sent For: cmh 6/24 1v 6/24 6/24

<END>

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---

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See Attached

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Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kenneda	/1 6/22 jg	kjf 6/22	kjf/ch 6/22			

FE Sent For:

<END>

DAK
ARC

To Be Drafted

Agency	DHFS	Amendment#	84
ARC Analyst	Brian Dake	LRB#	
		Tax Cut	☐

Summary

Under current law, no state, county, city, village, or town funds and no federal funds passing through the state treasury may be authorized or paid for performance of an abortion. The prohibition does not apply to the following: a) an abortion is directly and medically necessary to save the life of the woman; b) an abortion in a case of sexual assault or incest that has been reported to the law enforcement authorities; or c) the authorization or payment of funds for prescription of a drug or the insertion of a device to prevent the implantation of the fertilized ovum.

The amendment prohibits state or local government employees, while acting within the scope of their employment from; a) providing or assisting in providing an abortion; b) aiding or encouraging a pregnant woman to have an abortion; c) making abortion referrals either directly or through an intermediary; or d) providing instruction on how to perform a medical treatment or surgical procedure for the purpose of performing or inducing an abortion. Any persons who violates any of these provisions shall be required to forfeit not more than $1,000 for each offense. Please note that items "a" through "c" would be allowable only if the abortion is directly or medically necessary to save the life of a pregnant woman.

The amendment further prohibits public property from being used by a state or local government to; a) provide or assist in providing an abortion; b) aid or encourage a pregnant woman to have an abortion; c) make abortion referrals either directly or through an intermediary; or d) provide instruction on how to perform a medical treatment or surgical procedure for the purpose of performing or inducing an abortion. Any persons who violates any of these provisions shall be required to forfeit not more than $5,000 for each offense. Please note that items "a" through "c" would be allowable only if the abortion is directly or medically necessary to save the life of a pregnant woman.

With respect to the public property provision, the restrictions are not applicable to public property that is leased to a private person under a lease agreement prior to the effective date of this amendment until the date on which the lease agreement expires or is extended, modified or renewed.

Fiscal Impact

The amendment would have a minimal fiscal effect that is indeterminate.

Statement of Intent

DHFS. Prohibit the use of public employees and public property for activities relating to abortion and providing a penalty.

Request# 168

1999 **Date (time) needed** Soon - Inedit 6/22 [D-NOTE] **LRB b** 0859 / 1

DAK : jlg :

CAUCUS BUDGET AMENDMENT
[ONLY FOR CAUCUS]

See form **AMENDMENTS — COMPONENTS & ITEMS.**

CAUCUS AMENDMENT
TO ASSEMBLY SUBSTITUTE AMENDMENT 1
TO 1999 ASSEMBLY BILL 133

>>FOR CAUCUS SUPERAMENDMENT — NOT FOR INTRODUCTION<<

At the locations indicated, amend the substitute amendment as follows:

#. Page 418, line 25: after that line insert:

~~**#.** Page . . . . , line . . . . :~~

~~**#.** Page . . . . , line . . . . :~~

~~**#.** Page . . . . , line . . . . :~~

~~**#.** Page . . . . , line . . . . :~~

#. Page . . . . , line . . . . :

1999 BILL

1 AN ACT *to create* 20.9273 of the statutes; **relating to:** prohibitions on the use of
2 public employes and public property for activities relating to abortion and
3 providing a penalty.

Analysis by the Legislative Reference Bureau

Under current law, no state, county, city, village or town funds and no federal funds passing through the state treasury may be authorized or paid for performance of an abortion. This prohibition does not apply to any of the following: 1) the performance of an abortion that is directly and medically necessary to save the life of the woman or to prevent grave, long–lasting physical health damage to the woman; 2) the performance of an abortion in a case of sexual assault or incest that has been reported to the law enforcement authorities; and 3) the authorization or payment of funds for prescription of a drug or the insertion of a device to prevent the implantation of the fertilized ovum.

