

Eating Hot Peppers to Avoid HIV/AIDS: New Challenges to Failing Abstinence-Only Programs

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EATING HOT PEPPERS TO AVOID HIV/AIDS:
NEW CHALLENGES TO FAILING
ABSTINENCE-ONLY PROGRAMS

ABSTRACT

This Note examines abstinence-only education curricula, including its history, criticisms against it, and the failure of judicial challenges to end its promotion and federal funding. It addresses how abstinence-only education has managed to remain a central means of teaching sexual education, despite its ineffective and controversial nature. Finally, this Note will discuss how abstinence-only education curricula may fall out of favor or be modified with new state and federal requirements that sexual educational curricula be medically accurate. This is demonstrated by the *American Academy of Pediatrics v. Clovis Unified School District* case in California.

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INTRODUCTION

According to five seventh graders in a New Orleans middle school, the best way to prevent HIV/AIDS transmission is to eat a

hot pepper immediately after sexual intercourse. Coincidentally, according to these seventh graders, this is also an effective means of preventing pregnancy. These students attended a middle school that prohibited the mention of condoms and other contraceptives as part of its strict abstinence-only education curriculum. Their information on HIV/AIDS, pregnancy, and sexually transmitted diseases (STDs) came from friends, siblings, and popular culture references—particularly the sexually explicit rap songs popular among their classmates. At this very school, three seventh grade girls were pregnant.¹

Since 1982, the United States federal government has spent over 1.5 billion dollars on abstinence-only education.² Although the Obama administration began providing funding for comprehensive sexual education in 2010,³ abstinence-only education has received exponentially more federal funds throughout the years.⁴ Even today, federal money continues to pour into abstinence-only education.⁵ As late as October of 2012, the Department of Health and Human Services awarded five million dollars in federal grants to abstinence-only education.⁶ The government awarded this money despite numerous findings that abstinence-only education is ineffective in preventing risky sexual decisions by teens, and the resulting pregnancies and

1. This anecdote comes from my own personal experience volunteering in the spring of 2009 at a charter school in New Orleans, Louisiana. I volunteered as a part of a university class entitled “Hip Hop & HIV/AIDS” in which part of the class credit came from teaching HIV/AIDS awareness to a small group of local seventh grade students. My classmates and I were not advised prior to volunteering in the school that the school followed a strict abstinence-only policy. After our first volunteer session at the school, we were informed that because we had mentioned condoms in our discussion of HIV/AIDS transmission, we had violated the school’s sexual education policy and were no longer welcome to teach HIV/AIDS awareness in the school.

2. JULIE F. KAY & ASHLEY JACKSON, LEGAL MOMENTUM, SEX, LIES & STEREOTYPES: HOW ABSTINENCE-ONLY PROGRAMS HARM WOMEN AND GIRLS 3 (2008) available at <http://globalhealth.usc.edu/Home/Research%20And%20Services/Pages/~media/2CB6B053D52A41E2B14C961F2E708597.ashx>.

3. *The President’s Teen Pregnancy Prevention Initiative: Providing Young People the Information and Skills They Need*, SEXUALITY INFO. AND EDUC. COUNCIL OF THE U.S. (May 2012) [hereinafter *President’s Teen Pregnancy Prevention Initiative*], <http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1190>.

4. Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 507 (2008).

5. *Title V State Abstinence Education Grant Program Fact Sheet*, FAMILY AND YOUTH SERVS. BUREAU (Oct. 24, 2013), <http://www.acf.hhs.gov/programs/fysb/resource/aegp-fact-sheet>.

6. Tara Culp-Ressler, *Federal Funds Awarded to Abstinence-Only Education Programs*, THINK PROGRESS (Oct. 10, 2012, 5:45 PM), <http://thinkprogress.org/health/2012/10/10/987411/federal-funds-abstinence-only-programs/>. This money was part of Title V funding, which was resurrected as a part of the healthcare reform package. See *infra* Part V.

STDs.⁷ Abstinence-only education is still federally funded today, even though the vast majority of Americans do not support it.⁸

This Note will argue that *American Academy of Pediatrics v. Clovis Unified School District* has the potential to correct these deficiencies and curtail ineffective abstinence-only education. Although past judicial challenges to end the allocation of federal money to abstinence-only education have failed, this recently filed California case represents a new trend and could eliminate abstinence-only education entirely, or at least correct its most inefficient and offensive components.

Part I of this Note will contrast abstinence-only education under its various iterations with abstinence-plus programs, particularly the abstinence-plus programs promoted and funded by the Obama administration. Part II will examine some of the criticisms leveled against abstinence-only programs, including their asserted ineffectiveness, discriminatory nature, and unpopularity in the United States. Part III will explore why legislation providing support and funding for abstinence-only education continues to pass, despite popular opposition by the general American populous. Part IV will examine past judicial challenges to the federal promotion of abstinence-only education and why these challenges have failed to change sexual education policies. Part V will explain how *American Academy of Pediatrics v. Clovis Unified School District* could be the model for new successful judicial challenges to abstinence-only education. It will demonstrate how this case, and cases like it, could succeed where other challenges have failed, and could have lasting implications on the future of sexual education policies.

