IMPORTANT MESSAGE TO TEXAS SCHOOL BOARDS
IMMEDIATE ACTION NEEDED

The following is written by the legal author of the Texas Schoolchildren's Religious Liberties Act/Religious Viewpoints Antidiscrimination Act:

1. Texas has enacted the "School Children's Religious Liberties Act/Religious Viewpoints Antidiscrimination Act" (hereinafter "Act"). Between now and the beginning of the 2007-2008 school year, every Texas school district that will have a student speaker at any school function or event (including graduations) must either (1) adopt the safe harbor Model Policy that is recommended and included as a part of the Act, or (2) draft its own policy that must comply with all aspects and provisions of the new Act.

2. Every Texas school board member and superintendent should read the following documents (all of which can be printed from the website www.kellycoghlan.com): Copy of New Act; Texas Act Passes; Governor's Press Release; Why a Model Policy.

3. A safe harbor Model Policy (Sec. 25.156) is written into the Act. It was included to make it easy and inexpensive for schools to comply with the Act by simply adopting and following the Model Policy. Not only was the Act's Model Policy drafted and reviewed by numerous constitutional attorneys across the country before being included in the Act, the policy was field-tested in a number of public school districts for up to 6 years from Texas to Illinois. Superintendents from two such school districts testified in the House and Senate that no student had abused or exploited any speaking opportunity, embarrassed the school district, or caused any lawsuit or complaint under the policy.

4. Before being included in the Act, the Model Policy underwent the legislative scrutiny of hearings before the Senate Education Committee and House State Affairs Committee and has the imprimatur of the Texas Legislature as the recommended policy for school districts to adopt. As an enacted part of the law, the Model Policy has the approval of the Texas Legislature, Governor, and thus the citizens of Texas who elected these officials.

5. If a school district adopts and follows the Act's Model Policy, the school district is automatically assured of compliance with the Act regarding all matters covered in the Model Policy. This is the only way that a school district will have this assurance.

6. Furthermore, since the Model Policy is part of the Act, adoption of the Model Policy will assure the assistance of the Texas Attorney General in the event of a facial challenge to a school's adoption of the Model Policy. While a school is free to have an outside organization draft a policy, unless that policy is "substantially identical" to the Model Policy, a school district will have no protection or assurance that it is in compliance with the law and will be on its own to legally defend that policy against any legal challenges.

7. Adopting the Act's Model Policy is the safest, least risky, and least expensive way to comply with the Texas Act. Why would any school district take the unnecessary risk when a viable, tested, and State approved Model Policy is already part of the new law?

8. On July 27, TASB emailed all of its Texas school boards a package of documents entitled "Student Expression—Urgent Starting Points" addressing the new Act. Bewilderingly, in addition to the Act's Model Policy, TASB has submitted to schools what it calls an "alternative policy" to compete with the Legislature's Model Policy. TASB's alternative policy significantly deviates from the Act's Model Policy and from the Act itself. As part of its alternative policy, TASB has added its own definitions to key phrases from the Act, having no basis under the Act or in law (and, in fact, are contradictory to the clear words, meaning, and legislative history of the Act). The definitions added by TASB have the effect of severely narrowing and restricting the application of the Act and thwarting the clear language, spirit, and legislative intent.

9. As an example, TASB's newly added definition of "to publicly speak" is as follows:

> For purposes of this policy, "to publicly speak" means to address an audience at a school event using the student's own words. A student is not using his or her own words when the student is **reading or performing from an approved script, is delivering a message that has been approved in advance or otherwise supervised by school officials, or is making brief introductions or announcements**." (emphasis added).