Also, under current law, no state agency or local governmental unit may authorize payment of certain funds of this state, of the local governmental unit or, to the extent permitted by federal law, of certain federal funds passing through the state treasury as a grant, subsidy or other funding involving a pregnancy program, project or service of an organization if either of the following applies:

1. The pregnancy program, project or service that uses the funds provides abortion services, promotes, encourages or counsels in favor of abortion services, or makes abortion referrals either directly or through an intermediary in any instance other than when an abortion is directly and medically necessary to save the life of the pregnant woman.

BILL

2. The pregnancy program, project or service is funded from any other source that requires, as a condition for receipt of the funds, that the pregnancy program, project or service perform any of the activities specified in item 1.

If a pregnancy program, project or service that uses the funds performs any of the activities specified in item 1., the grant, subsidy or other funding under which it received the funds is terminated, it must return all funds given to it under that grant, subsidy or other funding and it may not receive similar grants, subsidies or other funding for 24 months after the time it used funds in a prohibited manner.

This bill creates new prohibitions against using public employes and public property for abortion–related activity. First, the bill provides that no person employed by this state, by a state agency, by a local governmental unit (a city, village, town or county or an agency or subdivision of a city, village, town or county) or by an authority may, while acting within the scope of his or her employment, unless an abortion is directly and medically necessary to save the life of a pregnant woman, provide or assist in providing the abortion, aid or encourage the pregnant woman to have the abortion or make abortion referrals either directly or through an intermediary. A "state agency" is defined in the bill to mean an office, department, agency, institution of higher education, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts. Second, the bill prohibits a public employe from providing instruction on how to perform a medical treatment or surgical procedure for the purpose of performing or inducing an abortion.

In addition, the bill provides that, unless an abortion is directly and medically necessary to save the life of a pregnant woman, certain public property may not be used to provide or assist in providing the abortion; aid or encourage the pregnant woman to have the abortion; or make abortion referrals either directly or through an intermediary. In addition, the public property may not be used to provide instruction on how to perform a medical treatment or surgical procedure for the purpose of performing or inducing an abortion. The public property covered by the restrictions created in the bill includes public facilities, public institutions or other buildings or parts of a building that are owned, leased or controlled by the state, a state agency or a local governmental unit, and any equipment or other physical asset that is owned, leased or controlled by the state, a state agency or a local governmental unit. For public property that is leased to a private person under a lease agreement that was entered into before the effective date of the bill, however, the restrictions do not apply until the lease agreement expires or is extended, modified or renewed.

The bill provides forfeitures for violations of the prohibitions.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

(1) " **SECTION 1.** 20.9272 of the statutes is created to read: [handwritten: 4, X, (60r) ← (8)]

1 **20.9273 Prohibition on the use of public employes and public property**
2 **to perform abortions or engage in abortion-related activity.** (1) It is the
3 intent of the legislature that this section shall further the profound and compelling
4 state interest in protecting the life of an unborn child throughout pregnancy by
5 favoring childbirth over abortion and implementing that value judgment through
6 the allocation of public resources.

7 (2) In this section:

8 (a) "Abortion" has the meaning given in s. 253.10 (2) (a).

9 (b) "Authority" means an authority created in chs. 231 and 233.

10 (c) "Local governmental unit" means a city, village, town or county or an agency
11 or subdivision of a city, village, town or county.

12 (d) "Public property" means a public facility, public institution or other building
13 or part of a building that is owned, leased or controlled by the state, a state agency,
14 a local governmental unit or an authority, or any equipment or other physical asset
15 that is owned, leased or controlled by the state, a state agency, a local governmental
16 unit or an authority.

17 (e) "State agency" means an office, department, agency, institution of higher
18 education, association, society or other body in state government created or
19 authorized to be created by the constitution or any law, which is entitled to expend
20 moneys appropriated by law, including the legislature and the courts.