I. ABSTINENCE-ONLY EDUCATION VERSUS ABSTINENCE-PLUS EDUCATION

A. *What Is Abstinence-Only Education?*

Although the federal government is prohibited from prescribing state and local school curriculum,⁹ for the past two decades, Congress has been able to successfully craft a definition of abstinence-only education and use it to dictate sexual education policies in

7. Shatz, *supra* note 4, at 517–18.

8. THE HENRY J. KAISER FAMILY FOUND., *SEX EDUCATION IN THE U.S.: POLICY AND POLITICS* 1 (2002).

9. Danielle LeClair, *Let's Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should Be Overturned*, 21 WIS. WOMEN'S L.J. 291, 293 (2006).

school districts across the country.¹⁰ Congress defines abstinence education as

an educational or motivational program which . . . has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity; teaches abstinence from sexual activity outside marriage as the expected standard for all school age children; teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems; teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity; teaches that sexual activity outside of the context of marriage as likely to have harmful psychological and physical effects¹¹

The language Congress uses to define abstinence education puts parameters on what educators may and may not discuss with their students. For example, educators are prohibited from discussing contraceptives.¹² They are prohibited from acknowledging that teenagers may become sexually active,¹³ and may not discuss abortion or anything concrete about STDs.¹⁴

Traditionally, Congress has been able to indirectly impose its abstinence definition on school districts by making federal funds contingent on a state teaching federally approved abstinence-only curriculum.¹⁵ Forty-nine states, with California serving as the sole exception, have at one time or another accepted these federal funds.¹⁶ States receiving federal funds from Congress are required to abide by Congress's eight-point statutory definition of abstinence education.¹⁷

10. 42 U.S.C. § 710 (2006); *see also A History of Federal Funding for Abstinence-Only-Until-Marriage Programs*, SEXUALITY INFO. AND EDUC. COUNCIL OF THE U.S. (Oct. 19, 2012), <http://www.siecus.org/index.cfm?fuseaction=page.viewPage&pageID=1340&nodeID=1>.

11. 42 U.S.C. § 710.

12. Shatz, *supra* note 4, at 508.

13. *Id.*

14. The only context under which STDs can be discussed is when their threat justifies abstinence. CHRIS COLLINS ET AL., ABSTINENCE ONLY VS. COMPREHENSIVE SEX EDUCATION 1, 1 (2002).

15. *Id.*

16. *A History of Federal Funding for Abstinence-Only-Until-Marriage Programs*, *supra* note 10.

17. Although most of Congress's definition of abstinence has already been given, Congress's full eight points of abstinence education are

an educational or motivational program which . . . has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity; teaches abstinence from sexual activity outside marriage as the expected standard for all school age children; teaches

Congress has passed three main abstinence-only programs. The Adolescent Family Life Act (AFLA) was the first federally sanctioned and funded sexual education legislation.¹⁸ Passed in 1981, AFLA espoused abstinence as a means through which to prevent teen pregnancy and promote “chastity and self-discipline.”¹⁹ Although AFLA originally relied on religious dogma to promote abstinence in both public and private schools, an out-of-court settlement with the ACLU stripped AFLA of its use of overtly religious references.²⁰ The settlement also required programs supported by AFLA to be medically accurate, and prohibited fund grantees from using church sanctuaries for their programs or giving presentations in parochial schools during school hours.²¹ As a consequence, many conservative supporters of AFLA abandoned the act and refocused their attention on abstinence-only programs with more stringent and restrictive abstinence criteria.²²

One of these stricter programs is Title V.²³ Passed under welfare reform laws and renewed under the Patient Protection and Affordable Care Act of 2010,²⁴ Title V requires states receiving federal funding to teach sexual education in accordance with Congress’s eight point definition of abstinence.²⁵ Title V dictates that states must expressly teach at least one of the points of the definition,²⁶ and prohibits them from providing students with information that contradicts any of the other points.²⁷

that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems; teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity; teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects; teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society; teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and teaches the importance of attaining self-sufficiency before engaging in sexual activity.

42 U.S.C. § 710 (2006).

18. LeClair, *supra* note 9, at 294.

19. THE HENRY J. KAISER FAMILY FOUND., *supra* note 8, at 2.

20. *See* Bowen v. Kendrick, 487 U.S. 589 (1988).

21. LeClair, *supra* note 9, at 296 (quoting ADVOCATES FOR YOUTH & SEXUALITY INFO AND EDUC. COUNCIL OF THE U.S., TOWARD A SEXUALLY HEALTHY AMERICA: ROADBLOCKS IMPOSED BY THE FEDERAL GOVERNMENT’S ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION PROGRAM 5 (2001)).

