



THE

# AFCON

SENTINEL



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A Quarterly of the Academic Freedom Coalition of Nebraska

June 15, 2001

## AFCON OFFICERS

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### Purpose:

To promote academic freedom, defined as intellectual freedom in educational and research contexts. This includes freedoms of belief and expression and access to information and ideas.

## MESSAGE FROM THE PRESIDENT—Dwayne Ball

### What It Is Ain't Exactly Clear

This is the second in a series of essays on threats to academic freedom at American universities. Here are some stories from around the country that might shock you.

1. A public university administrator talks to the press about an e-mail deeply offensive to Jews that was broadcast anonymously to a large fraction of the e-mail addresses at his university. During the conference, he says, "The perpetrator is probably a black student. After all, African Americans are the root of most evil." No action is taken against the administrator; he remains in his well-paid public job to this day, while the targets of his contempt suspect that the university administration, despite its protestations to the contrary, would be happy to see them disappear.

2. At one public university, a full-credit course is offered in "defeating Race and Sex Preferences in Hiring and Admissions," and is taught by a professor who openly advocates the repeal of affirmative action policies. The course catalog description makes it clear that the purpose of the course is to develop plans of political action, and quite obviously, the merits of affirmative action are not to be discussed in any fair and impartial way.

3. At a third public university, a new set of procedures is put in place, with the approval of the faculty, to handle religious discrimination. For example, should a faculty member say something during a classroom lecture that a student finds offensive on the basis of his religious dogma, the faculty member may be accused of religious harassment, not allowed to face or cross-examine her accusers, not allowed a copy of the detailed charges or the testimony, will be judged by a panel specifically selected and "trained" in the fine points of religious harassment as interpreted by fundamentalist Chris-

tians, and may be subjected to the entire range of administrative penalties, including termination. Objections to the policy are ignored and the university official charged with pushing the policy refuses to show up at a panel discussion sponsored by the ACLU.

Are you shocked? Are you outraged? How could such things have happened in this day and age? Well, they didn't—not exactly as I have described them.

The first story really comes from the University of Iowa, where Vice-President for Public Relations Ann Rhodes told the press in the Spring of 2000 that an anonymously-broadcast e-mail deeply offensive to many African-Americans had probably been sent by a white male. "I figured it was going to be a white guy between 25 and 55 because they're the root of most evil," she said. In fact, the perpetrator turned out to be a black female. There was a small outcry, and minor opprobrium mixed with expressions of support for her statement from some elements of the university community; Rhodes later apologized and seems to have suffered no change in her employment conditions. Can you imagine what would have happened, though, if the story as I first related it was the real one? The male administrator would have been fired outright or forced into a humiliating series of "sensitivity" sessions.

The second story comes from the University of Michigan Fall 1999 course catalog, Afro-American Studies 203.001 (meets with Women's Studies 253.001,) and, of course, advocates preferences, not their repeal. "This course will address the dilemma of the response and attempt to shape some thinking about the fight for affirmative action." So much for the notion of the university as a place where a responsible scholar develops the critical thinking abilities of his students and welcomes their reasoned dissent. (Continued on page 3.)

## Upcoming Events

AFCON Board Meetings, July 9, September 8, and October 6  
Gere Library, 56th and Normal, Lincoln, Nebraska; 10 AM

## MINUTES of the AFCON Board of Directors

**March 10, 2001**—February minutes approved as corrected—last two lines in “Subcommittees and recruitment” deleted. Treasurer’s report accepted.

Peggy Adair assisted by Mary Lou Benesch made an AFCON presentation at the Nebraska State Reading Association Conference in Kearney, February 24. Gerry Cox made sales at the AFCON table.

Bob Haller, Mel Krutz, and Cathi McMurtry discussed sending the SENTINEL to the chairs of constituent organizations.

Haller noted that the National Coalition Against Censorship was limited to national organizations.