10. This flies in the face of the language of the Act itself. At Section 25.152 of the Act, the section begins with, "To insure that the school district does not discriminate against a **student's publicly stated…expression**…a school district shall adopt a policy, which must include the establishment of a limited public forum for student speakers at all school events at which a student is to **publicly speak**." (emphasis added). "Publicly speak" is defined in the first part of the sentence as any time something is "publicly stated" by a student. The requirements added by TASB to the meaning of "publicly speak" (per its new definition) fly in the face of the broad language of the Act. Had the Legislature intended to include all of these additional hurdles, provisions, and restrictions before a student could express a religious viewpoint without discrimination, the Legislature would have written it into the Act. The Act speaks in the broadest terms, with no such restrictions. Adding this aberrant definition violates the clear language of the Act itself.

11. By adding its own definitions to key phrases in the Act (which find no support in the language of the Act, in the legislative history, or in law), TASB invites schools to avoid application of the Act by simply requiring that anything ever spoken by a student over a school microphone (or otherwise) first either be "approved in advance" and/or be "supervised by school officials" and/or be deemed as "brief introductions or announcements." Since all student speeches are "supervised by school officials" and since a school could begin requiring all student introductions and speeches be reviewed and "approved in advance," the Act would be entirely thwarted *via* the TASB definitions.

12. As part of the legislative history of the Act, the requirement of limited public forums was expressly included, *inter alia*, to eliminate this type of ploy. In the testimony before both

the House State Affairs Committee and the Senate Education Committee, the author testified to the following:

> An additional reason the Bill provides for "**limited public forums**" for student speakers is to make schools PLAY FAIR. This eliminates a "PLOY" (MANUEVER) used by some schools of turning the students into government spokesmen and then telling the students that since they are government spokesmen, they can't mention God. A limited public forum is restricted as to the SUBJECT students may speak on; but it prohibits schools from discriminating against religious viewpoints of students on otherwise permissible subjects (*Good News Club v. Milford*).

13. TASB continues to champion this maneuver even in the face of clear legislation (with a supportive legislative history) expressly intended to eliminate it.

14. As a further example of TASB's adding definitions outside the Act, TASB's definition of a "school event" is as follows:

> For purposes of this policy, a "school event" is a school-sponsored event or activity that **does not constitute part of the required instruction for a segment of the school's curriculum, regardless of whether the event takes place during or after the school day**. (emphasis added).

15. Under this definition, a school could arguably claim that most anything that occurs during or after school in which there is some teacher/coach/school-official oversight falls within "required instruction for a segment of the school's curriculum."

16. The provisions and substance of the Act's Model Policy demonstrate what the Legislature considered, at a minimum, as being within the definition of "school event." By including in the safe harbor Model Policy the occasions of "opening announcements and greetings for the school day," and "football games," (as well as a further list of activities) as being "school event[s]" to which the law would apply, the Legislature has indicated that its intended definition of "school event" (as used at Section 25.152 of the Act) would include, at a minimum, these enumerated occurrences--which do not depend on whether or not the public is invited. At a minimum, "opening announcements and greetings for the school day," "football games," "other athletic events," "assemblies," "pep rallies," and the like are "school event[s]" under the Act. The language and provisions of the Act demonstrate that the Legislature intended for "school event" to be defined broadly. The dictionary defines "event" as "a happening or occurrence," and this definition is in line with the Legislature's intended broad meaning of "school event."

17. Neither TASB nor any other organization has been granted rule making authority by the Legislature under the Act to add definitions outside the Act's express language, intent, and legislative history, or to narrow or change the applicability of the Act in any way.

18. **It is the author's opinion that Adoption of the TASB alternative policy will put a school district in violation of the Act and open the school district to legal claims. It is the author's opinion that school districts should adopt the Act's Model Policy as the safest, least expensive, and only sure means of complying with the Act.**

SAFEGUARDS FOR SCHOOL DISTRICTS' ENACTMENT OF POLICY:

19. The Act does not require or suggest that any student express a prayerful or other religious viewpoint on an otherwise permissible subject/topic, it just protects students if they do. While parents, pastors, students, citizens and other non-school-officials are free to encourage students to express prayerful or other religious viewpoints whenever students have the opportunity to do so, school officials acting in their official capacities are not legally permitted to do so.