21 (3) Beginning on the effective date of this subsection .... [revisor inserts date],
22 no person employed by this state, by a state agency, by a local governmental unit or
23 by an authority may do any of the following while acting within the scope of his or
24 her employment:

1 (a) Provide or assist in providing an abortion, unless the abortion is directly and
2 medically necessary to save the life of the pregnant woman.
3 (b) Aid or encourage a pregnant woman to have an abortion, unless the abortion
4 is directly and medically necessary to save the life of the pregnant woman.
5 (c) Make abortion referrals either directly or through an intermediary, unless
6 the abortion is directly and medically necessary to save the life of the pregnant
7 woman.
8 (d) Provide instruction on how to perform a medical treatment or surgical
9 procedure for the purpose of performing or inducing an abortion.
10 (3) (4) (a) Except as provided in pars. (b) and (c), beginning on the effective date
11 of this paragraph .... [revisor inserts date], no public property may be used to do any
12 of the following:
13 1. Provide or assist in providing an abortion, unless the abortion is directly and
14 medically necessary to save the life of the pregnant woman.
15 2. Aid or encourage a pregnant woman to have an abortion, unless the abortion
16 is directly and medically necessary to save the life of the pregnant woman.
17 3. Make abortion referrals either directly or through an intermediary, unless
18 the abortion is directly and medically necessary to save the life of the pregnant
19 woman.
20 4. Provide instruction on how to perform a medical treatment or surgical
21 procedure for the purpose of performing or inducing an abortion.
22 (b) Paragraph (a) does not prohibit a private person from using police or fire
23 protection services or any services provided by a public utility.
24 (c) Paragraph (a) does not apply to public property that is leased to a private
25 person under a lease agreement entered into before the effective date of this

1 paragraph .... [revisor inserts date], until the date on which the lease agreement
2 expires or is extended, modified or renewed.
3 (5) (a) Any person who violates sub. (4) shall be required to forfeit not more than
4 $1,000 for each offense.
5 (b) Any person who violates sub. (4) shall be required to forfeit not more than
6 $5,000 for each offense.
7 (c) The penalties under pars. (a) and (b) may not be construed to limit the power
8 of the state, a state agency, a local governmental unit or an authority to discipline
9 an employe.
10 (END)

D-NOTE

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBb0859/1dn
DAK+MJL:...

(j9)

To Brian Dake:

1. With respect to First Amendment issues posed by this amendment with respect to encouragement in favor of abortion services and referral for abortion, the language is primarily based on the federal Title X regulatory provisions that were upheld as constitutional in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). However, that case dealt with medical services offered in connection with a family planning program that was limited in scope. What the court actually found and its significance with respect to this amendment is as follows:

"It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor–patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. *Nor is the doctor–patient relationship established by the Title X program sufficiently all–encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post–conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.* The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. *In these circumstances*, the general rule that the Government may choose not to subsidize speech applies with full force." *Rust*, 111 S. Ct. at 1776 (emphasis mine).

The amendment, in contrast, places the restrictions on all actions of a public employe while acting within the scope of his or her employment. Therefore, a publicly–employed physician may not, during the course of post–conception medical care of a woman, counsel her to have an abortion. This is precisely the situation that distinguishes the amendment from the circumstances in *Rust*.

2. Section 20.9274 (2) (b) and (3) (a) 2. of the amendment in part follows the language of two of the Missouri statutes at issue in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989)). Please note that the Missouri provisions were held to be unconstitutional by the Eighth Circuit Court of Appeals and *not* held to be constitutional by the U. S. Supreme Court in *Webster*. The following is the unanimous opinion of the court in *Webster* with respect to these issues:

"The Missouri Act contains three provisions relating to 'encouraging or counseling a woman to have an abortion not necessary to save her life.' Section 188.205 states that no public funds can be used for this purpose; section 188.210 states that public employees cannot, within the scope of their employment, engage in such speech; and section 188.215 forbids such speech in public facilities. *The Court of Appeals* did not consider section 188.205 separately from sections 188.210 and 188.215. It *held that all three of these provisions were unconstitutionally vague*, and that 'the ban on using public funds, employees, and facilities to encourage or counsel a woman to have an abortion is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently.' 851 F. 2d, at 1079.

"Missouri has chosen only to appeal the Court of Appeals' invalidation of the public funding provision, section, 188.205. . . ." Webster, at 3053 (emphasis mine).

The court goes on to declare section 188.205 moot, because appellees accepted Missouri's claim that section 188.205 was directed solely at the persons responsible for expending public funds, not at the conduct of physicians or health care providers.