Peggy Adair reported that LB 462, the fetal tissue bill was still in committee and that Dr. Howard Gendelman, a neuroscientist at the University of Nebraska Medical Center, received a \$3,000,000 to continue research—using human tissue, including fetal brain cells—into Parkinson’s and Alzheimer’s diseases and AIDS-related dementia. Krutz suggested AFCON enter the fetal cell discussion with a conference of its own or in conjunction with an affiliate group.

Adair reported that LB 303, the Education Roundtable bill, is at Final Reading. Its provisions decreased Community Representation from 10 to 8, and added new categories for a non-educational (home school) parent and a school administrator. There are no categories for teachers, public school parents, nor students. McMurtry will contact Jim Griess at NSEA to send a letter of support for AFCON’s nominee--Mel Krutz--to the roundtable.

The AFCON Web Page is operational: <http://firefly.unl.edu/afcon>.

Policy Issues: (See special insert on page 3—editor.)

President Ball asked Haller and Moshman to contact other academic senates to discuss their participation with AFCON and mentioned that President-Elect Beckstead will check constituent organizations as to when

their annual meetings are.

Moshman reported he wrote an article for the UN-L Teachers’ College Newsletter about AFCON’s Principles of Academic Freedom. He shared a news article from the Brooklyn Heights (New York) Press that reported on AFCON’s Year 2000 Annual Meeting’s panel discussion of Harry Potter. (See excerpts on Page 6—editor.)

**April 14, 2001**—The Board authorized the Secretary’s minutes and the Treasurer’s report be e-mailed to board membership in advance of monthly meetings so they could be voted on as “consent agendas.”

Mel Krutz is working with organizations that do not have representatives who can attend AFCON Board meetings.

The Nebraska Press Association will provide a table for AFCON to distribute material at the next NPA meeting.

Tom Black via NSEA staff provided names of teachers who might serve on the AFCON Secondary/Elementary Subcommittee and the addresses of the presidents of the largest NSEA locals to invite them to join AFCON.

Linda Beckstead contacted several organizations to see if AFCON could attach its Annual Meeting to one of theirs. None worked. Dwayne Ball will find out when the ACLU Annual Meeting is held.

Policy Issues: (See Special insert on page 3—editor.)

Ball and Moshman continue discussions with UNO, Creighton, and Chadron’s faculty senates. Ball is applying for tax exemption status for AFCON via the Tax Exemption Forms 501.c.3.

Moshman circulated the article from the Brooklyn Heights Press in which Howard Moshman (David’s father) talks about AFCON’s Annual Meeting in which a panel of adults and children discussed censorship and book banning. Mr. Moshman used the discussion as a springboard to recall his own memories of reading as a child.

Krutz and Ball presented information on LB 394 via an e-mail from Adair.

The bill, introduced by Senator Adrian Smith attempts to protect the privacy of individual students. The Board discussed ways in which the bill might negatively affect the release of information to the public. This includes school yearbooks, newspapers, and athletic media guides which might be banned because they contain personal information about students. The Board suggested Ball write Senator Smith about AFCON’s concerns.

AFCON might request a table to distribute flyers at UNL’s new student orientation—the Big Red Day, August 26, 2001.

AFCON Board member Bob Haller will be honored April 24 for receiving the Academic Freedom Award sponsored by the UNL Academic Senate. (See his acceptance speech on Pages 4 and 5.)

**May 12, 2001**—The consent agenda of the Secretary’s and Treasurer’s reports (a balance of \$1118.74) was accepted with revisions.

Beckstead continues arrangements for an AFCON Annual Meeting.

Ball distributed a letter he sent to Senators Adrian Smith and Ron Raikes and a reply from Smith on LB 394. The bill, intending to protect student privacy, might infringe on legitimate access to information about students and school activities. Smith indicated that it would enhance school discretion but is unlikely to be debated this session.

The Board will act at the next meeting on whether to adopt “A Teacher’s Guide to Religion in the Public Schools” as AFCON policy or not.

Moshman reported that the academic freedom issue in the UNL Teachers’ College has been resolved. In a recent memo, the Dean indicated that faculty would remain free to conduct independent research without administrative approval.