22. *Id.*

23. *Id.* at 297.

24. *Title V State Abstinence Education Grant Program Fact Sheet*, *supra* note 5.

25. 42 U.S.C. § 710 (2006).

26. LeClair, *supra* note 9, at 297–98.

27. *Id.* at 38.

Although these guidelines do not explicitly prohibit discussions about contraceptives, it is practically impossible for an educator to discuss contraceptives without opposing the tenets of Congress's abstinence definition.²⁸ As a result, schools "do not promote [the] use of contraception, on the premise that such information is inconsistent with [the] program goals."²⁹

The federal government grants Title V around fifty million dollars per year to distribute to those school districts teaching sexual education in accordance with its restrictions.³⁰ Title V also requires states to pour their own resources into these educational efforts. States must match three of their own dollars with every four federal dollars awarded through Title V programs.³¹ Consequently, the allure of federal funding not only incentivizes states to teach sexual education in accordance with congressional standards, but also requires them to pour their own resources into abstinence-only education.

Congress continued to move towards more stringent standards in 2000, when it approved the Special Projects of Regional and National Significance (SPRANS).³² This legislation, spearheaded by Representative Ernest J. Istook, was a reaction to congressional fears that state governments were using federal funds, but undermining abstinence-only education by selecting to teach only the least controversial tenets of the eight point definition.³³ To combat this, SPRANS cut states out of the allocation of funds and made grants directly available to community-based organizations, including primarily faith-based organizations.³⁴ SPRANS required that sexual education curriculum comply with all eight tenets of the federal definition of abstinence,³⁵ but did not require the government to review federally funded curricula for medical and factual accuracy.³⁶

28. BARBARA DEVANEY ET AL., MATHEMATICA POLICY RESEARCH, INC., THE EVALUATION OF ABSTINENCE EDUCATION PROGRAMS FUNDED UNDER TITLE V SECTION 510; INTERIM REPORT 28 (2002), available at <http://www.mathematica-mpr.com/PDFs/evalabstinence.pdf>.

29. *Id.*

30. *Federal Funding for Abstinence-Only Programs*, LEGAL MOMENTUM: THE WOMEN'S LEGAL DEF. AND EDUC. FUND, <http://www.legalmomentum.org/our-work/sfr/federal-funding-for-aop.html> (last visited Mar. 30, 2014).

31. *Id.*

32. CYNTHIA DAILARD, ABSTINENCE PROMOTION AND TEEN FAMILY PLANNING: THE MISGUIDED DRIVE FOR EQUAL FUNDING 2 (2002), available at <http://www.guttmacher.org/pubs/tgr/05/1/gr050101.pdf>.

33. *Id.*

34. *Id.*

35. LeClair, *supra* note 9, at 299.

36. U. S. HOUSE OF REPS. COMM. ON GOV'T REFORM—MINORITY STAFF SPECIAL INVESTIGATIONS DIVISION, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS i (2004) [hereinafter COMM. ON GOV'T REFORM].

B. *What Is Abstinence-Plus Education?*

Like abstinence-only programs, abstinence-plus promotes abstinence as the only fool-proof method of protection from pregnancy and disease.³⁷ However, abstinence-plus allows educators to provide students with information about birth control and disease prevention.³⁸ Rather than bar all classroom discussions related to sexuality, abstinence-plus programs strive to provide students with “a positive view of sexuality, . . . information they need to take care of their sexual health, and . . . skills to make decisions now and in the future.”³⁹ Abstinence-plus programs allow students access to information about abortion, HIV/AIDS, STDs, and effective means of minimizing the risks associated with sexual activity.⁴⁰

President Obama signed the Consolidated Appropriations Act of 2010 into law on December of 2009.⁴¹ This act was the first to allocate federal funding to comprehensive sexual education programs.⁴² The act provides 114.5 million dollars for the President’s Teen Pregnancy Prevention Initiative (TPPI).⁴³ TPPI “funds medically accurate and age-appropriate programs that reduce teen pregnancy and associated risk behaviors and covers costs associated with administering and evaluating the program.”⁴⁴ TPPI provides funding to: 1) replicate evidence-based programs that have been proven effective in reducing teen pregnancy and behavioral risks; 2) research and demonstration grants used to develop, replicate, refine, and test additional models and strategies for preventing teen pregnancy; and 3) research, evaluation, and technical assistance.⁴⁵

Another major change in sexual education under the Obama administration was the termination of funding for AFLA and SPRANS.⁴⁶ Title V, however, remains in effect today. Although Title V expired in 2009, legislators incorporated it into the Patient Protection and

37. THE HENRY J. KAISER FAMILY FOUND., *supra* note 8, at 1.

38. *Id.*

39. NAT’L GUIDELINES TASK FORCE, GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION (3rd ed. 2004), *available at* http://www.siecus.org/_data/global/images/guidelines.pdf.