The result is that the Missouri prohibitions on public employes from encouraging or counseling a woman to have an abortion and engaging in this speech in public facilities have been found unconstitutional by the Eighth Circuit Court of Appeals, and that decision has not been reversed by the U. S. Supreme Court.

Debora A. Kennedy
Managing Attorney
Phone: (608) 266–0137

1. The amendment's prohibition against providing instruction on how to perform or induce an abortion (s. 20.9274 (2) (d)✓and (3) (a) 4.) may be challenged as an unconstitutional prior restraint (a limit placed upon the right to speak or publish, as opposed to a sanction imposed after speech or publication) under the First Amendment. The United States Supreme Court has noted that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" because they have an immediate and irreversible effect. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Hence, a prior restraint is presumed to be unconstitutional, and a proponent of a prior restraint has a heavy burden to justify its validity. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559–560 (1975). Instruction on performing an abortion falls within the category of speech for First Amendment purposes, and thus it is possible that a court would find this prohibition presumptively unconstitutional, especially in light of the court's concern about safeguarding academic freedom on college campuses. See, e.g., *Healy v. James*, 408 U.S. 169, 180–181 (1972) (holding that a state college could not restrict speech or association simply because it found the views expressed by a student group abhorrent).

2. The amendment allows abortions to be performed only if "directly and medically necessary to save the life of the pregnant woman." If Wisconsin medical schools are

prohibited from instructing medical students on how to perform abortions, it is possible that in the future some hospitals and clinics will have no physicians on staff to perform abortions in those instances in which the abortions are medically necessary to save the lives of pregnant women.

Madelon J. Lief
Legislative Attorney
Phone: (608) 267–7380

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBb0859/1dn
DAK&MJL:jg:kjf

June 22, 1999

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2. The amendment allows abortions to be performed only if "directly and medically necessary to save the life of the pregnant woman." If Wisconsin medical schools are

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Madelon J. Lief
Legislative Attorney
Phone: (608) 267–7380

SOON - In edit 6/23

1999 – 2000 LEGISLATURE

LRBb0859/1 2
DAK:jlg:kf

D-NOTE

cmh

ARC:......Dake – Amdt. No. 84, Prohibit use of public employes and public property for activities relating to abortion

FOR 1999–01 BUDGET — NOT READY FOR INTRODUCTION

CAUCUS AMENDMENT

TO ASSEMBLY SUBSTITUTE AMENDMENT 1,

TO 1999 ASSEMBLY BILL 133

W.P.O. - please fix topic line on request cover sheet

INSERT 1-5

1 At the locations indicated, amend the substitute amendment as follows:

2 **1.** Page 418, line 25: after that line insert:

3 "SECTION **650r.** 20.9274 of the statutes is created to read:

4 **20.9274 Prohibition on the use of public employes and public property**

5 **to perform abortions or engage in abortion-related activity.** (1) In this

6 section:

7 (a) "Abortion" has the meaning given in s. 253.10 (2) (a).

8 (b) "Authority" means an authority created in chs. 231 and 233.

9 (c) "Local governmental unit" means a city, village, town or county or an agency

10 or subdivision of a city, village, town or county.

1 (d) "Public property" means a public facility, public institution or other building
2 or part of a building that is owned, leased or controlled by the state, a state agency,
3 a local governmental unit or an authority, or any equipment or other physical asset
4 that is owned, leased or controlled by the state, a state agency, a local governmental
5 unit or an authority.

6 (e) "State agency" means an office, department, agency, institution of higher
7 education, association, society or other body in state government created or
8 authorized to be created by the constitution or any law, which is entitled to expend
9 moneys appropriated by law, including the legislature and the courts.

10 (2) Beginning on the effective date of this subsection .... [revisor inserts date],
11 no person employed by this state, by a state agency, by a local governmental unit or
12 by an authority may do any of the following while acting within the scope of his or
13 her employment:

14 (a) Provide or assist in providing an abortion, unless the abortion is directly and
15 medically necessary to save the life of the pregnant woman.

16 (b) Aid or encourage a pregnant woman to have an abortion, unless the abortion
17 is directly and medically necessary to save the life of the pregnant woman.