The Board agreed to allocate funds to participate in UNL’s Big Red Day August 26, 2001.

## Threats at American Universities

(Continued from page 1.)

The third story comes from Columbia University this year, and it concerns the new sexual harassment (not religious harassment) code, which has the provisions I described. The excuse for such violations of the fundamental rights of the accused is that people will not come forward with accusations of sexual harassment if they know such accusations might be challenged in person and in detail by the accused. The policy has recently been approved by the faculty and is now before the Columbia Board of Trustees.

Are you upset? You ought to be. Or, are you generating rationalizations for why women or minority administrators can

say the sorts of things about white men that white male administrators can't say about women or minorities, or why accusations about speech with sexual content is somehow different from other kinds of accusations, or why political action on one side of the political spectrum can be disguised as course content but not on the other side?

This is just a sampling. I went through my files and counted about three dozen stories of the outrages of political correctness—outrages committed on the concept of a university as a bastion of free thought and expression—before I got tired and called it a day. I'll take this up again in the next newsletter, when I expand on the threats of political correctness to academic freedom.

## Policy Discussions during AFCON Board of Directors' Meetings —David Moshman

In the **March** meeting, Dave Moshman reported that AFCON's Policy on Sexuality was forwarded to a staff member of Graham Spanier, President of Penn State, where a student-held Sex Fair had resulted in controversy.

The Nebraska State Board of Education has an abstinence only policy in regard to sex education. Does this policy include AIDS education and, if so, does this rules out all information about condoms and safe sex?

Moshman distributed a "Teacher's Guide to Religion in the Public Schools," available from the Freedom Forum First Amendment Center. AFCON may adopt this as its policy statement or develop its own.

He described several recent cases:

\* A science fair study by a third grade student in Boulder, Colorado, which concluded that students preferred a white Barbie doll over a black Barbie. She was told that "the science fair was not the best forum for considering racial issues." The school board has asked the superintendent to reconsider the school's science fair policy.

\* A U.S. Circuit Court of Appeals struck down a broadly-written high school speech code as an unconstitutional infringement of the First Amendment rights of students.

\* A case in UN-L Teachers' College in which a memo from the Dean of Teachers' College to the faculty suggests a decline of academic freedom of inquiry. In response to the memo, Moshman pointed out to the Dean that the new policy violates AAUP and AFCON principles and University of Nebraska Regents Bylaw 4.2. The

AFCON Board authorized President Ball to write a letter on this issue, if it cannot be resolved within the College.

In the **April** meeting, Moshman stated that the "A Teacher's Guide to Religion in the Public Schools" encourages schools to remain neutral, instead of separate, regarding religion. Discussion followed whether AFCON should endorse the guide as policy or create a policy using the booklet as a guide.

He described several recent cases:

\* A superintendent from Boone Central School District led a group in prayer to help them determine which mascot to use when two school districts consolidated. The ACLU-Nebraska will research the case as an administrative complaint and not as a lawsuit.

\* A student in Tulsa, Oklahoma, filed a lawsuit through the ACLU about a notebook that was confiscated because she had drawn a Wicca symbol on it. When a teacher later became ill, the student was suspended for casting a spell.

\* An article was distributed called "Schools Fall Short on First Amendment Rights." The article said that although educators believe they do a good job in teaching First Amendment rights, they do a poor job in granting the same rights. The Association for Supervision and Curriculum Development in Virginia will partner with the First Amendment Center in New York City on a multi-year project. Their goals include the following: develop guidelines, develop model schools, encourage development of curricula, and educate school and community leaders.

\* An article was distributed called

"Ed Board fails to pass sex ed plan," published in the Lincoln Journal Star. In a 4-4 vote, the Nebraska State Board of Education voted down a measure to alter the current state's abstinence-only education policy. The measure would have allowed HIV/AIDS prevention education in its sex education program.

