

**2001 DRAFTING REQUEST**

**Assembly Amendment (AA-ASA1-SB55)**

Received: 06/25/2001

Received By: **kenneda**

Wanted: **As time permits**

Identical to LRB:

For: **Assembly Republican Caucus 7-4887**

By/Representing: **Hughes**

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

Drafter: **kenneda**

May Contact:

Addl. Drafters:

Subject: **Health - abortion**

Extra Copies: **ISR**

Submit via email: **NO**

Requester's email:

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**Pre Topic:**

ARC:.....Hughes -

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**Topic:**

AM104--Prohibitions on the use of public employees and public property for activities relating to abortion

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**Instructions:**

See Attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kenneda 06/25/2001	wjackson 06/25/2001		_____			
/1			pgreensl 06/25/2001	_____	lrb_docadmin 06/25/2001		

FE Sent For:

<END>

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1?	kenneda	1 wly 6/25	9/25 PB	RPN/mgd 6/25			

FE Sent For:

<END>

# Budget Amendments 2001 - 2003

Prepared by the Assembly Republican Caucus

**Statement of Intent** (1) Prohibits the use of public employees and public property for activities relating to abortion and providing a penalty

(2) Extends the protections under the current conscience clause laws

**Legislator** Walker

**Amendment** 104

**Legislator 2**

**Pass or Fail** Pass

**Legislator 3**

**Spending Cut**

**Legislator 4**

**Withdrawn**

**Staff contact** Melissa

**Package**

**Agency** Health and Family Services

**Summary** (1) Prohibits state or local employees from engaging in abortion-related activities while acting within the scope of their employment. An abortion-related activity is defined as (a) providing or assisting in providing an abortion unless the abortion is directly and medically necessary to save the life of the pregnant woman; (b) aiding or encouraging a pregnant woman to have an abortion, unless the abortion is directly and medically necessary to save the life of the pregnant woman; (c) making abortion referrals either directly or through an intermediary, unless the abortion is directly and medically necessary to save the life of the pregnant woman; or (d) requiring, providing, referring for, or making arrangements for the provision of training in the performance of a medical treatment or surgical procedure for the purpose of performing or inducing an abortion. Any public employee who violates this prohibition would be subject to disciplinary procedures and a civil forfeiture of not less than \$500 nor more than \$1,000.

The legislation would also prohibit state and local public facilities from being used to do any abortion-related activities, as defined above. Any person who violates this prohibition would be subject to a civil forfeiture of not less than \$2,000 nor more than \$5,000.

*From 6/25 Carolyn Hughes Don't put → in this audit*

(2) Extends the protections under the current conscience clause laws, which deal with abortion and sterilization, by: (a) creating a conscience clause law for pharmacists; (b) extending the conscience clause protections to other related issues such as the use of abortifacients, destruction of or experimentation on human embryos, use of fetal tissues, withholding or withdrawal of nutrition or hydration, assisted suicide, and euthanasia; (c) granting protection from employment discrimination, professional liability and civil liability; and (d) granting persons whose conscience rights are being violated the right to sue for injunctive relief and damages.

**Fiscal Impact** (1) The fiscal effect is indeterminate, but it appears that any potential loss of revenue from ceasing abortion-related activities would be minimal. Additionally, revenue may be generated from the violation of stated prohibitions. Forfeitures range from \$500 to \$5,000.

(2) According to the Department of Workforce Development, additional costs for reprinting materials related to employment discrimination could be absorbed within the agency's budget. Also, the Personnel Commission states that any additional costs related to an increase in employment discrimination complaints could be absorbed within the agency's existing budget.

**Drafting Inst**

**Request #** 7

*DAX*

Friday, June 22, 2001

Page 3 of 28

# Budget Amendments 2001 - 2003

Prepared by the Assembly Republican Caucus

ARC Analyst Hughes

Request #

7

Friday, June 22, 2001

Page 4 of 28

2001

Date (time) needed soon

LRB b 1749 / 11

**ARC CAUCUS BUDGET AMENDMENT  
[ONLY FOR CAUCUS]**

DAY : WJ :