20. In adopting any policy that comes before a school board (including the policy required under the Act), school officials may not be motivated by either (1) the hope that students will pray or express some other religious viewpoint, or (2) the fear that students will pray or express some other religious viewpoint. Board members, superintendents and school officials are legally prohibited from considering either. Whether or not a student would ever use a speaking opportunity to express a prayerful or other religious viewpoint, as opposed to expressing a secular viewpoint, is speculation regarding which a school board and school officials must not indulge and must not interject into discussions or considerations.

21. The school board meeting set to consider the issue of adoption of a policy under the Act may draw those who wish to express religious or anti-religious views to try to persuade the Board. Districts might therefore want to take affirmative steps to protect themselves from unfounded accusations later that the district has based its decisions upon religious or anti-religious arguments. At the beginning of the meeting, the district might choose to read a prepared disclaimer (and enter it into the official record) that makes clear that the school district is not legally permitted to act with a religious or anti-religious purpose and must remain neutral regarding such matters, stating something of this nature:

> As citizens who address the board, you are free to express your views on religious subjects, the existence or non-existence of a Supreme Being, and any other matter on which you wish to address the school board. All citizens should feel free to share their views and concerns with their elected officials. School officials (including the superintendent and school board members), however, are legally prohibited from acting with a purpose to either encourage or discourage religion or religious expression. The school district, superintendent, and school board, must act, and will act, with strict neutrality regarding matters of religion, will not act with a religious or anti-religious purpose in considering and deciding matters that come before the board, and will make decisions based wholly upon secular considerations, as required by law.

RELIGIOUS STUDENTS' RIGHTS CLARIFIED BY ACT:

22. Schools are not religion-free zones, school officials are not prayer-police, religious students are not enemies of the state, and the Texas Religious Viewpoints Antidiscrimination Act (also known as the Schoolchildren's Religious Liberties Act) makes that clear. The Act, which goes into effect at the beginning of the 2007-2008 school year, provides much needed guidance for school officials who have sometimes felt compelled to quash students' religious expressions for fear of lawsuits. The new law pulls together Supreme Court rulings into a format that is easy to understand and apply.

23. "This law is a victory for freedom and non-discrimination for every young Texan," said Rep. Charlie Howard who introduced the bill. "It is win-win for students, school administrators and teachers. No longer will a cloud of confusion obscure the rights to individual expression students enjoy under the U.S. Constitution. School officials need no longer fear the threat of lawsuits simply for allowing students to exercise their constitutional rights." Houston attorney Joe Reynolds, a 16-year member of the Texas A&M Board of Regents, who has represented more Texas school districts than any other attorney said "This is the best piece of legislation for school districts that has been introduced in the past 50 years."

24. This Act does not require or suggest that any child express a prayer or other religious viewpoint, it just protects them if they do. Whether or not a student will ever use a speaking opportunity to express a religious viewpoint on an otherwise permissible topic is a matter upon which school officials must not speculate, opine or discuss since school officials must remain neutral. Doing otherwise will land a school in constitutional hot water. However, parents, pastors, students, citizens and all other non-school-officials are free to encourage students to publicly pray and honor God whenever students have the opportunity to do so.

25. The first sentence of the Act (Sec. 25.151) provides that "A school district shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject." The remainder of the new law instructs school districts how to properly apply this legal declaration.

26. A safe harbor Model Policy (Sec. 25.156) for schools to include in their local policies is a part of the Act. If a school district adopts and follows the suggested Model Policy, the district is automatically assured of being in compliance with the Act regarding all matters covered in the model policy. Not only was the Act's Model Policy drafted and reviewed by numerous constitutional attorneys across the country, the policy was field-tested in a number of public school districts for up to 6 years from Texas to Illinois. Superintendents from two such school districts testified in the House and Senate that no student had abused or exploited any speaking opportunity, embarrassed the school district, or caused any lawsuit or complaint under the policy. Adopting the Act's Model Policy is the safest route for school districts and assures the district of help from the

Texas Attorney General in the event of a facial challenge since the Model Policy is part of the Act.