18 (c) Make abortion referrals either directly or through an intermediary, unless
19 the abortion is directly and medically necessary to save the life of the pregnant
20 woman.

21 (d) Provide instruction on how to perform a medical treatment or surgical
22 procedure for the purpose of performing or inducing an abortion.

23 (3) (a) Except as provided in pars. (b) and (c), beginning on the effective date
24 of this paragraph .... [revisor inserts date], no public property may be used to do any
25 of the following:

1 1. Provide or assist in providing an abortion, unless the abortion is directly and
2 medically necessary to save the life of the pregnant woman.

3 2. Aid or encourage a pregnant woman to have an abortion, unless the abortion
4 is directly and medically necessary to save the life of the pregnant woman.

5 3. Make abortion referrals either directly or through an intermediary, unless
6 the abortion is directly and medically necessary to save the life of the pregnant
7 woman.

8 4. Provide instruction on how to perform a medical treatment or surgical
9 procedure for the purpose of performing or inducing an abortion.

10 (b) Paragraph (a) does not prohibit a private person from using police or fire
11 protection services or any services provided by a public utility.

12 (c) Paragraph (a) does not apply to public property that is leased to a private
13 person under a lease agreement entered into before the effective date of this
14 paragraph .... [revisor inserts date], until the date on which the lease agreement
15 expires or is extended, modified or renewed.

16 (4) (a) Any person who violates sub. (2) shall be required to forfeit not more than
17 $1,000 for each offense.

18 (b) Any person who violates sub. (3) shall be required to forfeit not more than
19 $5,000 for each offense.

20 (c) The penalties under pars. (a) and (b) may not be construed to limit the power
21 of the state, a state agency, a local governmental unit or an authority to discipline
22 an employe.".

23 (END)

D-NOTE

1 **20.9273 Prohibition on the use of public employes and public property**
2 **to perform abortions or engage in abortion–related activity.** (1) It is the
3 intent of the legislature that this section shall further the profound and compelling
4 state interest in protecting the life of an unborn child throughout pregnancy by
5 favoring childbirth over abortion and implementing that value judgment through
6 the allocation of public resources.

7 (2) In this section:
8 (a) "Abortion" has the meaning given in s. 253.10 (2) (a).
9 (b) "Authority" means an authority created in chs. 231 and 233.
10 (c) "Local governmental unit" means a city, village, town or county or an agency
11 or subdivision of a city, village, town or county.
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14 a local governmental unit or an authority, or any equipment or other physical asset
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16 unit or an authority.
17 (e) "State agency" means an office, department, agency, institution of higher
18 education, association, society or other body in state government created or
19 authorized to be created by the constitution or any law, which is entitled to expend
20 moneys appropriated by law, including the legislature and the courts.
21 (3) Beginning on the effective date of this subsection .... [revisor inserts date],
22 no person employed by this state, by a state agency, by a local governmental unit or
23 by an authority may do any of the following while acting within the scope of his or
24 her employment:

End of INS 1-5

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBb0859/2dn
DAK&MJL:jg:kjf

~~June 22, 1999~~

1. Because you have informed me that this amendment is based on 1999 LRB-0548/3, I have redrafted the amendment to include the statement of legislative intent that was contained in 1999 LRB-0548/3. INSERT DN-1

To Brian Dake:

2. With respect to First Amendment issues posed by this amendment with respect to encouragement in favor of abortion services and referral for abortion, the language is primarily based on the federal Title X regulatory provisions that were upheld as constitutional in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). However, that case dealt with medical services offered in connection with a family planning program that was limited in scope. What the court actually found and its significance with respect to this amendment is as follows:

"It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor–patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. *Nor is the doctor–patient relationship established by the Title X program sufficiently all–encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post–conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.* The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. *In these circumstances*, the general rule that the Government may choose not to subsidize speech applies with full force." *Rust*, 111 S. Ct. at 1776 (emphasis mine).

The amendment, in contrast, places the restrictions on all actions of a public employe while acting within the scope of his or her employment. Therefore, a publicly employed physician may not, during the course of post–conception medical care of a woman, counsel her to have an abortion. This is precisely the situation that distinguishes the amendment from the circumstances in *Rust*.