40. COLLINS ET AL., *supra* note 14, at 1.

41. *An Explanation of Federal Funding for More Comprehensive Approaches to Sex Education*, SEXUALITY INFO. AND EDUC. COUNCIL OF THE U. S., <http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1262> (last visited Mar. 30, 2014).

42. *Id.*

43. *Id.*

44. *President’s Teen Pregnancy Prevention Initiative*, *supra* note 3.

45. *Id.*

46. *An Explanation of Federal Funding for More Comprehensive Approaches to Sex Education*, *supra* note 41.

Affordable Care Act.⁴⁷ Consequently, Congress continues to use Title V to allocate federal money to those states abiding by its strictly constrained definition of abstinence. However, when Title V was added to the Patient Protection and Affordable Care Act, legislators added the requirement that information taught as a part of the program be “medically accurate.”⁴⁸

Although President Obama has bucked the trend of the last two decades and allocated federal funds to comprehensive sexual education programs, systems of abstinence-only education continue to receive federal funding today.

II. THE PROBLEMS WITH ABSTINENCE-ONLY EDUCATION

A. *Ineffectiveness*

Despite its continued federal backing through Title V, numerous studies have shown that abstinence-only education is unsuccessful in achieving its objectives.⁴⁹ Abstinence-only education does not alter students’ sexual behaviors.⁵⁰ Students who receive abstinence-only education are not more likely to abstain from sexual activity than their peers who receive abstinence-plus education or no sexual education at all.⁵¹ In fact, there has never been any evidence that abstinence-only programs are effective.⁵² Those studies that have touted the successes of abstinence-only programs are marred with methodical problems, which prevent a reliable measure of their success.⁵³

Studies have also found that students who receive abstinence-only sexual education are less likely than their peers to use condoms or other forms of contraception when they engage in sexual activity.⁵⁴ As a result, they are more likely to encounter unwanted pregnancies and sexually transmitted diseases than those students who receive information about contraceptives and STDs through their sexual education curricula.⁵⁵ Consequently, abstinence-only education is counterproductive in achieving its objectives.

47. *Title V State Abstinence Education Grant Program Fact Sheet*, *supra* note 5.

48. *Id.*

49. Shatz, *supra* note 4, at 517–18; *President’s Teen Pregnancy Prevention Initiative*, *supra* note 3.

50. Shatz, *supra* note 4, at 517–18.

51. *Id.*

52. LeClair, *supra* note 9, at 299 (quoting DEVANEY ET AL., *supra* note 28, at 28).

53. *Id.*

54. DEBRA HAUSER, ADVOCATES FOR YOUTH, FIVE YEARS OF ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION: ASSESSING THE IMPACT (2004), available at http://pol285.blog.gustavus.edu/files/2009/08/AfY_Abstinence-Only_Effect.pdf.

55. Shatz, *supra* note 4, at 517–18.

B. Abstinence-Only Education Disproportionally Harms Female Students

Some scholars have found abstinence-only education to be discriminatory, both in the information that it provides and the classroom atmosphere it breeds.

Studies have revealed some of the harms abstinence-only education causes women. The prohibition on information about contraceptives required by abstinence-only education withholds information that could lead to safer reproductive health, and even save women's lives.⁵⁶ The difference in decision making between girls who have received abstinence-only education and those who have received a more comprehensive sexual education is pronounced. Female students who have received information about contraceptives are more likely than women who have not to use condoms during their first sexual encounter.⁵⁷ This is especially problematic since, due to biological reasons, unprotected sexual activity is more dangerous for females than for males.⁵⁸ Females have higher rates of infection from STDs due to their biology.⁵⁹

Furthermore, females have the unique ability to get pregnant. While the serious emotional and financial issues associated with teen pregnancy affect both males and females, they are especially pronounced in women.⁶⁰ Teen mothers are less likely to complete high school than their male classmates or female classmates who are not pregnant.⁶¹ They are more likely to struggle financially and end up on welfare.⁶²

Beyond denying women the information necessary to protect their reproductive health, abstinence-only educational programs perpetuate discriminatory gender stereotypes.⁶³ Abstinence-only education treats gender stereotypes as scientific fact,⁶⁴ imposing traditional moral values and social norms on a system of sexual education.⁶⁵

56. LeClair, *supra* note 9, at 300.

57. Laura Duberstein Lindberg & Isaac Maddow-Zimet, *Consequences of Sex Education on Teen and Young Adult Sexual Behaviors and Outcomes*, 51 J. ADOLESCENT HEALTH 332, 332 (2012).

58. *STD Statistics in the USA*, AVERTING HIV AND AIDS, <http://www.avert.org/std-statistics-america.htm> (last visited Mar. 30, 2014).

59. CTR. FOR DISEASE CONTROL, HIV/AIDS AMONG WOMEN (2008), *available at* <http://www.cdc.gov/hiv/topics/women/resources/factsheets/pdf/women.pdf>.

60. NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, <http://thenationalcampaign.org/data/landing>.

61. *Id.*

62. *Id.*

63. Linda McClain, *Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63, 63 (2006).

64. COMM. ON GOV'T REFORM, *supra* note 36, at ii.

65. McClain, *supra* note 63, at 66.

The idea that women are the gatekeepers of male sexuality is espoused in the curriculum of many abstinence-only programs.⁶⁶ According to this view, women are responsible for the proper regulation of men's sexuality.⁶⁷ The WAIT Training curriculum, a popular abstinence-only educational video approved under federal guidelines, explains that men are less discriminatory than women about who they are sexually attracted to.⁶⁸ As a result, women must bear the burden of controlling men's sexual impulses.⁶⁹ According to WAIT, women are responsible for nurturing the relationship because they have a greater intuitive awareness of how to develop a loving relationship.⁷⁰

Other abstinence-only education materials present similar sexist themes. Some even blame the way a woman dresses for how men treat her.⁷¹ According to this view, women are required to take their role as gatekeepers of male sexuality into consideration in all aspects of their lives, including what they wear.

By requiring women to bear the burden of controlling male sexuality, abstinence-only education denies women their own individual sexuality.⁷² Through its deprivation of information and its sexist themes and messages, abstinence-only education is discriminatory against female students.

C. Abstinence-Only Education Disproportionally Harms Gay Students

Just as women are disproportionately harmed by abstinence-only education, so are those individuals whose life narratives do not fit into the box of traditional heterosexual marriage.⁷³ Those who are gay, bisexual, and transgender are cast aside in abstinence-only education, where the standard for sexual activity is only within the confines of marriage.⁷⁴

Marriage is not an option for many people who identify as homosexual.⁷⁵ Only seventeen states and the District of Columbia

66. *Id.* at 63.

67. *Id.* at 66.

68. COMM. ON GOV'T REFORM, *supra* note 36, at 18.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.*

73. McClain, *supra* note 63, at 80.

74. *Id.*

75. *Defining Marriage: Defense of Marriage Acts and Same Sex Marriage Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Mar. 2014), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>.

currently allow legal marriage for same-sex couples.⁷⁶ Thus, sexual education programs that require abstinence outside the confines of marriage present gay teens with a daunting decision: pretend to be straight or remain celibate forever.⁷⁷

Furthermore, the rhetoric used to define the standard for sexual activity contributes to an atmosphere of homophobia. Abstinence-only education presents the message that homosexual sexual activity is not only contrary to the expected standard for sexual activity, but is also inherently wrong and harmful.⁷⁸ As the education material Abstinence 101 explains, “[t]he male and female body are not anatomically suited to accommodate sexual relations with members of the same sex. Sexual practices in the homosexual lifestyle are considered very dangerous for disease, infection, etc. This lifestyle should not be encouraged as healthy or as an equal alternative to marriage.”⁷⁹

Middle school and high school is the time during which many teens begin to understand their own sexuality and the sexuality of their classmates.⁸⁰ By categorizing homosexual sexual relations as wrong and unhealthy, abstinence-only programs breed an atmosphere of intolerance and homophobia that will not only affect gay students, but will also influence many of their straight classmates’ views on same-sex relations.⁸¹

D. The Unpopularity of Abstinence-Only Education

Americans overwhelmingly favor comprehensive sexual education programs over abstinence-only ones.⁸² Surveys consistently report that around eighty percent of Americans believe schools should teach abstinence-plus sexual education curricula.⁸³

This overwhelming support for abstinence-plus education stretches across social divisions. People of different genders, religions, and political ideologies all overwhelmingly prefer comprehensive sexual

76. *Winning the Freedom to Marry: Progress in the States*, FREEDOM TO MARRY <http://www.freedomtomarry.org/states/> (last visited Mar. 30, 2014).

77. KAY & JACKSON, *supra* note 2.

78. LeClair, *supra* note 9, at 308.

79. Martha Kempner, *Leslee Unruh: The Queen of Ab-Only and CPCs Now Leads Anti-Choice Efforts in South Dakota*, RH REALITY CHECK (Mar. 29, 2011, 11:41 AM).

80. See *Adolescent Sexual Behavior: Demographic*, ADVOCATES FOR YOUTH, <http://www.advocatesforyouth.org/publications/413?task=view> (last visited Mar. 30, 2014).

81. See Alex Blaze, *Homophobia: Part of the Real-life Abstinence-only Curriculum*, THE BILERICO PROJECT (Mar. 2, 2009, 9:30 AM), http://www.bilerico.com/2009/03/what_students_are_really_being_taught_in.php.