\* An article was distributed called "Judge Lets College suspend Professor for Creating 'Hostile Learning Environment'" about a Federal appeals Court ruling at Macomb Community College that said the college has the right to suspend a faculty member regarding the language he used in his classroom. The appeals court said, "While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment." Discussion followed about academic freedom versus hostile environment and community college versus university methods to resolve similar issues.

In the **May** meeting, Moshman reported on the U.S. Third Circuit Appeals Court's upholding the authority of a university to require a faculty member to change a grade on the ground that "[b]ecause grading is pedagogic, the assignment of the grade is subsumed under the University's freedom to determine how a course is to be taught." He indicated that this reasoning is consistent with other recent applications of Hazelwood to deny First Amendment protection to faculty and students in curricular contexts at all levels of education.

## 2001 James A. Lake Academic Freedom Award presented to Professor Robert S. Haller

I thank you, members of the UNL Academic Senate and of the Committee, for the honor of this award. Any award which bears the name of James A. Lake, Sr., is particularly valuable to me. Jim Lake, as many of you know, always signed his name "James A Lake, Sr.," for fear (he said) that he would be charged for his son's extravagances. He was the best one-armed wood-worker I know, and his dean turned down his request for a handicap parking sticker because you couldn't get one for mental defects. I don't have one either. He was President of the Nebraska State Conference of the American Association of University Professors thirty years ago when I was its Secretary. I learned a great deal from him about the profession and its standards, and picked his brain on many different issues, such as Native American Tribal law in relation to the law of this country. You knew how strongly he respected the right of all persons to their opinions by witty and withering contempt with which he dismissed those opinions which were not in agreement with what he knew was right. And we all know how much we still owe him and the other giants of his day for the phrasing of our current University By-Laws, which in all matters related to academic freedom remain strong and right-minded.

I owe practically everyone on the list before me some kind of debt for at some point providing me with insight into Academic Freedom or assistance in its preservation and defense. I have been similarly inspired by my colleagues on the Academic Freedom Coalition of Nebraska, Laurie Lee, Dave Moshman, Dwayne Ball, and John Bender from the University and other persons in the state who have been active in defense of the freedom of students and teachers at all levels, in particular Mel Krutz, Tom Black, Gerry Cox, Cathi McMurtry, Linda Beckstead, Pam Trefz, Peggy Williams, Spencer Davis and others who have show that Academic Freedom cannot live at the university without support from education at all levels.

I am particularly indebted to the late Erv Goldenstein for a seminar we jointly

ran over 25 years ago on the Medieval University. It was that seminar which first made me aware of the unique qualities of a university, an institution founded in the 12th century constituted by the principles of collegiality and recognizing from its beginning that academic freedom although not always under that name, supported by autonomy and internal self-governance were essential to its operation. The prestige and power which the major universities very rapidly acquired in the 13th century came from the recognition that this freedom and independence gave the faculties an authority for the settlement of disputes unparalleled in previous history.

Universities in general and this university in particular have varied in the vigor with which they maintain and defend these traditions of independent self-government and intellectual freedom. We can at the present moment be happy that the Legislature failed to pass LB 462, the ban on fetal tissue research, but have to be apprehensive that it is scheduled to be reconsidered the next legislative session in January 2002. Reading this bill is greatly distressing to lovers of academic freedom. Claiming to be a bill "related to abortion" it contains in its operative provisions the most blatant representation of the violation of academic freedom conceivable. It instructs the Attorney General to enjoin a faculty member engaged in research vetted and funded by a Federal agency and passed by ethics committees inside and out of the university and to take that researcher to court if the injunction is ignored. It instructs the Attorney General to enjoin the Board of Regents, elected by the people of the state and charged with the governance of the University, if it allows research using fetal tissue to take place in its facilities, and blocks the use of any funds received from any source for the carrying out of this research. It contained no provisions for indemnifying the Federal agency which supplied the funds or to answer a suit for breach of contract, and no provisions for compensating the faculty member for the loss of that person's livelihood.

