

The AFCON Sentinel

Newsletter of the Academic Freedom Coalition of Nebraska

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Special Issue:

Free Speech and Academic Freedom at the University of Nebraska

AFCON 2018 Annual Membership Meeting

Saturday, October 13, 10:00 AM to 1:00 PM

Nebraska Union, UNL city campus

(right by the proposed free speech zone)

open to all, no charge

Keynote Address

UNO Professor Emeritus Sam Walker

Walker will also receive AFCON's annual academic freedom award for his protest against the University of Nebraska Board of Regents "free expression" policy adopted in January 2018 and his lifelong work defending and promoting intellectual freedom in academic and other contexts. For more about Sam Walker see p. 7.

Panel Discussion

Panelists will be **Nebraska state senator Steve Halloran**, who introduced a bill in the 2018 Unicam to promote free expression in public higher education; **ACLU Nebraska Legal Director Amy Miller**, who has written to UNL, UNO, and UNK about their free speech policies; and **UNL journalism professor John Bender**, who has served as president of the UNL Faculty Senate, the UNL AAUP, and AFCON. **AFCON President Dave Moshman** will serve as moderator.

Panelists will discuss current intellectual freedom issues at the University of Nebraska, including restrictive speech zones, unconstitutional speech codes, the new Regents policy warning teachers against introducing controversial matters, and the recent censure of UNL by the AAUP for penalizing speech without due process. The focus will be on what needs to be done, and what supporters of intellectual freedom should do.

There will be a very brief annual business meeting, open to all, after the program.

For background on intellectual freedom at the University of Nebraska, see pages 2-7.

For information about related events, see pages 7-8.

For further information, email Dave Moshman at dmoshman1@unl.edu

AFCON Opposes New Regents Free Expression Policy

A Statement from the Academic Freedom Coalition of Nebraska

16 March 2018

This statement originally appeared in the April 2018 AFCON Sentinel

The Academic Freedom Coalition of Nebraska has been increasingly concerned about Regents Policy 6.4.10 on free expression, adopted January 25 by the University of Nebraska Board of Regents. As explained below, we are particularly concerned about (1) unconstitutional restrictions on where expression is free, (2) unconstitutional restrictions on what students may say, and (3) warnings to faculty to avoid “controversial matters” in their classes. Since the passage of this policy, both UNL and UNO have taken actions confirming our worst fears.

At its March 10 meeting, the AFCON Board of Directors voted unanimously to oppose R.P. 6.4.10. Although the policy includes strong statements of commitment to free expression, First Amendment rights, and academic freedom, we concluded after thorough discussion that the policy as a whole is a major infringement on intellectual freedom at the University of Nebraska and should be rescinded.

Where speech is free

The public areas of college campuses have been widely viewed since the 1960s as traditional public forums like streets and parks where anyone may proclaim anything they wish about any topic, as both ACLU Nebraska and the Foundation for Individual Rights in Education (FIRE) have argued. R.P. 6.4.10, in contrast, assumes that no part of any campus is a traditional public forum. Campuses are authorized to identify distinct speech zones and determine the regulations governing expression within each. First Amendment rights are fully respected only in limited areas of campus under limited

circumstances, as determined by each campus.

UNO has issued draft regulations implementing the Regents policy, including limited zones for free speech and a 30-day waiting period. UNO professor emeritus Sam Walker, who met with AFCON March 10, is planning to protest the policy.

What speech is free

Contrary to what some have suggested, the University of Nebraska has not adopted the widely acclaimed University of Chicago free expression policy. Although the Regents have drawn on the Chicago policy in some places, the language has been altered to allow broader censorship and punishment of speech. UNL already has a Student Code of Conduct and other policies that threaten constitutionally protected speech, as documented in letters it received from the Foundation for Individual Rights in Education (FIRE) in August 2014 and September 2015. The new Regents policy has not resulted in any reconsideration of UNL’s restrictive speech codes.

On the contrary, since approval of the Regents policy, UNL has extended its unconstitutional restrictions into the classroom. In a February 22 email message to all faculty, UNL’s Executive Vice Chancellor (and chief academic officer) distributed a one-page “TipSheet” concerning “safe and civil discourse in learning spaces.” The TipSheet made clear that the UNL Student Code of Conduct applies in classrooms and should be strictly enforced. Instructors are urged to

include in the syllabus of each course “a safe and civil discourse statement” making it clear to students that their speech must always meet standards of respect and civility and that any speech deemed “abusive, harassing, intimidating, or coercive” may result in expulsion from the classroom and further disciplinary action. UNL expects its faculty to enforce its unconstitutional speech code in all classes.