3. Section 20.9274 (2) (b) and (3) (a) 2. of the amendment in part follows the language of two of the Missouri statutes at issue in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). Please note that the Missouri provisions were held to be unconstitutional by the Eighth Circuit Court of Appeals and *not* held to be constitutional by the U.S. Supreme Court in *Webster*. The following is the unanimous opinion of the court in *Webster* with respect to these issues:

"The Missouri Act contains three provisions relating to 'encouraging or counseling a woman to have an abortion not necessary to save her life.' Section 188.205 states that no public funds can be used for this purpose; section 188.210 states that public employees cannot, within the scope of their employment, engage in such speech; and section 188.215 forbids such speech in public facilities. *The Court of Appeals* did not consider section 188.205 separately from sections 188.210 and 188.215. It *held that all three of these provisions were unconstitutionally vague*, and that 'the ban on using public funds, employees, and facilities to encourage or counsel a woman to have an abortion is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently.' 851 F. 2d, at 1079.

"Missouri has chosen only to appeal the Court of Appeals' invalidation of the public funding provision, section, 188.205. . . ." Webster, at 3053 (emphasis mine).

The court goes on to declare section 188.205 moot, because appellees accepted Missouri's claim that section 188.205 was directed solely at the persons responsible for expending public funds, not at the conduct of physicians or health care providers.

The result is that the Missouri prohibitions on public employes from encouraging or counseling a woman to have an abortion and engaging in this speech in public facilities have been found unconstitutional by the Eighth Circuit Court of Appeals, and that decision has not been reversed by the U. S. Supreme Court.

Debora A. Kennedy
Managing Attorney
Phone: (608) 266–0137

1. The amendment's prohibition against providing instruction on how to perform or induce an abortion (s. 20.9274 (2) (d) and (3) (a) 4.) may be challenged as an unconstitutional prior restraint (a limit placed upon the right to speak or publish, as opposed to a sanction imposed after speech or publication) under the First Amendment. The United States Supreme Court has noted that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" because they have an immediate and irreversible effect. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Hence, a prior restraint is presumed to be unconstitutional, and a proponent of a prior restraint has a heavy burden to justify its validity. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559–560 (1975). Instruction on performing an abortion falls within the category of speech for First Amendment purposes, and thus it is possible that a court would find this prohibition presumptively unconstitutional, especially in light of the court's concern about safeguarding academic freedom on college campuses. See, e.g., *Healy v. James*, 408 U.S. 169, 180–181 (1972) (holding that a state college could not restrict speech or association simply because it found the views expressed by a student group abhorrent).

2. The amendment allows abortions to be performed only if "directly and medically necessary to save the life of the pregnant woman." If Wisconsin medical schools are

prohibited from instructing medical students on how to perform abortions, it is possible that in the future some hospitals and clinics will have no physicians on staff to perform abortions in those instances in which the abortions are medically necessary to save the lives of pregnant women.

Madelon J. Lief
Legislative Attorney
Phone: (608) 267–7380

DRAFTER'S NOTE FROM THE LEGISLATIVE REFERENCE BUREAU

LRB–0548/3dn
DAK:wlj:mrc
cmh

June 14, 1999

INSERT DN-1

To Representative Walker:

1. This redraft (LRB–0548/3) does not change the bill with respect to the First Amendment issues posed, the potential unconstitutionality of limiting a public employe's employment to exclude abortion–related activities and the restrictions of the Hyde Amendment with respect to medical assistance. Therefore, points 2., 3. and 5. concerning the bill in its form as 99–0548/2 contained in my Drafter's Note of May 6, 1999, still stand, as do the comments by Attorney Lief.

2. I have included the standard of "profound" state interest in s. 20.9273 at Ms. Mary Keaver's explicit request. However, because that the adjective "profound" is used in *Planned Parenthood v. Casey,* 112 S. Ct. 2791, 2821 (1992), to express state interest in potential life, not in protecting the life of an unborn child throughout pregnancy, its use in a very different context from that of the factual situation at issue in *Casey* may not effect your intent.