For this reason, we as a faculty should

not spend the next eight months quietly waiting. We should make certain that no Legislator will find it possible to think that the issue is confined to the Medical Center. The faculties of every branch of the University must make it clear that a threat to one is an attack on us all, and above all on the integrity of the university. The proponents of the bill outside the Legislature have mounted an attack on the university, falsely alleging bad faith and secrecy on its part and demonstrating a contempt for the freedom of the intellectual life at the heart of the university. We can be happy of course at the vigor with which our Chancellor asserted the university's independence in his testimony before the Judiciary Committee on this bill, and equally happy that our Regents, particularly Drew Miller and Chuck Hassebrook who faced re-election and won last year with uncompromising defenses of academic freedom. They in the process persuaded many citizens that they were right and their opponents who wished to accept the ban were wrong. I was very proud to represent the Academic Freedom Coalition of Nebraska and therefore the Academic Senate in presenting our annual Academic Freedom Award to the Regents for their consistent support of sound educational principles in this struggle.

I might say parenthetically that the courageous independence of our current Board of Regents makes me suspicious of attempts to alter its composition by adding appointed members. In the current situation, that looks like an attempt to undermine the constitutional independence of the University and place it more clearly in the political arena.

You members of the Academic Senate were active in the fight over this bill and have consistently resisted attempts to weaken academic freedom and faculty self-government as embodied in the By-Laws and traditions of this University. While I have the opportunity, I would like to suggest three ways the faculty of UNL might consider making academic freedom more salient as the central core of our endeavors.

( Continued on page 5.)

**Haller** (Continued from page 4.)

The first is to broaden its scope to include students and potential students of the university. Institution of the Integrated and Essential Studies requirements were motivated in part by the desire to assure that students see intellectual inquiry as open-ended and free, and based on the existence of a wide range of ideas and methods bringing variety and conflict to the research and creative activities of all fields of study. We can be, I think, even more explicit in our syllabuses and assignments in emphasizing the intellectual freedom that students acquire at their matriculation. Students need to be told explicitly that they have this freedom, complementary to their First Amendment rights but not the same as these rights; and the conduct of our classes should demonstrate this. The best way to assure that our freedom is respected by the public is to be sure that students know what their freedoms are and how to exercise them. Such an emphasis is even more important for graduate students, who aspire to fellowship, to collegiality with the faculties of their programs. There are some currents of thought in our profession which downgrade the conditions and procedures which support our academic freedom. I got through my graduate education without ever hearing of academic freedom and it took me some time to recognize its importance to the profession. We should try to assure that our graduate students cannot leave us for academic jobs uninformed of their essential freedoms. Similarly, it is important for us to work for the extension of academic freedom to our potential students in the schools. Current law arising out of test cases gives school administrations extensive powers to limit all forms of student expression which can

be classified as elements of the curriculum. Certain other policies, such as those which would impose standardized testing as the measure of school success, in many cases impose limitations on the freedom of teachers and students. For the same reason we should be suspicious of programs which would supply vouchers for non-public schools. Many such schools boast of their antipathy to academic freedom and to those procedural protections of student and parental rights which the open and democratic nature of the public schools makes necessary parts of their procedures.

The second essential of the exercise of academic freedom for this faculty is greater activity in the public arena. Sometimes the emphasis on peer reviewed research directed to others in the profession provides a disincentive for our participation as citizens in the creation and assessment of laws and policies. I think we all know that free scholarship and research develop habits of mind which are enormously valuable in areas of public controversy. We acquire the knack for considering issues in a global and historic context and with a cool distinction between fact, speculation and wishful thinking. Our newspapers these days run columns and opinion pieces from the various foundations and trusts, think tanks, with small print at the bottom claiming that the writer works for a non-partisan and non-profit foundation or institute, when it often appears in the reading of these writings that the writers have been hired to support the opinions of their patrons by any means possible, with very little regard for truth and balance. It is no coincidence that these private foundations and trusts are often the sources of attacks on tenure, on university research, and on government funding: these private organizations recog-

nize that objectivity and the single-minded pursuit of truth will not always support the self-interest of the founders of these groups. There are of course already many faculty involved conspicuously and behind the scenes in public policy. I would urge others to get involved. So long as we protect each other's work as citizens and agents of public policy we justify the protections which we have built into our freedom over the years.