Controversy in the classroom

The Regents policy also briefly addresses academic freedom, focusing especially on avoiding “controversial matters” in the classroom. Regents Bylaw 4.2 on Academic Freedom mandates without exception: “Members of the professional staff are entitled to freedom in the classroom in discussing their subjects.” R.P. 6.4.10 makes no reference to this bylaw. Instead it warns, “teachers are entitled to freely discuss topics in the classroom, but they should be careful not to introduce controversial matters, which have no relation to the subject being taught.”

Although the Regents academic freedom policy claims to draw on the 1940 policy statement of the American Association of University Professors (AAUP), the AAUP language has been subtly altered in a manner that rules out AAUP’s 1970 interpretation. The AAUP warns faculty to avoid matters unrelated to the curriculum, especially when such matters are controversial. The Regents policy, in contrast, warns faculty to avoid controversial matters, because such matters are not part of the curriculum.

Controversy is of course central to academic work. The new Regents policy is utterly inconsistent with AAUP policy, with the Regents’ own Bylaws, and with any conception of academic freedom.

Conclusion

With R.P. 6.4.10 and subsequent campus actions, the University of Nebraska is (1) restricting free speech on campus through speech codes and speech zones that violate the First Amendment and (2) maintaining classrooms in which no one will feel disrespected or offended, even at the expense of curricular freedom for the instructor and freedom of discussion for students. AFCON is happy to assist anyone at the University of Nebraska or elsewhere in developing policies that respect intellectual freedom for students, teachers, and researchers in all academic contexts and in resisting infringements on academic freedom. Contact AFCON President David Moshman at dmoshman1@unl.edu.



AFCON Testimony on Free Speech Bills

This summary originally appeared as part of President Dave Moshman’s column in the February 2018 Sentinel.

In the past few weeks I testified on behalf of AFCON concerning two bills protecting student freedom of expression....

LB 718, as amended prior to its January 30 education committee hearing, provided broad protection for free speech in public higher education but had sufficiently serious problems that AFCON could not support it. We testified in a neutral capacity that we supported the intent of the bill and most of its provisions and

would be pleased to support a properly amended version. ACLU Nebraska provided similar testimony, also in a neutral capacity. The Foundation for Individual Rights in Education (FIRE), taking the same general view, testified in favor of the bill with the understanding that they were already rewriting it in cooperation with its sponsor, Senator Steve Halloran.

AFCON testified that, over the past 30 years, public colleges across the United States have instituted unconstitutional policies authorizing punishment of broad categories of objectionable speech. UNL's Student Code of Conduct, we pointed out, prohibits "verbal abuse" and endangering the "reputation of any person," and other UNL policies include similar threats to speech protected by the First Amendment, as noted by FIRE in 2014 and 2015 letters to UNL.

Free expression issues in Nebraska higher education, we added, are by no means limited to UNL. AFCON has addressed free expression issues at Peru State, Wayne State, and Chadron State, including several serious matters in the past few years. We suggested on the basis of our experience that the state of free expression in the state college system is worse than within the University of Nebraska, in part because it is easier to keep problems hidden. We saw much need for a law that would require all public educational institutions to adhere to strong standards of free expression and to be transparent about their policies and practices in this regard.

We had two general concerns about the bill, however. First, we were concerned that the bill was so detailed as to micromanage the policies and activities of colleges and universities. And second, we were concerned about a lack of clarity concerning the relation of free speech in the public areas of the campus, the focus of this bill, to the academic freedoms of

faculty and students in teaching, learning, and inquiry. We also had a number of more specific concerns about vague or inadequate language in some provisions and suggested the committee follow the excellent First Amendment guidance it was receiving from ACLU Nebraska and FIRE.

Many of those testifying against the bill argued that it was unnecessary because the University of Nebraska Board of Regents had just adopted a new free expression policy that shows its strong commitment to the First Amendment. But the new Regents policy, though it has some admirable language, also has serious flaws. ACLU Nebraska provided the Regents with detailed advice about the proposed policy, but it was adopted without change.

