



MISSOURI ACADEME

Missouri Conference of the American Association of University Professors

"Academic Freedom Isn't Free"

November 2008

FERPA Update:

What Educators and Institutions Need to Know

by Nancy F. Browning, with Barrie Talbott

Kathleen Markie, from the General Counsel Office, University of Missouri-Columbia, addressed the MOAAUP annual state meeting in Columbia. She reviewed educators' and institutions' responsibilities related to the Family Educational Rights and Privacy Act (FERPA), including its impact on electronic communications. Markie began with a short history of FERPA, also called the [James] Buckley Amendment, which has two prongs: allowing the student to see her/his records and prohibiting the release of information without student consent. FERPA applies to public and private institutions because both receive federal funds, through scholarships, etc.

Markie reviewed aspects of FERPA related to students, the institution at large, and to faculty. For example, Markie pointed out that even if parents pay for college, a student (even those under 18) must give his/her permission in order for the parents to have access to that student's records. Even positive accomplishments, such as being on the Dean's list, cannot be divulged if the student has notified the university not to disclose directory information. Some information is not considered private, such as the heights and weights of athletes. Unless a student waives the right to see some part of his/her records, he/she is entitled to see all except the financial records of his/her parents.

Each college or university must have a centralized place where faculty/staff can discover whether students have given permission to publicize their name, address, and phone number.

Because any student can seek to amend their educational records, each school must have a procedure for this process; even if the student's complaint is not accepted by the institution, his/her statements have to be entered along with the original records. It is important to realize that e-mail among faculty may be considered part of the educational record of students; therefore, each

school should have an electronic records retrieval policy stating how long e-mail will be kept/archived, etc.

See FERPA, page 2

Brooker Bill Defeated Again

By Keith T. Hardeman

Academic freedom in Missouri survived its second political assault since 2007, as a bill to insert politics in college classrooms was, again, defeated this past spring. House Bill 1315, The Emily Brooker Higher Education Sunshine Act of 2008, was a redux of last year's misnamed Brooker Intellectual Diversity Act. Representative Jane Cunningham (R-Chesterfield) sponsored both bills. While the 2007 bill overwhelmingly passed in the Missouri House, it subsequently



Keith T. Hardeman, MOAAUP President

died in the Senate. This year's attempt never made it out of Committee. The bill is named for a Missouri State University student who sued the college over improper grading. It is a clone of activist David Horowitz's Academic Bill of Rights, which has now been introduced in and rejected by nearly 30 states.

At the February 5 hearing before the Missouri House Higher Education Committee, Rep. Cunningham and University of

Missouri-Columbia Professor of Medicine John Marshall both testified in favor of biased political oversight for college classrooms. Cunningham charged that college faculty routinely deny inclusion of varied points of view, assaulting students' beliefs.

In all, seven testified to dispute Cunningham's allegations and to vigorously oppose the bill. MU students Rick Puig and Mark Buhrmester of the College Democrats called the charges inaccurate and asserted that the situation at MSU was isolated. "While the Brooker case was an unfortunate occurrence, using it as a political tool is nothing more than a systematic attempt to make the exception the rule," Puig said in a Columbia Missourian article. "At the end of the day, we still debate a grossly redundant, politically motivated and intellectually poisonous piece of legislation that attempts to solve a problem that doesn't exist," he concluded.

MOAAUP vice president David Robinson was equally passionate: "Legislating so-called 'balance' in the classroom will mean that political opinions or religious beliefs will be given equal weight with facts and scientific theories, regardless of the consensus of scientists and scholars." Robinson then addressed the pragmatic effect of such legislation. "Other states have calculated the costs of similar bills: Annual costs have been projected at \$4.2 million in Florida, \$348,000 in Montana, and \$130,000 per institution in Virginia. If this becomes another unfunded mandate, faculty and staff will have even less time for important duties of course preparation, grading, tutoring, research, student recruiting, etc.," he said.