My third and strongest urging is that we as a faculty work to rebuild an effective independent faculty body to protect and strengthen our freedom, self-governance and independence. When I have been a Senator myself, I appreciate the degree to which those who become Senators quickly recognize that defense of faculty prerogatives is essential to the operation of the Senate. But Senators move in and out of the body; I am afraid that the traditions of academic freedom suffer when there is not a core of dedicated faculty attending to these matters backed by an extensive representation of faculty in, preferably, the American Association of University Professors which has so long been the organization which has formulated our basic principles and defended them locally and nationally. I hope particularly that younger faculty will realize that such a combined effort is required to maintain what I think now is a strong sense of the importance of Academic Freedom, shared between the faculty and the administration. I know that I have always at UNL felt that my colleagues and the spirit of the institution were always behind me in whatever ways I have tested the limits of academic freedom, and I thank you all, faculty, administrators, and AFCON colleagues, for that privilege.

**FOR SALE BY AFCON**

Send orders to Mel Krutz, 2625 Bluff Road, Seward, NE 68434-9801

T-shirts with a Paul Fell "banned books" design; Sizes M, L, XL, XXL, XXXL; \$15.00. Packaging and postage: \$2.00 each.

Note cards with a Paul Fell design; \$1.50; four for \$5.00. Packaging and postage: \$0.75 per packet.

Reader's Theatre Script of a TANGLED ISSUE: Student Freedom of Expression. \$10.00 buys the book with rights to duplicate the script and produce the play. Packaging and postage: \$2.00 each.

**AFCON SPEAKER'S BUREAU (As of June 2001)**

Dwayne Ball: "Threats to Academic Freedom at Universities"  
3120 Jasper Ct., Lincoln, NE 68516  
dwall@alltel.net

Linda Beckstead: "Freedom of Student Press Issues"  
3919 Davenport, Omaha, NE 68131  
becksteadl@aol.com

John Bender: "The Nebraska Student Freedom of Expression Bill"  
3609 S. 20 St., Lincoln, NE 68508  
jrbender@unl.edu

Spencer Davis: "Academic Freedom on the College Campus" and "Principles of Academic Freedom"  
512 Laurel Circle, Bellevue, NE 68005  
sdavis@bobcat.peru.edu or ssdavis@uswest.net

Bob Haller: "Money Talks: Ideas in the Political Process" and "Religion, Intellectual Freedom, and the University"  
4000 S. 56th St., Lincoln, NE 68506  
rhaller1@unl.edu

Jeff Lofthus: "Surveying Censorship in Nebraska"  
1220 Hayes Ave., Norfolk, NE 68701  
jlofthus@pluggers.esu8.k12.ne.us

Mel Krutz: "So, When the Supreme Court Says Yes to Censorship, What Do You Say, Dear?" and "Current Nebraska Censorship Issues and Why They Matter"  
2625 Bluff Rd., Seward, NE 68434  
ck34938@alltel.net

Carol MacDaniels: "Street Language and Student Writing"  
4740 Grassridge Rd., Lincoln, NE 68512  
cmaddani@unl.edu

David Moshman: "Principles of Academic Freedom" and "Student Rights"  
1901 Pepper Ave., Lincoln, NE 68502  
dmoshman1@unl.edu

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Presentation of the Readers' Theatre production of A Tangled Web: Student Freedom of Expression (a cast of adults and students)

**A Nebraska Symposium Arouses Memories of Libraries That Were—by Howard B. Moshman**  
(Brooklyn Heights, New York, Press)

In December of 2000, I attended a meeting of AFCON (Academic Freedom Coalition of Nebraska,) an organization in which my oldest son, David, has been active. He is a professor in the Educational Psychology Department of the University of Nebraska in Lincoln, and has resided there for over twenty years.

