

The following analysis of HB 1001 ('Religious Viewpoints Antidiscrimination Act), authored by Reps. Sally Kern and Mike Reynolds, was provided by the legal staff of a major national organization upon the request of OESE.

## **BILL WOULD LEAD TO LAWSUITS AGAINST SCHOOL DISTRICTS, INTERFERE WITH SCHOOL ADMINISTRATION, AND HARM STUDENTS' RELIGIOUS LIBERTY.**

### HB 1001 Is Unnecessary

The bill is unnecessary to protect student expression of religious viewpoints, because most of the provisions of the bill already exist in current law. It sets forth rights already guaranteed by the U.S. and Oklahoma Constitutions and federal and Oklahoma state law, (1) as well as recommendations made in federal guidelines (2). Numbers in parentheses are references listed at end of this article.

### HB 1001 Is Confusing, Controversial, and "Irresponsible"

Because so much of the bill restates current law, it may seem innocuous. The bill, however, is far from innocuous. Section 3 of the bill and Articles II and III of the Model Policy will likely create enormous problems for schools.

### Views on this Bill from Texas

HB 1001 is based on a Texas bill signed into law in 2007. People in Texas see the law as controversial and problematic:

- The Dallas Morning News said the Texas law **"has created statewide confusion** over how districts should comply with the law and added a new layer of divisiveness to an issue already well known for passionate discord — religion in schools." Brandon Formby, "Schools wrestling with policies under new religious liberties act," Dallas Morning News, Aug. 27, 2007.
- Richard Middleton, Superintendent of the North East Independent School District in Texas said, "This mandate is going to create a collision of ideas that should really take place outside of the school" and worried that the District's **"lawyer fees are going to go up because of this."** Jenny Lacost-Caputo, "Law on Religion in School Spurs Fear," San Antonio Express-News, July 25, 2007, at 1B.
- Charles Stafford, President of the Denton, Texas, School Board said, "What I really think is the truth here — the Legislature kind of **handed the school districts a hand grenade** with the pin pulled. . . . It doesn't matter which way you throw the thing, someone is going to get hurt. There is going to be **controversy, and anger and disappointment** no matter what we do." Stafford continued, "I believe in religious freedom, strongly. . . . It's just that, well, you have to be very careful in how you structure one person's right to express them. One person's set of rights can run quickly against someone else's set of rights." Sarah Chacko, "School Districts Wary of Law," Denton Record-Chronicle, Sept.

1, 2007.

• Douglas Laycock, a professor at the University of Michigan Law School and one of the foremost First Amendment scholars in the United States said, ““This is so irresponsible . . . [i]t’s going to cause **legal problems for districts across the state**, and they’re going to be **stuck with the lawsuits.**”” Jenny Lacost-Caputo, “Law on Religion in School Spurs Fear,” San Antonio Express-News, July 25, 2007, at 1B.

### Student Religious Expression Bills in Other States

Mandating that schools create limited public forums for certain students to speak in schools is not just controversial in Texas. In 2008, four states (besides Oklahoma) considered bills dealing with students’ religious viewpoint expression. In **Virginia**, the introduced version included a requirement for schools to establish policies to create limited public forums, like HB 1001. The bill was amended twice and the section of the bill mandating that schools create limited public forums was scuttled. In **Arizona** and **South Carolina**, the bills as introduced didn’t even include this controversial requirement; instead, they just restated federal guidelines with regard to students’ expression rights. And in **Kansas**, a bill set forth students’ rights to express religious viewpoints but it did not include any requirement for schools to create limited public forums.

### Schools’ Intimate Involvement in Student Speech Cannot Be Disclaimed: School-Sponsorship and Endorsement of Student Speech Will Be Clear

According to the Model Policy set forth in Section 7 of the bill, schools will

- Decide at which **official school functions** students will speak;
- Determine the eligible speakers and set a policy to select student speakers from among those eligible;
- Set the time limit for the speaker;
- Dictate the subject matter for the student speaker; and
- Declare that some types of speech are forbidden.

Section 7 also says that schools will disclaim endorsement and sponsorship of students’ speech. This disclaimer, however, won’t work. Any reasonable observer, aware of the broad context of the policy (including the disclaimer), of the official school events where students speak, and of the schools’ intimate involvement in what the students say, would easily conclude that the **students’ speech should be attributed to the school.** (3)

### Limited Public Forums Create Opportunities for Students to Say Anything and Adoption of the Model Policy Will Not Protect Schools from Lawsuits that May Result

The bill states that if a school were to adopt the Model Policy, the school would be in compliance with this law. Adopting the Model Policy, however, would not shield the school from lawsuits brought under the Constitution. The Establishment Clause of the First Amendment to the U.S. Constitution prohibits schools from taking any action that has the effect of endorsing religion (4) and **they may not coerce anyone to participate in religious exercise.** (5)

### Student Religious Exercise Will Lead to Lawsuits Against Schools

Because everything students say under the Model Policy will be deemed to be sponsored by schools, when students pray, proselytize, or quote the Bible, the school will have violated the Establishment Clause. And since students are required to attend school and school events, the

rest of the student body becomes a captive audience to whatever the student speaker says — and therefore if the student speaker prays, the rest of the students will be coerced to participate in religious exercise. Schools have a responsibility to protect all students' religious liberties — not just those who hold “positions of honor” and are chosen to speak.

If a chosen speaker concludes the morning announcements with a prayer to her Lord and Savior, Jesus Christ, how will Jewish, Hindu, or Muslim students feel? As important, how will their parents react? Will they sue the school? What if a Wiccan student gets elected to be student-council secretary and he asks the Mother Goddess to watch over the school, concluding with “Blessed be.” How will most of the students feel? Again, how will their parents react? And what if these students go beyond prayer to proselytizing? What if the Christian student says that unless all students accept Jesus Christ they will burn in hell?