Kathleen Markie, General Counsel Office, University of Missouri, Columbia

FERPA, from page 1

Student records at an institution are only divulged on a need-to-know basis (to advisors, financial aid, etc.), but the law does not specify who decides what persons can see any particular record. If records are released, the school must keep documentation of the requests, the recipients, and their need to know. If an instructor wants a student's transcript in order to write a reference, the instructor must get the student's permission. However, in a letter of recommendation, an instructor can disclose the grade that a student received in that instructor's course because FERPA is a law about records, not about what is known from personal interaction or observation. In the same way, it is not a FERPA violation to report students whose behavior is concerning; in this connection, Markie also stated that we are seeing more students with mental health issues at the college level.

Faculty also need to be aware that if grades are posted outside an instructor's office, the identifier used must be one that others could not use to identify the student, not a social security number or birth date. Additionally, as higher education moves toward more online coursework, it is important to realize that students must waive their privacy rights in order to communicate with others electronically and to share documents online.

In regard to electronic communication, some major lawsuits outside the realm of education have changed the federal rules of discovery. Now, if there is a lawsuit, federal rules state that the institution needs to put a litigation hold on all electronic documents so that they are not written over. In one case, a litigation hold required faculty to replace their hard drives with mirror images, and these were combed through in search of catch phrases. Even e-mail from a personal address can be captured by a university computer. When dealing with sensitive information, it is best to phone.

Complaints to the Missouri Commission on Human Rights or the EEOC will trigger a litigation hold, as will the filing of a lawsuit. If it is reasonably likely that the case will result in a lawsuit, it is best to start with a litigation hold; however, it may not be appropriate in all complaint cases. Interestingly, there are currently no standards for when to use a litigation hold. Markie stated that the high cost of looking through electronic documents can make a settlement more likely.

Bill, from page 1

"Differing theoretical perspectives are always presented within courses, but this legislation asks us to bring in perspectives that may not be credible," argued Victoria Johnson, chapter vice president of MU AAUP. Dr. Johnson also illustrated concerns about faculty retention. "Passing HB 1315 will make it difficult to recruit and retain the best faculty. The University of Missouri is fast gaining a reputation for where NOT to go. Passing HB 1315 will result in the loss of the most innovative and creative faculty and students," she said.

I testified that numerous studies supported the fact that college faculty were, in spite of Rep. Cunningham's unfounded blanket charges, doing outstanding jobs training and educating their students. "By far, graduates get better jobs, have greater income, have fewer divorces, commit fewer crimes, and live healthier and longer than those who don't attend college. Contrary to the beliefs of this bill's supporters, college graduates probably make better life decisions, not because professors try to teach them what to think, but rather because we teach them how to think."

Others who testified against the Brooker bill were Otto Fajen, Legislative Director of the Missouri National Education Association, and Karen Piper, Associate Professor of English at MU.

Committee Chair Gayle Kingery (R-Poplar Bluff) seemed to be persuaded. In a *Missourian* article he conceded that the reprisal of the Brooker bill might have been based in "political motivation." The bill died in committee, never making it to a floor vote in the House.

Rep. Cunningham will leave the House in January 2009, but she recently won a seat in the Missouri Senate. Time will tell if she, again, decides to pursue such ill-conceived legislation in the future. MOAAUP will remain vigilant. However, it does appear that the national trend of pushing for passage of these so-called Academic Rights bills is losing steam. For a complete breakdown of the issues of the Brooker bill, Horowitz's campaign and other issues of campus free speech, see freeexchangeoncampus.org, which not only serves as a clearing-house for information but also helps organize political opposition to anti-democracy legislation.

*Reports from David K. Robinson***Columbia Meeting about Organizing**

The annual meeting of Missouri Conference of AAUP was held on Saturday, February 23, in Room B-234 of Brady Commons, on the University of Missouri campus in Columbia.

During the first hour, Kathleen Markie, of University of Missouri's General Counsel Office, discussed issues of the Family Educational Rights and Privacy Act (FERPA) and emerging federal-court rules on electronic discovery, including email. (See lead article on FERPA.)

See Meeting, page 3





Photo Courtesy of
Webster University

MOAAUP Mourns the Loss of Earl Henry

On July 26, 2008, Missouri AAUP lost a great friend and colleague when Earl Henry, MOAAUP Executive Committee member and newsletter editor, passed away. Earl hosted our February 2007 annual Conference meeting in St. Louis, and it was one of the best-attended in recent years. His magic improved everything that he touched.