Before the business meeting of AFCON, they hosted a panel discussion on book banning. The specific books under discussion were the Harry Potter books by J.K. Rowling. The panel consisted of two librarians, a retired college professor/journalist, and two children, one of whom was my twelve-year-old grandson, Michael. Like a tremendous number of children nowadays, Michael had had to be coaxed, coerced or bribed into reading anything, but couldn't wait to dive into each of the four Harry Potter books, and even put aside television for it.

I saw the same phenomenon in my office. A child in the dental chair, in the midst of treatment, had a Harry Potter volume in his lap and turned to it at every opportunity. It is interesting

to note that on a list of the nation's one hundred most banned books are classics like *Huckleberry Finn* and *Catcher in the Rye*. Also notable is that on questioning people who demand that certain books be stricken from reading lists and eliminated from libraries, the majority have never read the books in question. Their objections may be based on the use of specific words, a perceived racism, or views contrary to religious beliefs.

In Michael's presentation, relating to the Harry Potter novels, he contended that parents should make the decision on what their children may read, and that children who are old enough to read and understand a book are capable of distinguishing fantasy from reality.

One of the librarians, in her closing remarks, pointed out that in a period when children have a myriad of distractions, from television to computer games, the internet and even hand-held Game Boys and the like, J.K. Rowling has created a generation of readers who have learned that books can be exciting

**REQUEST FOR NEWS FOR FUTURE ISSUES**

The editor of the AFCON SENTINEL invites all AFCON individual and organizational members to send news about academic freedom issues in Nebraska or editorial comments for inclusion in this newsletter and/or announcements of organizational meetings for the UPCOMING EVENTS column. Due date for submissions to the September 21, 2001, issue is August 25, 2001.

## Unicameral 2001 LB 394

Current law Section 84-712.05, Re-issue Revised Statutes of Nebraska, states, “The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records: (1) personal information in records regarding a student, prospective student, or former student of any tax-supported educational institution maintaining the records, other than routine directory information; ...”

Current law bars educational institutions from withholding “routine directory information.”

State Senator Adrian Smith introduced LB 394 to protect student privacy on behalf of school officials and in response to rising school violence across the nation. LB 394 would amend 84-712.05 (1) with the words “except that directory information maintained by a school district regarding a student, prospective student, or former student who is seventeen years of age or younger may be withheld.” A proposed amendment to LB 394 would insert after “withheld,” “For purposes of this subdivision, routine directory information means a student’s name, his or her parent’s or guardian’s name, and his or her enrollment status.”

LB 394, would allow school districts to withhold “directory information.”

Dwayne Ball, President of AFCON, in a letter to the introducer of the bill asked “Will LB 394 prevent school yearbooks from identifying individual students or student groups? Will the identification of honor students be withheld from newspapers? Will students be able to be identified when they participate in sports, debate, and other extracurricular activities? How will this bill affect the dissemination of student information for college and/or military recruitment? Will there be any type of standard form for requesting student information? Will there be any specific standards for determining when information is permissible to be disbursed, and when it is not?”

The bill was not debated this year.

## The College Hazelwood Case

Student media advocates ended a seven-month vigil January 5, 2001, as the Sixth Circuit Court of Appeals reversed its decision to allow censorship in the “college Hazelwood” case.

In an *en banc* decision, nine of the 13 federal judges who heard *Kincaid v. Gibson* agreed that Kentucky State University violated students’ rights when it confiscated and refused to distribute the 1992-94 biennial student yearbooks. Judge R. Guy Cole, Jr., who alone dissented from the court’s prior, three-judge-panel ruling in favor of KSU, authored the new decision. Judge Cole not only ruled for the students, but suggested that the previous rulings had erred specifically in applying high school press law to a public university case.

