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STATE OF NEBRASKA
OFFICIAL
MAR 10 1994
DEPT. OF JUSTICE

DATE: March 8, 1994

SUBJECT: Constitutionality of Proposed Amendment to LB 1266; Whether the Enforcement of Rules and Regulations Restricting Students From Participation in Certain Non-School Activities as a Requirement for Participation in School Activities Violates the Rights of Student Athletes.

REQUESTED BY: Senator Janis McKenzie
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Lauren L. Hill, Assistant Attorney General

Current Law

Under current law, the Nebraska School Activities Association ["NSAA" or "Association"], a private organization comprised of public and private Nebraska schools, regulates participation in certain school activities for students in grades nine through twelve. "All [school] districts in Nebraska which operate high schools are members voluntarily. They have relegated to the Association extensive control over the interschool sports [and extra-curricular] activities and are limited in their athletic [and extra-curricular] programs by the rules of the Association." ***Reed v. Nebraska School Activities Ass'n***, 341 F. Supp. 258, 261 (1972). Any student whose school is a member of the Association is bound by the NSAA regulations. Although it has the power to do so pursuant to Neb. Rev. Stat. § 79-328 (Cum. Supp. 1992), the Nebraska State Board of Education ["State Board"] does not presently regulate participation in activities by secondary school students nor does the Board review the rules adopted by the NSAA. The only regulation of student activities promulgated under the Board's authority is found in 92 NAC 10 (1993). Under that rule, the Board

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has set forth certain restrictions on athletic contests for all seventh and eighth grade students and for pupils in kindergarten through sixth grade. *See* 92 NAC 51, § 004.02B4.

LB 1266

As introduced, LB 1266 would recognize the NSAA "as an unincorporated association of public and private schools . . . that controls the organization of school activities for the ninth through twelfth grades of school districts throughout Nebraska." The bill also provides that all NSAA rules and regulations would be subject to mandatory review by the State Board of Education and that the State Board could modify or reject any NSAA regulation which "violates the civil rights of any person affected, violates rules and regulations of the board, or is against public policy." LB 1266, § 2. The legislation would also require that "[a]ll proceedings of the association which may result in the imposition by the association of a penalty or restriction of a student or school's participation in school or private activities shall be subject to the requirements of due process of law." Finally, LB 1266 would prevent the NSAA from restricting any student's participation in non-school activities as a requirement for participation in school activities.

You have indicated that "[a]n amendment to LB 1266 has been proposed to dissolve the Nebraska School Activities Association by placing its organizational responsibilities, its current rules and regulations, within the domain of the Nebraska Department of Education. In doing so the rules and regulations provided by the NSAA shall not be reviewed by the Department, as is currently provided in LB 1266, but shall be **enforced** by the Department of Education." (Emphasis in original.)

You have posed the following question: does enforcement of a regulation which places as a condition to a student's eligibility for participation in a school-sponsored activity the requirement that he or she not participate in an activity conducted outside of school violate the student's rights. As we have noted on previous occasions, a general question on the constitutionality of proposed legislation will necessarily result in a general response from this office. *See* Op. Att'y Gen. No. 85-157 (December 20, 1985). If we are to address specific questions or potential problems with a bill, they must be set out in the opinion request. Your inquiry is simply whether the proposed amendment to LB 1266 would violate the rights of student athletes. We must, therefore, provide a general response to your question in the absence of any description of your specific concerns.

Discussion

Clearly, enforcement of the current NSAA rules by the Nebraska Department of Education would be deemed as "state action," invoking the protections of the U.S. Constitution's fourteenth amendment which provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Therefore, we initially find three potential constitutional challenges to enforcement of the "outside competition" rule by the Nebraska Department of Education.