82. LeClair, *supra* note 9, at 309.

83. THE HENRY J. KAISER FAMILY FOUND., *supra* note 8, at 1.

education.⁸⁴ Support for providing students with the necessary information to best protect their reproductive health supersedes those divisions in the American population that so often arise with contentious debates.⁸⁵

III. WHY LEGISLATORS CONTINUE TO SUPPORT AND FUND ABSTINENCE-ONLY EDUCATION

Despite public favor for comprehensive sexual education, Congress continues to pass legislation espousing abstinence-only rhetoric and continues to pour money into the promotion of abstinence-only curricula.⁸⁶ These actions do not reflect the contemporary views of the majority of the American public.⁸⁷ This disconnect can be attributed to the continued power of the Religious Right and the uncomfortable feelings towards discussing sexuality, which stem from the early influence of the Religious Right.⁸⁸ These past and contemporary influences have resulted in inertia for sexual education policies.

Throughout its history, the Religious Right has had an unprecedented ability to shape sexual education policies in the United States.⁸⁹ Religious Right is the term given to a group of conservative advocates who pursue a “moral agenda focused primarily on family, education, and sexuality.”⁹⁰ The Religious Right first began to mobilize around the issue of sexual education in the mid-1960s in reaction to sexual education policies espoused by the Sexuality Information and Education Council of the United States (SIECUS).⁹¹ SIECUS proposed a “comprehensive, value-neutral framework . . . based on factual information regarding contraception, a critique of gender role socialization, and the promotion of sexuality as a natural force of human

84. Press Release, Othmer Inst. at Planned Parenthood, Poll Finds Even Anti-Choice Voters Support Sex Education that Includes Abstinence AND Contraception: Congress Prepared to Mislead Nation's Youth (May 15, 2002), *available at* <http://www.othmerinstitute.org/press/press5.html>.

85. *Id.*

86. As previously discussed, abstinence-only education is still funded today at about fifty million dollars a year through the Patient Protection and Affordable Care Act. *Title V State Abstinence Education Grant Program Fact Sheet*, *supra* note 5.

87. Surveys find that around eighty percent of Americans strongly prefer comprehensive sexual education over abstinence-only programs. THE HENRY J. KAISER FAMILY FOUND., *supra* note 8, at 1.

88. Diane di Mauro & Carole Joffe, *The Religious Right and the Reshaping of Sexual Policy: An Examination of Reproductive Rights and Sexuality Education*, 4 *SEXUALITY RES. & SOC. POL'Y* 67, 67 (2007).

89. *Id.*

90. FRANK LAMBERT, *RELIGION IN AMERICAN POLITICS: A SHORT HISTORY* 185 (2010).

91. *SEXUALITY INFO. AND EDUC. COUNCIL OF THE U.S.*, <http://www.siecus.org/> (last visited Mar. 30, 2014).

life.”⁹² The Religious Right opposed this policy, construing this program as part of a conspiracy to “weaken America’s moral fiber in preparation for a communist takeover.”⁹³

The Religious Right’s influence over sexual education policy increased during the AIDS epidemic of the 1980s.⁹⁴ Fear surrounding the spread of the disease provided a timely moral boost to the abstinence-only movement.⁹⁵ Members of the Religious Right blamed the proliferation of AIDS on decaying moral and family values.⁹⁶ They associated SIECUS’s approach to sexual education with the promotion of promiscuity, abortion, and homosexuality.⁹⁷ The Religious Right believed that abstinence-only education was a viable means through which to protect youth and support traditional family values.⁹⁸ Supported by morality rhetoric and the goal of protecting family values, the Religious Right’s version of sexual education quickly began to gain popularity.⁹⁹ By the 1990s, the Religious Right’s views on sexual education gained enough support that they were codified into federal abstinence-only legislation without community discussion or public debate.¹⁰⁰

The Religious Right’s interest in the issue of sexual education can be explained by the connection between abstinence-only education and the evangelical Christian message.¹⁰¹ As explained by a former abstinence educator, “[y]ou’re really hoping everyone will come to Christ and wait till marriage for sex.”¹⁰² The Religious Right has remained committed to abstinence-only education despite changing societal attitudes towards sexual education.

The Religious Right shaped sexual education policies in the United States for more than sixty years.¹⁰³ Consequently, many of the ideas that provide the basis for their policies have seeped into the American consciousness and shape popular views on sexuality today.¹⁰⁴ These views have been difficult to shake, even in the face of changing trends in sexual education. One of these views is that parents, teachers, and administrators have the responsibility to

92. di Mauro & Joffe, *supra* note 88, at 79.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. di Mauro & Joffe, *supra* note 88, at 79.

99. *Id.*

100. *Id.*

101. Shatz, *supra* note 4, at 524.

102. *Id.* (quoting ESTHER KAPLAN, WITH GOD ON THEIR SIDE 205 (2005)).