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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBb0859/2dn
DAK&MJL:jg:jf

June 24, 1999

To Brian Dake:

1. Because you have informed me that this amendment is based on 1999 LRB–0548/3, I have redrafted the amendment to include the statement of legislative intent that was contained in 1999 LRB–0548/3. Because the adjective "profound" is used in *Planned Parenthood v. Casey,* 112 S. Ct. 2791, 2821 (1992), to express state interest in potential life, not in protecting the life of an unborn child throughout pregnancy, its use in a very different context from that of the factual situation at issue in *Casey* may not effect your intent.

2. With respect to First Amendment issues posed by this amendment with respect to encouragement in favor of abortion services and referral for abortion, the language is primarily based on the federal Title X regulatory provisions that were upheld as constitutional in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). However, that case dealt with medical services offered in connection with a family planning program that was limited in scope. What the court actually found and its significance with respect to this amendment is as follows:

"It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor–patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. *Nor is the doctor–patient relationship established by the Title X program sufficiently all–encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide post–conception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.* The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. *In these circumstances*, the general rule that the Government may choose not to subsidize speech applies with full force." *Rust*, 111 S. Ct. at 1776 (emphasis mine).

The amendment, in contrast, places the restrictions on all actions of a public employe while acting within the scope of his or her employment. Therefore, a publicly employed physician may not, during the course of post–conception medical care of a woman,

counsel her to have an abortion. This is precisely the situation that distinguishes the amendment from the circumstances in *Rust*.

3. Section 20.9274 (2) (b) and (3) (a) 2. of the amendment in part follows the language of two of the Missouri statutes at issue in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). Please note that the Missouri provisions were held to be unconstitutional by the Eighth Circuit Court of Appeals and *not* held to be constitutional by the U.S. Supreme Court in *Webster*. The following is the unanimous opinion of the court in *Webster* with respect to these issues:

"The Missouri Act contains three provisions relating to 'encouraging or counseling a woman to have an abortion not necessary to save her life.' Section 188.205 states that no public funds can be used for this purpose; section 188.210 states that public employees cannot, within the scope of their employment, engage in such speech; and section 188.215 forbids such speech in public facilities. *The Court of Appeals* did not consider section 188.205 separately from sections 188.210 and 188.215. It *held that all three of these provisions were unconstitutionally vague*, and that 'the ban on using public funds, employees, and facilities to encourage or counsel a woman to have an abortion is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently.' 851 F. 2d, at 1079.

"Missouri has chosen only to appeal the Court of Appeals' invalidation of the public funding provision, section, 188.205. . . ." *Webster*, at 3053 (emphasis mine).

The court goes on to declare section 188.205 moot, because appellees accepted Missouri's claim that section 188.205 was directed solely at the persons responsible for expending public funds, not at the conduct of physicians or health care providers.

The result is that the Missouri prohibitions on public employes from encouraging or counseling a woman to have an abortion and engaging in this speech in public facilities have been found unconstitutional by the Eighth Circuit Court of Appeals, and that decision has not been reversed by the U.S. Supreme Court.

Debora A. Kennedy
Managing Attorney
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1. The amendment's prohibition against providing instruction on how to perform or induce an abortion (s. 20.9274 (3) (d) and (4) (a) 4.) may be challenged as an unconstitutional prior restraint (a limit placed upon the right to speak or publish, as opposed to a sanction imposed after speech or publication) under the First Amendment. The United States Supreme Court has noted that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" because they have an immediate and irreversible effect. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Hence, a prior restraint is presumed to be unconstitutional, and a proponent of a prior restraint has a heavy

burden to justify its validity. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559–560 (1975). Instruction on performing an abortion falls within the category of speech for First Amendment purposes, and thus it is possible that a court would find this prohibition presumptively unconstitutional, especially in light of the court's concern about safeguarding academic freedom on college campuses. See, e.g., *Healy v. James,* 408 U.S. 169, 180–181 (1972) (holding that a state college could not restrict speech or association simply because it found the views expressed by a student group abhorrent).