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

**CAUCUS AMENDMENT  
TO ASSEMBLY SUBSTITUTE AMENDMENT 1  
TO 2001 SENATE BILL 55**

D-NOTE

>>FOR CAUCUS SUPERAMENDMENT — NOT FOR INTRODUCTION<<

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

#. Page 428, line 20: *after that line insert :*

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

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

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

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

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

**2001 BILL**

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

---

***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 pregnant woman or to prevent grave, long-lasting physical health damage to the pregnant 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 employees 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, county, or school district or an agency or subdivision of a city, village, town, county, or school district), 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 employee from requiring, providing, referring for, or making arrangements for the provision of training 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 require, provide, refer for, or make arrangements for the provision of training 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, a local governmental unit, or an authority, and any equipment or other physical asset that is owned, leased, or controlled by the state, a state agency, a local governmental unit, or an authority. 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.



**BILL**

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

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

(1)

SECTION 4. 20.9273 of the statutes is created to read:

995cb

2           **20.9273 Prohibition on the use of public employees and public**  
3           **property to perform abortions or engage in abortion-related activity. (1)**

4           It is the intent of the legislature that this section shall further the profound and  
5           compelling state interest in protecting the life of an unborn child throughout  
6           pregnancy by favoring childbirth over abortion and implementing that value  
7           judgment through the allocation of public resources.

8           (2) In this section:

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

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

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

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

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

**BILL**

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

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

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

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

12           (d) Require, provide, refer for, or make arrangements for the provision of  
13 training in the performance of a medical treatment or surgical procedure for the  
14 purpose of performing or inducing an abortion.

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

18           1. 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           2. 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           3. 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.

**BILL**

1           4. Require, provide, refer for, or make arrangements for the provision of  
2 training in the performance of a medical treatment or surgical procedure for the  
3 purpose of performing or inducing an abortion.

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

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

10           (5) (a) Any person who violates sub. (3) shall be required to forfeit not less than  
11 \$500 nor more than \$1,000 for each offense.

12           (b) Any person who violates sub. (4) shall be required to forfeit not less than  
13 \$2,000 nor more than \$5,000 for each offense.

14           (c) The penalties under pars. (a) and (b) may not be construed to limit the power  
15 of the state, a state agency, a local governmental unit, or an authority to discipline  
16 an employee. *V/O*

17

(END)

D-NOTE

DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-1928/2dn

DAK:wj:jjf

b1749/1dn

April 27, 2001

~~Representative Walker~~

amendment

1. This ~~redraft~~ of LRB 99-0548~~8~~ includes the standard of "profound" state interest in s. 20.9273 (1). However, because that adjective 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 proposed s. 20.9273 (3):

amendment's

a. The ~~draft~~ prohibitions apply to a "person employed by . . . a state agency" or by "a local governmental unit." "State agency" is defined in s. 20.9273 (2) (e) to include the legislature and the courts. Thus, the ~~bill~~ <sup>amendment</sup> applies to members of the legislature and members of the judiciary because they are on the state payroll and therefore considered to be "employed" by a state agency. However, the ~~bill~~ <sup>amendment</sup> appears not to apply to members of the common council of a city, town, or village or members of a county board of supervisors because those persons are considered, generally, to be "officers" rather than employees. (An exception to this latter application may exist in Milwaukee, where the members of the county board are full time and thus may be considered to be "employees.") Therefore, the ~~bill~~ <sup>amendment</sup> is applied differently to different types of elected officials.

b. The ~~draft~~ <sup>amendment</sup> prohibits certain employees, while acting within the scope of employment, from providing or assisting in providing an abortion, aiding or encouraging a pregnant woman to have an abortion, or making abortion referrals, unless the abortion is directly and medically necessary to save the woman's life. The definitions of "authority," "local governmental unit," and "state agency" in the ~~draft~~ <sup>amendment</sup> clarify that the prohibitions are intended to apply to "public" employees. Because the terms "aid" and "encourage" are not defined, it is uncertain how a court would interpret them. For instance, it is possible that a court could interpret them, among other things, as applying to statements made by legislative aides to constituents in response to constituent inquiries about the views of a legislator with respect to abortion issues; to discussions by justices of cases pending decision or to written opinions, concurrences, or dissents; or to statements by University of Wisconsin faculty teaching classes in, for instance, social policy. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990),

promotions, transfers, and recalls after layoffs that were based on political affiliation or support were found to be an impermissible infringement on the First Amendment rights of public employees; although the factual situation differs from the examples that I have given, especially in that the prohibitions in the ~~draft~~ <sup>amendment</sup> are enforced by the imposition of a forfeiture rather than by firing or failing to hire, a court may find the situations analogous.