The *Kincaid* case first drew national attention in 1998 when a federal district judge ruled that KSU was within its rights to confiscate yearbooks that the administration judged of poor quality: the book cover was purple and not KSU gold and green; the theme “Destinations Unknown” was “inappropriate;” it contained photos of celebrities who had not visited the campus; photos had no captions; it had a “confusing layout.”

The trial court relied on *Hazelwood School District v. Kuhlmeier*, a 1988 U.S. Supreme Court precedent that essentially

guttured high school press freedom in the name of “legitimate pedagogical concerns.” Previously, federal courts had refused to apply *Hazelwood* to college publications, or applied *Hazelwood*, but found college publications distinguishable.

In 1999, a three-judge-panel of the Sixth Circuit Court of Appeals upheld the lower court’s decision. Voting 2-1, the panel relied on *Hazelwood*, holding that the KSU yearbook, *The Thorobred*, was a “nonpublic forum,” like the high school newspaper in *Hazelwood*, thus subject to censorship on reasonable viewpoint-neutral, if content-based, grounds. The entire Sixth Circuit court later vacated that panel decision and heard new oral argument in the case on May 30, 2000.

In the January 5 decision, the court again applied the U.S. Supreme Court’s public forum analysis to *The Thorobred* but this time concluded that the yearbook was a “public forum,” which is subject to content-based censorship only in extreme circumstances. The court looked to four factors to determine the public forum status of the yearbook: 1) university policy, 2) university practice, 3) the nature of the forum and its compatibility with free expression, and 4) the context in which the publication occurs. Disagreeing with the lower court, the *en banc* panel determined that KSU policy intended to open the yearbook to student expression; that officials had not previously engaged in censorship inconsistent with that policy; that a student publication is inherently a forum compatible with

free expression, and that a university is a context where free expression is crucial.

The court had little difficulty reasoning that KSU’s grounds for censorship failed the demanding test applicable to public forums. But the court went further, stating that even were *The Thorobred* a nonpublic forum, KSU went too far. The court described confiscation as “amongst the purest forms of content alteration,” and Judge Cole evinced skepticism at KSU’s grounds for censorship. The confiscation decision was “rash” and “arbitrary,” he wrote, and “smack[ed] of viewpoint discrimination.”

The court regarded *Hazelwood*—which adapted forum analysis to high school publications and diminished protection for those that failed to earn public forum status—as “only marginally” applicable. The court opted for ordinary “adult” forum analysis over the less protective high school version.

As long as forum analysis remains the norm for campus publications, the court’s four-factor inquiry is instructive. The latter two factors should always weigh in favor of student publications. The former two factors, policy and practice, especially in light of the *Kincaid* litigation, dictate that college students and sympathetic educators should work to ensure that public universities have publication policies clearly guaranteeing “public forum” status, and that universities are complying with those policies.

As of May 2001, KSU still had the 1992-94 *Thorobreds* locked up on campus..

# AFCON

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## ACADEMIC FREEDOM COALITION OF NEBRASKA

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### HELP AFCON PROMOTE ACADEMIC FREEDOM

As a member of AFCON, you can help us

- ◆ support applications of the First Amendment in academic contexts, including elementary and secondary schools, colleges, universities, and libraries.
- ◆ educate Nebraskans about the meaning and value of intellectual freedom, intellectual diversity, mutual respect, open communication, and uninhibited pursuit of knowledge, including the role of these ideals in academic contexts and in democratic self-government.
- ◆ assist students, teachers, librarians, and researchers confronted with censorship, indoctrination, or suppression of ideas.
- ◆ act as liaison among groups in Nebraska that support academic freedom.

**MEMBERSHIP** (To become a member, send dues, organization or individual name, address, and phone number to Cathi McMurtry, 515 N. Thomas Avenue, Oakland, NE 68045)

**Organizational Membership** (\$100) entitles the organization to one seat on the AFCON Board and one vote in the election of officers and at the annual meeting, and eligibility for office and chairing standing committees and provides newsletter subscription for the board member to share with the organization's information director and reduced rates to AFCON conferences for its members.

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