103. SEXUALITY INFO. AND EDUC. COUNCIL OF THE U.S., *supra* note 91.

104. *Id.*

protect youth from potentially harmful information about sex.¹⁰⁵ The belief is that students should be protected and shielded, rather than equipped with information that could potentially encourage dangerous sexual activity.¹⁰⁶

School policies regarding sexual education have been slow to change. Policies have stagnated despite President Obama cutting the strings connecting federal money to strict abstinence-only curricula.¹⁰⁷ After having sexual education framed by the Religious Right for more than sixty years, there is a general discomfort in the United States when speaking about sexuality. This discomfort is most pronounced between parents and their children, and by extension, teachers and students.¹⁰⁸ Sexuality is viewed as private and potentially dangerous.¹⁰⁹ As a result, school administrators have been reluctant to take on sexual education policies during their tenures, resulting in inertia in many school districts. Therefore, many school districts and states retain their old sexual education policies, despite the newfound ability to access federal funds and use them to teach comprehensive sexual education.¹¹⁰

IV. THE FAILURE OF PAST CHALLENGES TO ABSTINENCE-ONLY EDUCATION THROUGH THE JUDICIAL BRANCH

There have been a number of efforts to invalidate abstinence-only curricula and replace it with curricula more reflective of contemporary views about sexual education. The court system has heard these challenges to abstinence-only education. Traditionally, these challenges have been brought under the Establishment Clause. The Establishment Clause states that “Congress shall make no law respecting an establishment of religion.”¹¹¹ Although this has been the established path used to challenge abstinence-only education, relatively few cases have been brought under the Establishment Clause,¹¹² and even fewer have been successful.¹¹³ These failures can be attributed to the malleable nature of the legal test used to prove

105. *Id.*

106. *Id.*

107. See *An Explanation of Federal Funding for More Comprehensive Approaches to Sex Education*, *supra* note 41.

108. Alice Park, *Parents' Sex Talk with Kids: Too Little, Too Late*, TIME (Dec. 7, 2009), <http://www.time.com/time/health/article/0,8599,1945759,00.html>.

109. *Id.* The view that sexuality is a source of danger comes from its association with unwanted pregnancy, disease, and moral corruption. Shatz, *supra* note 4, at 524.

110. Park, *supra* note 108.

111. U.S. CONST. amend. I.

112. Shatz, *supra* note 4, at 504.

113. *Id.*

Establishment Clause violations. Abstinence-only programs can easily contain some of the aforementioned offensive aspects, while remaining Constitutional under the Establishment Clause test.

Lemon v. Kurtzman established the standard for determining whether a law conforms with the Establishment Clause.¹¹⁴ Conformity demands that the law in question: 1) have a secular purpose, 2) not have as its primary purpose advancing or inhibiting religion, and 3) not cause an excessive entanglement between the government and religion.¹¹⁵

The Court in *Bowen v. Kendrick* determined that this was not a difficult standard to meet.¹¹⁶ The *Bowen* Court found AFLA to be constitutional despite it awarding grants to religious institutions providing counseling on teenage sexuality.¹¹⁷ The Court reasoned that AFLA's primary purpose was not to advance religion, but rather to counsel teens.¹¹⁸ It deemed that giving money to religious groups did not result in an excessive entanglement between the government and religion.¹¹⁹

Abstinence-only legislation and the programs they promulgate only need to demonstrate some secular purpose to avoid being declared unconstitutional.¹²⁰ Since sexual education generally serves to reduce STDs, HIV/AIDS, and unintended pregnancy among teens, it is not difficult for abstinence-only education to meet this low threshold of constitutionality.¹²¹ Abstinence-only curricula need only remove the most explicit religious references from its curricula to avoid violating the second and third prongs of the *Lemon* test.¹²² These include direct references to Jesus, Christianity, and God.¹²³ More subtle religious references are spared under this standard and still exist in many abstinence-only educational materials used today.¹²⁴ For example, the *Why kNOW* abstinence teaching tool presents a definition of love that is identical to that found in Corinthians 1:13.¹²⁵ The quote comes directly from the New Testament.¹²⁶

114. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); Shatz, *supra* note 4, at 499.

115. *Lemon*, 403 U.S. at 602.

116. *Bowen v. Kendrick*, 487 U.S. 589 (1988).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Lemon*, 403 U.S. at 602.

121. COLLINS ET AL., *supra* note 14, at 2.

122. *Lemon*, 403 U.S. at 602.

123. Shatz, *supra* note 4, at 527.

124. *Id.* at 516.

125. *Id.* (citing KRIS FRAINIE, WHY kNOW ABSTINENCE EDUCATION PROGRAMS: CURRICULUM FOR SIXTH GRADE THROUGH HIGH SCHOOL 4, 93 (Marcia Sweavingen & Pam Susler eds., 2002).

126. *Id.*

As a result of *Lemon*, abstinence-only education need only go through a sterilization process and obscure religious messages in order to meet the test for constitutionality.¹²⁷ This lenient standard cripples plaintiffs' ability to bring challenges against abstinence-only education and explains why sexual education policy remains stagnant in the face of widespread opposition.