c. Among the public employees affected by the ~~bill~~ <sup>amendment</sup> would be physicians who are employed by the University of Wisconsin Hospitals and Clinics Authority or by a state agency. These employees are prohibited from providing or assisting in providing abortions; aiding or encouraging abortions; and making direct or indirect referrals for abortions, other than to save the pregnant woman's life. The breadth of these restrictions appears to exceed the restrictions in 42 USC 300a-6 and 42 CFR 50.303 (limitations relating to abortion under Title X of the Social Security Act), and thus may either be preempted by federal law or may result in the loss or withholding of Title X funds. The breadth of the restrictions also appears to exceed the restrictions of the Hyde Amendment, since they make no exception for abortions in the case of rape, and thus may result in the loss or withholding to the state of Title XIX (Medical Assistance) funds. Unlike the restrictions of s. 20.927, stats., they make no exception for pregnancies resulting from cases of sexual assault or incest. Lastly, the breadth of the restrictions may impinge on the doctor-patient relationship to a degree that violates the First Amendment to the U.S. Constitution and article I, section 3, of the Wisconsin Constitution. Restrictions on counseling or referrals for abortion that were at one time placed on recipients of Title X funds were upheld in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759 (1991). With respect to the First Amendment challenge, the court found that programs covered by the restrictions did not significantly impinge on the doctor-patient relationship because that relationship was "not sufficiently all-encompassing" given that the program "does not provide post-conception medical care." *Rust*, 500 U.S. at 200, 111 S. Ct. at 1776. By going further than the regulations at issue in *Rust* and extending restrictions on abortion aid and encouragement to all activities of a physician, including those involving prenatal care and pregnancy services, the prohibitions created in this ~~draft~~ <sup>amendment</sup> may be susceptible to a free speech challenge.

d. No immunifying statutory provisions appear to apply to the ~~bill~~ <sup>amendment</sup>; the ~~bill~~ <sup>amendment</sup> creates a prohibition that, under s. 939.61, stats., subjects violators to a forfeiture of up to \$200. Section 893.82, stats., which provides a certain amount of indemnification to state employees for tort claims, does not provide a shield against an action by the state to impose a civil forfeiture for violation of a prohibition.

e. Section 20.9273 (3) (b) of the ~~draft~~ <sup>amendment</sup> prohibits a "public" employee from aiding or encouraging a pregnant woman to have an abortion, unless directly and medically necessary to save her life. Like language was considered in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). Please ~~not~~ 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 U.S. Supreme Court in *Webster* with respect to these issues:

*note*

"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 employees 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.

3. With respect to proposed s. 20.9273 (4):

a. The concerns expressed in items 2. b., c., and e., above, apply.

b. As "public property" is defined in the <sup>amendment</sup> draft, it would appear to apply to the state capitol building. Thus, under the ~~bill~~, all persons who might attend a rally in favor of expansion of abortion services or in opposition to limitations on abortion services held in that building would appear to be subject to the ~~bill's~~ <sup>amendment's</sup> prohibition. It would appear likely that this prohibition is vulnerable to constitutional challenge under the First Amendment to the U.S. Constitution and article I, section 3, of the Wisconsin Constitution.

4. The prohibitions under s. 20.9273 (3) (a) and (4) (a), although found permissible under Webster, appear to exceed the restrictions of the Hyde Amendment, since they make no exception for abortions in the case of rape. Therefore, for those public employees or public facilities that provide services to recipients of medical assistance, the ~~bill~~ <sup>amendment</sup>, if enacted, would place the state out of compliance with federal Title XIX (medicaid) requirements, which may result in the loss or withholding to the state of the federal medicaid funds.

5. Please note that I have drafted a definition for "authority" and have deleted mention of an authority in the definition of "state agency." I did this on the advice of Attorney Jeff Kuesel, who says that, strictly speaking, an authority is not considered to be a state agency, even though some statutes include authorities in such definitions. No substantive change is effected.