One major problem with the new Regents policy is that it invites campuses to designate free speech zones where expression has full First Amendment protection, with the understanding that speech has lesser protection anywhere on campus that has not been so designated. Both ACLU Nebraska and FIRE, in contrast, believe it is well established in First Amendment law that the public areas of a public college campus are traditional public forums, no less than city sidewalks or parks. Public colleges have no legitimate authority to restrict free speech to smaller zones. LB 718 would clarify this.

Another problem with the new Regents policy, of particular concern to AFCON, is that the new language regarding academic freedom is weaker than the existing University of Nebraska Regents Bylaw on academic freedom, which is nowhere mentioned. In particular, the new Regents policy cautions teachers about introducing "controversial matters" in the classroom. Board of Regents Bylaw 4.2 on Academic Freedom, in contrast, makes no

exception for controversial topics or ideas. I worry that the “controversial matters” clause in the academic freedom section of the new Regents free expression policy is a ticking time bomb.

Turning to the second bill, LB 886 protects student journalists and their advisers in higher education and public high schools. AFCON testified before the judiciary committee on February 8 that, in 30 years of defending academic freedom, we had repeatedly learned of and addressed issues of student press censorship in secondary and higher education across Nebraska. We noted that we have supported bills such as this one for most of our history and strongly support LB 886.

Our testimony focused on two issues raised by opponents of LB 718 that applied equally to LB 886 and had been raised in past hearings on its predecessors: (1) institutional academic freedom and (2) the relation of the bill to the First Amendment. We argued that both issues are important but that neither is an obstacle to either LB 718 or LB 886.

Starting with the first issue, academic freedom is historically and fundamentally concerned with the autonomy of educational institutions, especially with respect to legislative coercion. But LB 886, like LB 718, falls squarely within a limited and well-established area of legitimate regulation. Governments at all levels may protect and promote the basic civil rights and civil liberties of all persons. There is no academic freedom exemption from such laws for educational institutions.

Turning to the second issue, why do we need a law protecting free expression when we already have the First Amendment? We suggested two reasons. First, students and teachers shouldn't need to go to federal court to defend their free speech rights. And second, a state may legitimately decide to protect free

expression beyond the constitutional minimum set by the First Amendment.

LB 886 goes beyond the First Amendment in its protection of free expression, but only, we emphasized, in a limited way. Applying only to student journalism, it restores a First Amendment standard that previously governed public education from 1969, when the U.S. Supreme Court set this standard in *Tinker*, to 1988, when it largely removed First Amendment protection for curriculum-related expression in *Hazelwood*, a month before the founding of AFCON.

As of February 13, I concluded, “AFCON will have been defending intellectual freedom in the academic institutions of Nebraska for 30 years. If you'd like to give us a truly awesome birthday present, just pass this bill.”



A Brief History of Free Speech at UNL

This column by AFCON President David Moshman originally appeared in the January 21, 2018 issue of the Omaha World-Herald.

Over the past 30 years, colleges across the United States have instituted unconstitutional policies authorizing punishment of speech deemed racist, sexist, homophobic or otherwise objectionable. This led to a free speech crisis at UNL in the early 1990s.

Several years ago, UNL once again revised its policies to enhance its authority to punish unacceptable speech. Its revised

Student Code of Conduct, for example, now broadly prohibits “verbal abuse” and endangering the “reputation of any person.”

In August 2014 and September 2015, UNL received letters from the Foundation for Individual Rights in Education noting that such language unconstitutionally threatens a great deal of speech protected by the First Amendment. The 2015 letter informed UNL of a downgrade in its free speech rating.

Also in September 2015, then-Chancellor Harvey Perlman sent an email message informing all UNL students, faculty and staff: “We have designated the plaza outside the Nebraska Union as a place where provocative speech can be conducted.” He later denied UNL had a speech zone. The Academic Freedom Coalition of Nebraska urged UNL to review its policies, but to no avail.

In August 2016, UNL’s new chancellor, Ronnie Green, sent an email message to all UNL students, faculty and staff highlighting UNL’s “newly articulated belief statements.” The approved “beliefs on diversity and inclusion” include “freedom of speech,” but only for civil and inoffensive speech, explaining, “we do not tolerate words and actions of hate and disrespect.”

In August 2017, undergraduate Kaitlyn Mullen set up a table promoting Turning Point USA, a conservative campus-based organization known for its Professor Watchlist. This generated a small protest, during which at least two students engaged in extended hostile chants from close by.