27. The Act's Model Policy covers the following subjects: Student Expression of Religious Viewpoints, Student Speakers at Non-Graduation Events, Student Speakers at Graduation Ceremonies, Religious Expressions in Class Assignments, and Freedom to Organize Religious Groups and Activities.

28. The Act establishes safeguards to assure that a student's religious viewpoint, if any, is not attributable to the school or mistaken as affirmatively sponsored by the school by requiring (1) limited public forums for student speakers, (2) selection of speakers based on neutral criteria, and (3) disclaimers to be read and/or printed clearly establishing the individual nature of the expressed viewpoint.

29. Section 25.152 requires the "establishment of a limited public forum for student speakers at all school events at which a student is to publicly speak" in order to, *inter alia*, "eliminate any actual or perceived affirmative school sponsorship or attribution to the district of a student's expression of a religious viewpoint, if any." The 2001 Supreme Court case of *Good News v. Milford Central School* holds: "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint…. [Excluding a] religious perspective constitutes unconstitutional viewpoint discrimination." Thus, the Texas statute, by using the limited public forum format simply codifies the language of the Supreme Court.

30. Schools are not required to have student speakers for any occasion, and, thus, are not required to establish any limited public forums for student speakers. But if there are to be student speakers, a limited public forum is required. For schools that opt to adopt the Model Policy, a student speaker will publicly introduce the beginning of football games and the opening announcements/greetings for the school day (and any other events the school designates). From the inception of public education and football games, these two identified occasions have traditionally been introduced by student speakers; so nothing new here. Students are required to stick to the subjects/topics enumerated under the policy: "introductions must be related to the purpose of the event and to the purpose of marking the opening of the event, honoring the occasion, the participants, and those in attendance, bringing the audience to order, and focusing the audience on the purpose of the event." Under the model policy, the eligible student speakers are student council officers, senior class officers, captain(s) of the football team (and any other neutrally selected student leaders the school designates). Student speakers have normally been student leaders; so nothing novel here. Just as at graduations, not every student gets to speak. It has always been a great honor to have attained a student leadership position to be allowed to publicly address the school; and the Model Policy maintains that honor.

31. Why have student speakers? Public speaking fosters numerous educational benefits in established pedagogical areas such as Speech, English, Grammar, Drama and Civics. Students have to organize their thoughts, author, prepare, practice, and deliver a concise

oral presentation before a live audience, providing valuable educational opportunities. What a waste to allow school events to pass without utilizing them as opportunities for students to advance their communicative skills—important skills for any career. Some districts may be tempted to reduce or eliminate student speakers altogether, but this would not only be counter-educational but would likely stir up legal issues rather than avoid them. If a district's motivation for reducing or eliminating student speakers is to assure that no religious viewpoint will be expressed, that is an unconstitutional motivation inviting legal challenge.

32. Finally, sections 25.153 & 154 of the Act codify the almost identical language of sections of the U.S. Dept. of Education "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," drafted by the attorneys of the U.S. Dept. of Education and U.S. Dept. of Justice.

33. The Act is an anti-discrimination law protecting students' voluntary expressions of religious viewpoints to the same degree—no more and no less—as students' voluntary expressions of secular or other viewpoints on otherwise permissible subjects and topics. Religious children do not receive special rights, extra opportunity, preferential treatment or extra protection, just equal rights, equal opportunity, equal treatment and equal protection. That's fair.

[Kelly Coghlan is a Houston constitutional trial attorney and author of *Those Dangerous Student Prayers*. He has represented 159 students and parents as *amici curiae* before the U.S. Supreme Court on faith-based issues, obtained the first federal injunction preventing censorship of a student's voluntary public prayer in *Ward v. Santa Fe I.S.D.*, and is the legal author of the Texas Schoolchildren's Religious Liberties Act/Religious Viewpoints Antidiscrimination Act. Website www.kellycoghlan.com. This article's contents are the personal opinions of the author and are not legal advice, warranties, or representations]