Please let me know if I may assist you further with this ~~bill~~<sup>amendment</sup>.

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

1. The ~~bill's~~<sup>amendment's</sup> prohibition against requiring, providing, referring for, or making arrangements for the provision of training in the performance of an abortion (s. 20.9273 (3) (d)) 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). Training in the performance of 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 ~~bill~~<sup>amendment</sup> provides that unless an abortion is directly and medically necessary to save the life of the pregnant woman, certain public property — including University of Wisconsin Hospitals and Clinics — may not be used in performing the abortion. This restriction would prevent UW medical students from receiving instruction on how to perform abortions, thereby increasing the likelihood that in the future Wisconsin hospitals and clinics will have fewer 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**

LRBb1749/1dn  
DAK&MJL:wlj:pg

June 25, 2001

1. This amendment includes the standard of "profound" state interest in s. 20.9273 (1). However, because that adjective 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 proposed s. 20.9273 (3):

a. The amendment's prohibitions apply to a "person employed by . . . a state agency" or by "a local governmental unit." "State agency" is defined in s. 20.9273 (2) (e) to include the legislature and the courts. Thus, the amendment applies to members of the legislature and members of the judiciary because they are on the state payroll and therefore considered to be "employed" by a state agency. However, the amendment appears not to apply to members of the common council of a city, town, or village or members of a county board of supervisors because those persons are considered, generally, to be "officers" rather than employees. (An exception to this latter application may exist in Milwaukee, where the members of the county board are full time and thus may be considered to be "employees.") Therefore, the amendment is applied differently to different types of elected officials.

b. The amendment prohibits certain employees, while acting within the scope of employment, from providing or assisting in providing an abortion, aiding or encouraging a pregnant woman to have an abortion, or making abortion referrals, unless the abortion is directly and medically necessary to save the woman's life. The definitions of "authority," "local governmental unit," and "state agency" in the amendment clarify that the prohibitions are intended to apply to "public" employees. Because the terms "aid" and "encourage" are not defined, it is uncertain how a court would interpret them. For instance, it is possible that a court could interpret them, among other things, as applying to statements made by legislative aides to constituents in response to constituent inquiries about the views of a legislator with respect to abortion issues; to discussions by justices of cases pending decision or to written opinions, concurrences, or dissents; or to statements by University of Wisconsin faculty teaching classes in, for instance, social policy. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), promotions, transfers, and recalls after layoffs that were based on political affiliation or support were found to be an impermissible infringement on the First Amendment rights of public employees;



although the factual situation differs from the examples that I have given, especially in that the prohibitions in the amendment are enforced by the imposition of a forfeiture rather than by firing or failing to hire, a court may find the situations analogous.

c. Among the public employees affected by the amendment would be physicians who are employed by the University of Wisconsin Hospitals and Clinics Authority or by a state agency. These employees are prohibited from providing or assisting in providing abortions; aiding or encouraging abortions; and making direct or indirect referrals for abortions, other than to save the pregnant woman's life. The breadth of these restrictions appears to exceed the restrictions in 42 USC 300a-6 and 42 CFR 50.303 (limitations relating to abortion under Title X of the Social Security Act), and thus may either be preempted by federal law or may result in the loss or withholding of Title X funds. The breadth of the restrictions also appears to exceed the restrictions of the Hyde Amendment, since they make no exception for abortions in the case of rape, and thus may result in the loss or withholding to the state of Title XIX (Medical Assistance) funds. Unlike the restrictions of s. 20.927, stats., they make no exception for pregnancies resulting from cases of sexual assault or incest. Lastly, the breadth of the restrictions may impinge on the doctor-patient relationship to a degree that violates the First Amendment to the U.S. Constitution and article I, section 3, of the Wisconsin Constitution. Restrictions on counseling or referrals for abortion that were at one time placed on recipients of Title X funds were upheld in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759 (1991). With respect to the First Amendment challenge, the court found that programs covered by the restrictions did not significantly impinge on the doctor-patient relationship because that relationship was "not sufficiently all-encompassing" given that the program "does not provide post-conception medical care." *Rust*, 500 U.S. at 200, 111 S. Ct. at 1776. By going further than the regulations at issue in *Rust* and extending restrictions on abortion aid and encouragement to all activities of a physician, including those involving prenatal care and pregnancy services, the prohibitions created in this amendment may be susceptible to a free speech challenge.