One protester was Courtney Lawton, a graduate student and lecturer who called Mullen a “neo-fascist Becky” and gave her the finger. By “Becky” she meant what in social justice circles is sometimes termed,

more specifically, a “Beckzilla”: “a white woman who weaponizes her privilege.” “Becky” is also understood as a sexist slur akin to “bitch” that suggests particular sexual acts, especially fellatio.

Thus UNL faced what it claimed must never be tolerated: “words and actions of hate and disrespect.”

If a teacher treated one of her students as Lawton treated Mullen, this would be a violation of student rights and professional ethics. But the incident involved two students with no academic relationship, in a public area of the campus. Even viewing this as a student/student interaction, however, Lawton clearly violated the student code of conduct, which prohibits “verbal abuse” and threats to “reputation.”

This put UNL in an untenable position. If it punished Lawton for her speech, it would be violating her First Amendment rights. But if it failed to apply its code of conduct to verbal abuse targeting a conservative, it would be guilty of a double standard.

Bypassing usual procedures, UNL administrators ultimately guaranteed that Lawton would never again teach at UNL but were vague about whether she was being disciplined and, if so, for what. This earned UNL a third letter of concern from the Foundation for Individual Rights in Education and a threat of sanction by the American Association of University Professors.

Meanwhile, in the Nebraska Legislature, State Sen. Steve Halloran has introduced Legislative Bill 718, the Higher Education Free Speech Accountability Act, which includes carefully formulated provisions protecting free expression. In its current form, however, this bill unconstitutionally micromanages the University of Nebraska and thus infringes on its academic

freedom, by directing in detail what its Board of Regents must do.

Rather than wait for the Legislature or the Board of Regents, UNL should follow the excellent guidance in all three letters from the Foundation for Individual Rights in Education. It should rescind its actions against Courtney Lawton and revise all its policies to conform to First Amendment standards.



Gallup Climate Survey

In September 2018 the University of Nebraska released a Gallup Climate Study of University of Nebraska students, faculty, staff, and alumni. The results show that the University is perceived by most as a generally welcoming environment that is generally supportive of intellectual freedom in and out of the classroom. The responses also indicate, however, that many individuals, especially African Americans and political conservatives, sometimes find the University unsupportive and/or do not feel free to express themselves. Gallup's Executive Summary can be found here:

https://nebraska.edu/~media/UNCA/docs/news/NU_2018_Climate_Study_Executive_Summary.pdf

Regents Candidate Responses

AFCON invited all candidates for the University of Nebraska Board of Regents to answer these questions:

1. Do you believe that open green spaces on a public college campus are public forums for free speech or do you believe that free speech should be restricted to small spaces on campuses?

2. In a policy adopted in January, the Board of Regents warned that teachers "should be careful not to introduce controversial matters." Do you believe that teachers should try to avoid teaching controversial matters even when they relate to the subject of the course?

Responses can be found on our website: <https://www.academicfreedomnebraska.org/regent-candidate-responses.html>

Keynote Speaker Sam Walker

Sam Walker, who will give a keynote address and receive the AFCON Academic Freedom Award at the October 13 Annual Meeting (see page 1), is a professor emeritus of criminal justice at UNO, where he continues to work daily 13 years after his retirement. His 14 books on civil liberties, policing, and criminal justice policy have appeared in multiple editions. He is the 2018 recipient of the American Society of Criminology (ASC) Division of Policing Lifetime Achievement Award.

For more about the award see:

https://www.unomaha.edu/news/2018/09/walker-awarded-lifetime-achievement-award.php?utm_medium=email&utm_source=newsletter&utm_campaign=mavdaily&utm_content=feature

For more about Sam:

<http://samuelwalker.net/bio/>

Related Events

In the weeks following AFCON's annual meeting, the Lied Center is offering three events concerning intellectual freedom at the University of Nebraska and in higher education. These are:

October 17. There will be a panel discussion in the Nebraska Union auditorium at 6:00 P.M. on the topic "Dignity, Safety and Free Speech: A Conversation about Freedom of

Expression on College Campuses and Beyond.”

October 25-28. In partnership with the Angels Theater Company, the Lied Center has included David Wiltse’s play *Sedition*, about repression at the University of Nebraska during World War I, in its 2018-19 season, with four performances at the Johnny Carson Theater. Angels Theater did several readings of this play last year, including one at AFCON’s annual meeting.