### Other Potential Lawsuits

But problems for schools do not end with the popularly elected students professing their religious beliefs over the loudspeaker during morning announcements. Schools that create limited public forums can designate certain topics to be discussed — but **cannot limit the viewpoints that students may express.** (6) Students could include defamatory or hate speech in their remarks. Parents of students offended or harassed by these remarks could seek recourse by suing the school. Students may also feel so uncomfortable because of the tone of statements made by the chosen speakers that they would avoid participating in school events. When participation in these events is required, opting out based on harassment will negatively impact these students' grades. And even when declining to attend school events that are voluntary, students' educational opportunities and experiences will be harmed. Non-chosen students are not the only people injured: Faculty and staff of schools would also be compelled to listen to student speech that may be religious, hateful, or derogatory. Any of the people harmed by what the chosen speakers say could take the schools to court to rightly hold them accountable.

### HB 1001 Protects First Amendment Rights of Some, Not All

The sponsor of an identical bill, HB 2211, considered last year said that its “only purpose” is to “protect the First Amendment rights of students.” This is inaccurate. The bill would only protect the free-speech rights of popularly elected students. And worse, it would harm the religious liberties of the rest of the student body.

The Model Policy says that only students holding “positions of honor” are eligible to use the limited public forums and gives examples of “positions of honor”: student council officers, class officers, captains of the football team, homecoming kings and queens, prom kings and queens, and ranked in the top three of the graduating class. This excludes most of the student body who would not be eligible to speak in the limited public forum. Hard-working students who may not be the most popular or the top-ranked academically may never get a chance to speak in front of the student body or the school community. The football player who practices and plays hard but is not the star will not be elected to be team captain, a position that under this bill is no longer just about being a team leader but would also carry with it additional rights and privileges. These non-chosen students will lose out on educational opportunities that public speaking can provide. Moreover, students can sometimes do things just to stir up trouble. If the senior class decided that having a notorious troublemaker, drug user, or rabble-rouser as class secretary would be entertaining because they think he or she would be liable to say provocative things when making

morning announcements or introducing a football game, the election could be driven by these considerations. And when this person did in fact say what the class thought he or she might say, the school could do nothing to stop it. This student would hold a “position of honor” and therefore, have the privilege to speak in the limited public forum and the right to say anything.

### **HB 1001 Would Foster Divisiveness Among Students**

Students who are eligible to be student speakers nearly always hold “positions of honor” as a result of a popular election. By winning these popularity contests, these students will likely have viewpoints and profess religious beliefs that reflect those held by the majority of students and school community. Students practicing minority religions or those who have no religious faith, however, may not be elected to these positions. Moreover, the students voting on these positions will also know that those elected will be eligible to speak at school events and may vote based on what these student leaders may say. This bill only enhances what may already be a hostile environment for students of minority views and religions and gives students of the majority faith and viewpoints immunity to say whatever they want.

### HB 1001 Would Interfere with School and Classroom Administration

HB 1001 and the Model Policy would infringe upon schools’ autonomy to set their own policies and would enhance confusion about what students may say in classrooms.

- Under this bill, schools **would lose their otherwise substantial discretion to impose rules of order and other restrictions** on some popularly elected students’ speech. These rules and restrictions enable schools to foster a sound learning environment for all students. Teachers and administrators would no longer be able to intercede to stop student speech that harasses another student or a group of students.
- The Model Policy would compel schools to allow students to speak at designated events, even though existing school policies may not have these occasions set aside for speeches, let alone speeches given by students. Students must make morning announcements and introduce football games and other events like pep rallies and assemblies. Thus, the policy would give students an **opportunity to say just about anything during morning announcements — every morning in every school across the state**. And the policy makes no distinction between elementary schools, junior highs, and high schools. Does this mean that elementary students will be given the opportunity to speak and say whatever they want the same as high-school seniors?
- Teachers may be afraid to curtail student comments in class, that though made under the guise of religion, are just hateful speech intended to defame or harass other students or groups. If a discussion about current events in Iraq, a student could say that she believes that Muslims “are crazed fanatics . . . motivated by demonic power” (quoting Pat Robertson). When learning about the civil-rights movement, if a student was a member of the Kingdom Identity Ministries, he could say that “segregation from all non-white races,” is required, because “[r]ace-mixing is an abomination in the sight of Almighty God, a satanic attempt meant to destroy the chosen seedline, and is strictly forbidden by His commandments” (quoting the Ministries’ doctrinal statement).

Note added to organization’s report above: ***The bill would require the State Attorney General to defend any school district facing a law suit. This is an obvious encouragement for school***

***districts to undertake provisions of the bill, since they would not face direct lawsuits! The original bill in Texas (from which this is an almost exact plagiarized copy) was drafted by a team of creationist attorneys in Plano, Texas.***

References: Numbers are from text above.

1 70 O.S. § 11-101.2, enacted just over five years ago, mandates that Oklahoma schools observe a moment of silence every day. The law's purpose was to allow each student to exercise his or her individual choice to use that time to reflect, meditate, pray, or engage in other silent activity and that no student could interfere with, distract, or impede other students in exercising their choice of how to use that time. HB 1001 flies directly in the face of this law.

2 See Sections 2, 4, and 5; Section 7 (Model Policy), Articles I, IV, and V (as well as parts of Articles II and III).

3 See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 866 (2005).

4 *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).

5 *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Courts are especially diligent in ensuring that public schools comply with the strict requirements of the Establishment Clause because, in the school context, there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure." *Id.* at 592.

6 *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).