



April 2, 2014

Executive Director Rhonda Blanford-Green
Nebraska School Activities Association
P.O. Box 85448
Lincoln NE 68501

Dear Director Blanford-Green:

AMERICAN CIVIL
LIBERTIES UNION of
NEBRASKA

941 O ST. #706
LINCOLN, NE 68508
T/ 402.476.8091
F/ 402.476.8135

OMAHA
T/ 402.933.3635

LEGAL HELP LINE
1.855.577.ACLU (2258)

www.aclunebraska.org

I am writing in regards to the recently passed NSAA Content Standards rule regarding student speeches. The rule is unconstitutional as written, and is unconstitutional as applied to the reports of student Michael Barth's speech.

As you know, the NSAA is considered a state actor and therefore must obey the Constitution. See *Brentwood Academy v. Tenn. Secondary School Athletic Association*, 531 U.S. 288 (2001). The violation of clearly established students rights can subject the NSAA to litigation and potential punitive damages.

I am writing to inform you that the rule and the actions of the NSAA violate the state and federal constitution's guarantees of free speech. NSAA should immediately repeal the rule and permit Mr. Barth to give his winning performance without censorship.

CONTENT STANDARDS RULE

I have reviewed the "Content Standards" rule recently promulgated by the NSAA. While it is permissible to limit "vulgar" and "obscene" language in the high school setting, it is not permissible to have the vague standard of "inappropriate" limit student speech.

As the United States Supreme Court has famously said, students are not required to "shed [their] constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines*, 393 U.S. 503 (1969). Nor do they give up their free speech rights in extracurricular artistic performances. Student free speech rights may only be limited if it is reasonably likely to result in a material and substantial interference with the educational process or violate the rights of others.

Since this is not even arising in the school setting, there is no likelihood of disruption at all, making a rule limiting "inappropriate" speeches extremely suspect.

Further, courts have been slow to find limits on controversial student free speech when it is on a political subject such as the rights of gay and transgender people. Consider the following examples of recent student speech victories around the topic of LGBT rights: *Couch v. Wayne Local School District*, 2012 U.S. Dist. LEXIS 123046, where the student won the right to wear a t-shirt that said “Jesus Is Not a Homophobe;” *Zamecnik v. Indian Prairie School Dist.*, 636 F.3d 874 (7th Cir. 2011) where the student won the right to wear an anti-gay message reading “Be Happy, Not Gay;” *Paramo v. Kern County High Sch. Dist.*, No. S-1500-CV-255519 (Cal. 2006) where high school journalists won the right to print news stories interviewing gay and lesbian students about their treatment in school.

Based on clearly established law, the current “Content Standards” are too vague and too likely to prohibit speech that is constitutionally protected, and thus must be revised.

MICHAEL BARTH

Based on news reports, it appears that the sole reason student Michael Barth will not be permitted to perform his winning selection is the content of his speech: namely, the issue of gay and lesbian rights. Public statements from the NSAA have indicated that any LGBT topic is considered too controversial for inclusion.

This content based restriction is clearly unconstitutional. While we have not yet had any contact with this student and would defer to his choice in the resolution of the matter, it appears to us that the NSAA has an obligation to allow the student to perform in the broadcast with the other winning students.

CONCLUSION

ACLU of Nebraska takes student free speech rights very seriously. If the NSAA does not bring its rule into conformity with the First Amendment, we will conduct interviews with affected students who disagree with the rule and we will consider litigation. We urge you to consider the cases cited here and take the necessary steps to remedy this situation.

I look forward to hearing from you.


Amy A. Miller
Legal Director