



February 20, 2013
VIA FACSIMILE AND U.S. MAIL

Ms. Allison Sholar, President (on behalf of the Board of Directors)
Mr. Davis Whitfield, Commissioner
North Carolina High School Athletic Association
P.O. Box 3216
Chapel Hill, NC 27515

Re: Penalizing Student Prayer at Athletic Events

Dear Mr. Whitfield:

We recently became aware of an incident in which a student at Wake Forest-Rolesville High School was penalized for engaging in a short prayer before a high school wrestling match. It is our understanding that Nicholas Fant, a junior wrestler in the 220-pound weight class, jogged to the center of the mat and dropped to one knee for two-seconds of prayer before the commencement of his match. Fant had engaged in this practice all season long without incident. A referee associated with the North Carolina High School Athletic Association (the "NCHSAA") gave Fant a warning for allegedly stalling the match, even though Fant arose before the referee finished relaying the call. This warning later contributed to Fant losing a point. In our opinion, the actions of the NCHSAA-affiliated referee violated Fant's First Amendment right to freedom of speech and freedom of religion. We request that you respond to this letter to inform us of the steps the NCHSAA will take to ensure that students' constitutional rights are respected in the future.

By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. We are committed to ensuring that religious students and faculty are free to exercise their First Amendment rights to speak, associate, and learn on an equal basis with other members of the school community.

The NCHSAA "is a voluntary, non-profit association which administers [North Carolina's] interscholastic athletic program." NCHSAA Website, History of the NCHSAA, available at http://www.nchsaa.org/pages/3/History-NCHSAA/#.USI_rPK43Aw (last visited Feb. 18, 2013). It is composed of "public or non-boarding parochial high school[s]" in the State of North Carolina. *Id.* As the United States District Court for the Western District of Virginia recently explained, "[b]ecause statewide athletic associations are almost entirely comprised of and governed by government entities and representatives, the Supreme Court has deemed these

associations to be state actors.” *McGee v. Va. High Sch. League, Inc.*, No. 2:11-CV-00035, 2011 WL 4501035, at *3 (W.D. Va. Sept. 28, 2011) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001)).

In the *Brentwood* case, the Supreme Court considered whether the Tennessee Secondary School Athletic Association (the “TSSAA”), “a not-for-profit membership corporation organized to regulate interscholastic sport among ... public and private high schools in Tennessee,” was a state actor. 531 U.S. at 291. The Supreme Court concluded that the TSSAA was a state actor based on its “entwinement [with] member public schools” and its predominant leadership by public officials. *Id.* at 302. Thus, *Brentwood* established that “[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards.” *Id.* A court applying *Brentwood’s* reasoning is almost certain to hold that the NCHSAA is a state actor because its membership is predominantly made up of public schools and its board membership consists overwhelmingly of public school officials. The NCHSAA is accordingly bound by the terms of the First Amendment.

The Supreme Court has long held that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect ...” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). One of those fundamental rights is the freedom of speech. Under the First Amendment, students retain the “freedom of speech” even within “the schoolhouse gate.” *Tinker*, 393 U.S. at 506. This right does not “embrace merely the classroom hours” but extends to “the playing field” and other school-related events. *Id.* at 513. It entitles students to “express [their] opinions, even on controversial subjects,” *id.*, provided they do so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school.” *Id.* at 510.

In the *Tinker* case, the Supreme Court concluded that a group of students had been unconstitutionally prohibited from wearing black armbands in silent protest of the Vietnam War because a public school district failed to “demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” *Id.* at 504. A court is almost certain to reach the same conclusion in this case. Like the “silent, passive witness of the armbands” in *Tinker*, Fant’s “silent ... expression of opinion” in kneeling for a two-second prayer—*i.e.*, his faith in and reliance upon God—caused no “interference, actual or nascent, with the” wrestling tournament or “the rights of other students to be secure and to be let alone.” *Id.* at 508. In fact, disturbance of and delay to the match only resulted as a consequence of the NCHSAA referee’s stalling warning and subsequent inquiries into its basis. Maintenance of an orderly and dignified match would thus have been furthered, not hindered, by protecting Fant’s religious speech. And there is no real question that other expression during this period—such as introducing oneself to the referee, waiving to the audience, or wishing one’s opponent good luck—is generally allowed as matter of course.

Another fundamental right implicated by NCHSAA’s Rule 5-25-6b, which defines “stalling” as when either wrestler “delays the match,” is the right to the free exercise of religion. We understand that genuine “stalling” of wrestling matches should be disallowed and that referees need some discretion to ensure that wrestlers are not “playing for time” in a wide variety

of circumstances. But Fant's kneeling for a two-second prayer before the commencement of his match was obviously not some sort of delay tactic, but a genuine expression of religious devotion that has been commonly practiced by athletes for decades and which Fant engaged in all season without prior incident.

Indeed, if Fant had stopped for a short handshake with the referee, expression of good luck to his opponent, quick waive to his parents, or even knelt to tie his shoe, it is inconceivable that the NCHSAA referee would have issued a "stalling" warning. The only plausible reason the NCHSAA referee issued such a warning here is because Fant's action was religious, rather than purely "sportsmanlike," in nature. But the Free Exercise Clause prohibits government officials from "impos[ing] special disabilities on the basis of religious views or religious status." *Employment Div. v. Smith*, 494 U.S. at 877. In this particular case, the NCHSAA referee's application of Rule 5-25-6b to Fant consequently violated not only his fundamental right to freedom of speech, but also his right to the free exercise of religion.

As a state actor, the NCHSAA has a constitutional duty to protect students' First Amendment right to freedom of speech and freedom of religion. We do not believe that the NCHSAA fulfilled that duty in this case and we find the comments made by Mr. Whitfield in support of the NCHSAA referee's actions deeply troubling. *See e.g.*, Fox News Radio High School Wrestler Penalized for Prayer, available at <http://radio.foxnews.com/toddstarnes/top-stories/high-school-wrestler-penalized-for-prayer.html> ("By rule, the official was well within his rights to issue a stall warning."). We request that you respond to this letter by **March 6, 2013** informing us of the steps the NCHSAA will take to ensure that students' right to express their faith at school athletic events is respected in the future.

Sincerely,



David A. Cortman, Senior Counsel
Jeremy D. Tedesco, Senior Legal Counsel
Rory T. Gray, Litigation Counsel