2. The amendment allows abortions to be performed only if "directly and medically necessary to save the life of the pregnant woman." If Wisconsin medical schools are prohibited from instructing medical students on how to perform abortions, it is possible that in the future some hospitals and clinics will have no physicians on staff to perform abortions in those instances in which the abortions are medically necessary to save the lives of pregnant women.

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ARC:......Dake – Am #84, Prohibit use of public employes and public property for activities relating to abortion

FOR 1999–01 BUDGET — NOT READY FOR INTRODUCTION

CAUCUS AMENDMENT

TO ASSEMBLY SUBSTITUTE AMENDMENT 1,

TO 1999 ASSEMBLY BILL 133

1 At the locations indicated, amend the substitute amendment as follows:

2 **1.** Page 418, line 25: after that line insert:

3 "SECTION **650r.** 20.9274 of the statutes is created to read:

4 **20.9274 Prohibition on the use of public employes and public property**
5 **to perform abortions or engage in abortion–related activity.** **(1)** It is the
6 intent of the legislature that this section shall further the profound and compelling
7 state interest in protecting the life of an unborn child throughout pregnancy by
8 favoring childbirth over abortion and implementing that value judgment through
9 the allocation of public resources.

10 **(2)** In this section:

1 (a) "Abortion" has the meaning given in s. 253.10 (2) (a).

2 (b) "Authority" means an authority created in chs. 231 and 233.

3 (c) "Local governmental unit" means a city, village, town or county or an agency
4 or subdivision of a city, village, town or county.

5 (d) "Public property" means a public facility, public institution or other building
6 or part of a building that is owned, leased or controlled by the state, a state agency,
7 a local governmental unit or an authority, or any equipment or other physical asset
8 that is owned, leased or controlled by the state, a state agency, a local governmental
9 unit or an authority.

10 (e) "State agency" means an office, department, agency, institution of higher
11 education, association, society or other body in state government created or
12 authorized to be created by the constitution or any law, which is entitled to expend
13 moneys appropriated by law, including the legislature and the courts.

14 **(3)** Beginning on the effective date of this subsection .... [revisor inserts date],
15 no person employed by this state, by a state agency, by a local governmental unit or
16 by an authority may do any of the following while acting within the scope of his or
17 her employment:

18 (a) Provide or assist in providing an abortion, unless the abortion is directly and
19 medically necessary to save the life of the pregnant woman.

20 (b) Aid or encourage a pregnant woman to have an abortion, unless the abortion
21 is directly and medically necessary to save the life of the pregnant woman.

22 (c) Make abortion referrals either directly or through an intermediary, unless
23 the abortion is directly and medically necessary to save the life of the pregnant
24 woman.

1 (d) Provide instruction on how to perform a medical treatment or surgical
2 procedure for the purpose of performing or inducing an abortion.
3 **(4)** (a) Except as provided in pars. (b) and (c), beginning on the effective date
4 of this paragraph .... [revisor inserts date], no public property may be used to do any
5 of the following:
6 1. Provide or assist in providing an abortion, unless the abortion is directly and
7 medically necessary to save the life of the pregnant woman.
8 2. Aid or encourage a pregnant woman to have an abortion, unless the abortion
9 is directly and medically necessary to save the life of the pregnant woman.
10 3. Make abortion referrals either directly or through an intermediary, unless
11 the abortion is directly and medically necessary to save the life of the pregnant
12 woman.
13 4. Provide instruction on how to perform a medical treatment or surgical
14 procedure for the purpose of performing or inducing an abortion.
15 (b) Paragraph (a) does not prohibit a private person from using police or fire
16 protection services or any services provided by a public utility.
17 (c) Paragraph (a) does not apply to public property that is leased to a private
18 person under a lease agreement entered into before the effective date of this
19 paragraph .... [revisor inserts date], until the date on which the lease agreement
20 expires or is extended, modified or renewed.
21 **(5)** (a) Any person who violates sub. (3) shall be required to forfeit not more than
22 $1,000 for each offense.
23 (b) Any person who violates sub. (4) shall be required to forfeit not more than
24 $5,000 for each offense.

1 (c) The penalties under pars. (a) and (b) may not be construed to limit the power
2 of the state, a state agency, a local governmental unit or an authority to discipline
3 an employe.".

4 **(END)**