Dr. Earl Henry taught music at Webster University for 32 years. In addition to his classroom teaching, he wrote a number of books dealing with music theory. "Earl contributed to the intellectual life of the campus and of the profession of music. His writings continue to be a standard music theory text," said his department chair, Dr. Jeffery Carter. "Earl always championed the underdog. He was a capable debunker of the oppressing, the pompous, the ridiculous," added Dr. Carter.

A longtime member of AAUP, Earl worked selflessly for his university, Missouri, and the national organization, where he recently served on the Committee on Sexual Diversity and Gender Identity.

MOAAUP past-president John Harms lamented Earl's death, professionally and personally: "We are all worse off without Earl; he was a truly fine man. MOAAUP has lost a major source of inspiration."

MOAAUP vice president David Robinson reflected on his occasional discussions with Earl: "The more I talked to him, the more I was impressed with his mind, his accomplishments, and his humanity." "Earl's death is a shock and saddens me greatly," said David Naugler, MOAAUP Executive Committee member. He leaves behind his wife, Christine, and many who loved and admired him.

According to the Webster University website, memorials can be donated in Earl Henry's name to the Humane Society of Missouri or to the American Cancer Society.

Meeting, from page 2

Erika Gubrium of the Berkeley AAUP Office conducted workshops before and after lunch, dealing with organizing chapters and the general efforts of the state conference. She pointed out that, as threatening as they are, proposals of "intellectual diversity" legislation offer good opportunities for organizing, because they bring in various faculty groups (science, medicine, etc.) that are often difficult to interest in AAUP. Refusing to recognize the fine phrases and eschewing 'scare' quotes, Erika and her office have started referring to bills such as Missouri's HB 1315, "Emily Brooker Higher Education Sunshine Act," simply as *anti-democracy legislation*—it would limit the free speech and academic freedom that are necessary to maintain and develop democratic institutions in our technological, bureaucratic age. We have to keep organizing to protect higher education, particularly the role of the faculty. Erika challenged us to explore the opening for collective bargaining in a ruling by Missouri Supreme Court last year, but with so much on the agenda, the meeting did not discuss collective bargaining very much—maybe next year.

The business meeting was brief, because all state officers are continuing on their two-year terms. We elected our state delegation to the national AAUP meeting in DC, June 12-15: David Robinson (delegate, Truman St. U.) and Victoria Johnson (alternate, U.M. Columbia). Erika encouraged the Missouri Conference to contact the national office when we needed help (financial, organizing, and otherwise), and Mo-Conference extended the same offer to the chapter at U.M. Columbia, which has recently revived and dramatically increased membership. In spite of all our challenges, we would have to call it a pretty good year.

DC Meeting about Reorganization

My Conference's nomination enabled me to win the Hopper Award from the Assembly of State Conferences, money to attend the national AAUP meeting in Washington, DC, June 12-15. The main item of business was the formal membership vote to reorganize AAUP into 3 tiers: the "main" AAUP defined as a professional rather than charitable organization; the Collective Bargaining Congress (CBC); and a charitable/educational AAUP Foundation. AAUP's 501(c)3 status has lately been under scrutiny for reputed political activities, while some members demand that AAUP be more political. The new setup should help AAUP deal with both directions of pressure; under the new organization national officers will be able to address political issues as the need arises. Reorganization won't become official (nor do your dues-deduction practices need to change) until all IRS rulings have been completed, a year or two from now.

The membership committee reported that we now have nearly 50,000 members, and they encourage people to make use of the lower "entrant" dues rate, which lasts for four years. Resolutions from committee included anti-creationism (to which I spoke), and there was a failed resolution from the floor to support Fulbright students held at the Gaza border. Other resolutions that were less controversial passed. I also attended a meeting on partnership benefits (the committee on which Earl Henry served); it turns out that federal taxation policy is key in terms of how such benefits can be handled (and also in defining who can be considered partners). For this and many reasons, we see that AAUP and political currents will probably continue to interact.

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