November 7. Former ACLU President Nadine Strossen will be speaking at the Lied Center as part of the E. N. Thompson Forum on World Issues. The title of her talk and of her new book is *HATE: Why We Should Resist It with Free Speech, Not Censorship*.

For more, see:
<https://newsroom.unl.edu/announce/teacherconnect/7915/47862>

Minutes

**Academic Freedom Coalition of
Nebraska
Board of Directors Meeting**
Eiseley Library, Lincoln, Nebraska
September 8, 2018

Present:
Peggy Adair, secretary, legislative liaison
Russ Alberts, director at large
Nancy Comer, representing Nebraska
State Literacy Association
Laurie Thomas Lee, representing
American Civil Liberties Union of
Nebraska
Paula McClung, representing Nebraska
School Library Association
David Moshman, president, policy
coordinator
Rod Wagner, representing Nebraska
Center for the Book

MINUTES

President Dave Moshman convened the meeting at 10:15 a.m.

MINUTES: A motion was made by Comer, second by Adair, to approve minutes of the AFCON board meeting held on July 14, 2018. Motion carried on a voice vote.

TREASURER’S REPORT: Halley distributed the treasurer’s report via email. Balance on hand as of September 6, 2018, is \$2,789.27.

PRESIDENT’S REPORT: Moshman informed the board of Nadine Strossen’s newest book. The title of the book is *HATE: Why We Should Resist It with Free Speech, Not Censorship*.

TREAT OF THE DAY: Nada. Bob The Baker and Sous Chef Ally were both in absentia. Fortunately, President Moshman kept the meeting rolling at warp speed so people were able to quickly disperse to find sustenance elsewhere... mostly at nearby tailgates.

NEWSLETTER: Moshman reported September 24 is the deadline to submit articles for the next edition of the *Sentinel*.

WEBSITE: Todd Schlechte has updated and vastly improved the AFCON website. He encourages the Board to send him suggestions for items to include on the website.

ANNUAL MEETING: Moshman reported preparations for the AFCON annual meeting are nearly complete. Moshman will extend email invitations to state senators who are members of the education and appropriations committees.

NOMINATING COMMITTEE: Comer reported John Bender has accepted the nomination for the position of president-

elect for 2019. Alberts reported he will be unable to serve as AFCON president in 2019 due to health issues. President Moshman asked the nominating committee to pursue a nomination for president for 2019. The board discussed other options to pursue if the committee is unable to secure a nominee for president for 2019.

QUESTIONS FOR BOARD OF REGENTS CANDIDATES: Alberts reported Barbara Weitz is the only candidate for Board of Regents who has responded to the AFCON candidate questionnaire so far. Her response will be posted on the AFCON website with a notation that other Regent candidates have not yet responded.

MEMBER ORGANIZATION REPORTS: American Association of University Professors UNL Chapter: Moshman reported AAUP-UNL is searching for a person to represent them on the AFCON Board.

Nebraska State Reading Association: Comer reported the Association has changed its name to Nebraska State Literacy Association (NSLA). Comer reported the Association recently paid its AFCON dues. Thanks!

Nebraska School Library Association (the other NSLA): McClung reported the Association will hold its annual conference October 4-6, 2018. McClung reported school librarians often have to take personal days off to attend professional development events.

Nebraska Center for the Book: Wagner reported the Center's annual meeting is scheduled for October 27, 2018, in Lincoln. However, UNL football may wedge its way into the now-open football weekend. Wagner will advise the AFCON board of any changes.

AFCON MEETING DATES: Moshman reported AFCON is scheduled to meet November 10, 2018, and December 8, 2018. Moshman will hold that schedule for now but will likely cancel the November date after the AFCON annual meeting in October. AFCON will likely not meet in January, 2019, as Eiseley Library is unavailable.

There being no further business, the AFCON board adjourned at 11:03am.

Respectfully submitted,
Peggy Adair, Secretary

JOIN OR RENEW

Ally Halley, Treasurer

AFCON now accepts PayPal! Use your PayPal account to join or renew. We have two ways to pay: send a direct payment to us at afcon.freedom@gmail.com or use the PayPal button on our website <https://www.academicfreedomnebraska.org/join-afcon.html>. The button on the website will auto-renew your membership each year so you don't have to manually submit a payment when it's time to renew. If you do not have a PayPal account, send us a check at 3015 S 35 Ave, Omaha, NE 68105. Memberships are \$120 for organizations and \$15 for individuals.

www.academicfreedomnebraska.org