d. No immunifying statutory provisions appear to apply to the amendment; the amendment creates a prohibition that, under s. 939.61, stats., subjects violators to a forfeiture of up to \$200. Section 893.82, stats., which provides a certain amount of indemnification to state employees for tort claims, does not provide a shield against an action by the state to impose a civil forfeiture for violation of a prohibition.

e. Section 20.9273 (3) (b) of the amendment prohibits a "public" employee from aiding or encouraging a pregnant woman to have an abortion, unless directly and medically necessary to save her life. Like language was considered 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 U.S. Supreme 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 employees 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.

3. With respect to proposed s. 20.9273 (4):

a. The concerns expressed in items 2. b., c., and e., above, apply.

b. As "public property" is defined in the amendment, it would appear to apply to the state capitol building. Thus, under the amendment, all persons who might attend a rally in favor of expansion of abortion services or in opposition to limitations on abortion services held in that building would appear to be subject to the amendment's prohibition. It would appear likely that this prohibition is vulnerable to constitutional challenge under the First Amendment to the U.S. Constitution and article I, section 3, of the Wisconsin Constitution.

4. The prohibitions under s. 20.9273 (3) (a) and (4) (a), although found permissible under *Webster*, appear to exceed the restrictions of the Hyde Amendment, since they make no exception for abortions in the case of rape. Therefore, for those public employees or public facilities that provide services to recipients of medical assistance, the amendment, if enacted, would place the state out of compliance with federal Title XIX (medicaid) requirements, which may result in the loss or withholding to the state of the federal medicaid funds.

5. Please note that I have drafted a definition for "authority" and have deleted mention of an authority in the definition of "state agency." I did this on the advice of Attorney Jeff Kuesel, who says that, strictly speaking, an authority is not considered to be a state agency, even though some statutes include authorities in such definitions. No substantive change is effected.

Please let me know if I may assist you further with this amendment.

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1. The amendment's prohibition against requiring, providing, referring for, or making arrangements for the provision of training in the performance of an abortion (s. 20.9273 (3) (d)) 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). Training in the performance of 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 provides that unless an abortion is directly and medically necessary to save the life of the pregnant woman, certain public property — including University of Wisconsin Hospitals and Clinics — may not be used in performing the abortion. This restriction would prevent UW medical students from receiving instruction on how to perform abortions, thereby increasing the likelihood that in the future Wisconsin hospitals and clinics will have fewer 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:.....Hughes – AM104—Prohibitions on the use of public employees and  
public property for activities relating to abortion

FOR 2001-03 BUDGET — NOT READY FOR INTRODUCTION

**CAUCUS ASSEMBLY AMENDMENT**

**TO ASSEMBLY SUBSTITUTE AMENDMENT 1,**

**TO 2001 SENATE BILL 55**

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

2 **1.** Page 428, line 20: after that line insert:

3 **"SECTION 995cb.** 20.9273 of the statutes is created to read:

4 **20.9273 Prohibition on the use of public employees and public**  
5 **property to perform abortions or engage in abortion-related activity. (1)**

6 It is the intent of the legislature that this section shall further the profound and  
7 compelling state interest in protecting the life of an unborn child throughout  
8 pregnancy by favoring childbirth over abortion and implementing that value  
9 judgment through 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, county, or school  
4 district or an agency or subdivision of a city, village, town, county, or school district.
- 5 (d) "Public property" means a public facility, public institution, or other  
6 building or part of a building that is owned, leased, or controlled by the state, a state  
7 agency, a local governmental unit, or an authority, or any equipment or other  
8 physical asset that is owned, leased, or controlled by the state, a state agency, a local  
9 governmental 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) Require, provide, refer for, or make arrangements for the provision of  
2 training in the performance of a medical treatment or surgical procedure for the  
3 purpose of performing or inducing an abortion.

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

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

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

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

14           4. Require, provide, refer for, or make arrangements for the provision of  
15 training in the performance of a medical treatment or surgical procedure for the  
16 purpose of performing or inducing an abortion.

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

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

23           (5) (a) Any person who violates sub. (3) shall be required to forfeit not less than  
24 \$500 nor more than \$1,000 for each offense.