1. Due Process Challenge.

First, a student athlete could assert that the rule violates his or her right to due process of law. In a similar challenge raised by five student athletes enrolled in various Colorado public high schools against the Colorado High School Activities Association, the Court of Appeals affirmed a lower court's determination that "there is no constitutionally protected right to participate in interscholastic athletics; rather, such participation is a mere expectation." ***Zuments v. Colorado H. S. Activities Ass'n***, 737 P.2d 1113, 1115 (1987). The determination that "a student has no constitutional right to participate in interscholastic athletics" was also reached by the Indiana Supreme Court in ***Haas v. South Bend Community School Corp.***, 259 Ind. 515, 521, 289 N.E.2d 495, 498. The Nebraska Supreme Court has never addressed this issue. The court would, however, review any challenge to a statute under the due process clause of the U.S. Constitution, based upon the rule that "[u]nless [the provisions] `create suspect classifications or impinge upon constitutionally protected rights' . . . it need only be shown that they bear `some rational relationship to a legitimate state purpose.'" ***Robotham v. State***, 241 Neb. 379, 382-83, 488 N.W.2d 533, 538 (1992) (quoting ***Dallas v. Stanglin***, 490 U.S. 19, 23, 109 S.Ct. 1591, 1594 (1989)). Other state courts examining this issue have concluded that an "outside competition" rule serves legitimate state interests in "elevat[ing] academic endeavors over athletics," ***Indiana High School Athletic Ass'n, Inc. v. Schafer***, 598 N.E.2d 540, 551 (1992), and in

> 1) assuring fairness to other students who may wish to participate on the school team, 2) providing balance between school teams, 3) providing balance with respect to the individual student's participation in athletics, and 4) ensuring that student athletes do not endanger their well-being by over-extensive athletic competition and stress.

Zuments, 737 P.2d at 1115.

Should the Nebraska Supreme Court adopt this reasoning, then it would have to assess whether the "outside competition" rule rationally furthers such interests. If so, then the rule would not violate a student athlete's due process rights.

2. Equal Protection Challenge.

The second challenge that would likely be raised by the enforcement of an "outside competition" rule by the Department of Education would be that such a provision violates the equal protection guarantees contained in the state and federal constitutions.

Our supreme court has determined that under a challenge based upon the equal protection clause of the U.S. Constitution, the provision will be upheld so long as the classification which has been established is rationally related to a legitimate state interest. ***Robotham*** at 385, 488 N.W.2d at 539. "The Nebraska Constitution has identical requirements." ***Id.*** There are two narrow exceptions to this standard of review which are not applicable here and which will not be discussed. ***See id.*** The equal protection analysis would therefore be similar to that set forth above in subdivision 1.

3. The Freedom of Association Challenge.

The third challenge to enforcement of an "outside competition" rule by the Department of Education would likely arise from a student's assertion that such a rule violates his or her right to "freedom of association." The U.S. Supreme Court has determined that the right to freedom of association is a penumbral right under the U.S. Constitution's first amendment. ***See NAACP v. Alabama***, 357 U.S. 449, 78 S.Ct. 1163 (1958). Since a fundamental right is implicated, any state action having the effect of curtailing a student's freedom to associate would be subjected to strict scrutiny. Under this standard, the end which is sought to be accomplished must be a compelling state interest and the means employed by the rule "must be such that no less restrictive alternative exists." ***State v. Michalski***, 221 Neb. 380, 385, 377 N.W.2d 510, 515 (1985).

Examining a challenge raised by students on this basis, one state court determined that the students' free association rights were not implicated by an "outside competition" rule. ***Zuments***, 737 P.2d at 1115. The rule analyzed by the court provided that "[p]layers certified to participate as members of any high school sport may not compete on any other team, nor in any non-school activity or event in that sport during that sport's season. . . ." ***Id.*** at 1114. The court reasoned that under the rule

> all students are free to compete, or otherwise participate in any or all non-school events. Rather than impinging upon their right of free association, the rule merely delineates under what terms and conditions they may participate in interscholastic athletics.

Id. at 1115.

Thus, the court concluded that "there is no freedom of association issue here." *Id.* Affirming this conclusion, an appellate court determined that "[t]he rule merely requires that during a high school sport's season, students must choose between competing on their school team or competing on non-school teams." *Id.* at 1116. The court did not find such a choice to place an impermissible burden on the students' freedom of association right. *Id.*

In responding to your inquiry, we have sought to suggest the obvious challenges which could arise under the proposed amendment to LB 1266. We do not consider our opinion to be an exhaustive analysis of other potential challenges to enforcement of an "outside competition" rule by the Department of Education. Finally, we note that the decisions of other state courts discussed herein would merely be persuasive, and not binding, upon the Nebraska Supreme Court.

Respectfully submitted,

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cc: Patrick J. O'Donnell
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Approved by:

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