V. THE POTENTIAL NEW MODEL FOR SUCCESSFUL
JUDICIAL CHALLENGES: *AMERICAN ACADEMY OF
PEDIATRICS V. CLOVIS UNIFIED SCHOOL DISTRICT*

A complaint filed on August 21, 2012 in the Superior Court of California could signal a change in judicial challenges to the federal promotion and funding of abstinence-only education.¹²⁸ The complaint, which has led to a long-running, ongoing legal battle, forges a new path and could be successful where past challenges under the Establishment Clause failed.¹²⁹ This complaint is spearheaded by the American Civil Liberties Union (ACLU).¹³⁰ It comes from Fresno County, a region which boasts one of the highest teen birth rates in the state of California.¹³¹ In Fresno County, teenagers account for one third of the diagnosed chlamydia cases and one fourth of gonorrhea cases.¹³² The petitioners complain that Clovis Unified School District has failed to provide medically accurate, bias-free HIV/AIDS prevention instruction and sexual education to students in violation of section 51930-36 of the California Education Code.¹³³

According to section 51933 of the California Education Code, a school district that elects to offer sexual education must ensure that all "factual information presented shall be medically accurate."¹³⁴ The code defines medically accurate as

127. Shatz, *supra* note 4, at 527.

128. Verified Complaint, *Am. Acad. of Pediatrics v. Clovis Unified Sch. Dist.*, No. 12CECG02608 at *2 (Cal. Super. 2012) [hereinafter *Verified Complaint*].

129. *ACLU Files Update in Clovis Unified Sex Education Lawsuit*, ABC30 (Aug. 8, 2013), <http://abclocal.go.com/kfsn/story?id=9197829>.

130. The other parties to the complaint are the American Academy of Pediatrics, California District IX, Gay-Straight Alliance Network, Aubree Smith, and Mica Ghimenti. Both Ms. Smith and Ms. Ghimenti are mothers of children who attend schools in the Clovis Unified School District. Ms. Smith is a reproductive health educator and Ms. Ghimenti is a registered nurse. *Id.*

131. *Parents and Doctors Sue Clovis School District over Sex Education*, AM. CIVIL LIBERTIES UNION (Sept. 10, 2012), <http://www.aclu.org/lgbt-rights-reproductive-freedom/parents-and-doctors-sue-clovis-school-district-over-sex-education>.

132. *Id.*

133. CAL. EDUC. CODE § 51930-36 (2012); *Verified Complaint*, *supra* note 128.

134. CAL. EDUC. CODE § 51933. Section 51933 contains a number of other criteria that must be satisfied if a schools elects to teach comprehensive sexual education. However

verified or supported by research conducted in compliance with scientific methods and published in peer-reviewed journals, where appropriate, and recognized as accurate and objective by professional organizations and agencies with expertise in the relevant fields, such as the federal Centers for Disease Control and Prevention, the American Public Health Association, the American Academy of Pediatricians, and the American College of Obstetricians and Gynecologists.¹³⁵

Petitioners allege that the Clovis School District has not fulfilled its legal obligation under the California Education Code. Petitioners contend that the district's *Lifetime Health* textbook, a 2004 textbook published by Holt, Rinehart, and Winston, does not provide medically accurate, objective information about STD prevention.¹³⁶ The textbook recommends students "[g]et plenty of rest," and "[g]o out as a group" in order to protect their sexual health.¹³⁷ Petitioners contend that the information, or lack of information, provided by the textbook falls below the standard of sexual education required by California law because it does not mention condoms or any other FDA approved means through which to prevent the transmission of STDs.¹³⁸

Petitioners make a similar claim with regard to the textbook's information about HIV/AIDS prevention. Once again, the textbook neglects to mention the use of condoms to prevent HIV/AIDS contraction. It instead recommends abstinence, avoiding multiple sexual partners, not sharing needles and avoiding drinking alcohol and taking illegal drugs.¹³⁹ This is repeated in the book's chapter on pregnancy prevention.¹⁴⁰ Contraceptives are never mentioned in the entirety of the Holt textbook.¹⁴¹

Including California, twelve states have laws that require sexual education curricula be medically accurate.¹⁴² Although definitions of medical accuracy vary by state, similar criteria are used across the board.¹⁴³ For example, Colorado makes medical accuracy dependent

they are not mentioned here because they are not relevant to the current complaint. According to the California Educational Code, comprehensive sexual education means "education regarding human development and sexuality, including education on pregnancy, family planning, and sexually transmitted diseases." CAL. EDUC. CODE § 51931.

135. CAL. EDUC. CODE § 51931 (West 2012).

136. Verified Complaint, *supra* note 128, at *2.

137. *Id.*

138. CAL. EDUC. CODE § 51933.

139. Verified Complaint, *supra* note 128, at *3.

140. *Id.* at *11.

141. *Id.*

142. DAILARD, *supra* note 32.

143. *State Policies on Sex Education in Schools*, NAT'L CONFERENCE OF STATE LEGISLATURES (Feb. 2014), <http://www.ncsl.org/issues-research/health/state-policies-on-sex-education-in-schools.aspx>.

on published authorities upon which medical professionals rely.¹⁴⁴ Hawaii, much like California, defines medical accuracy as being supported by research recognized as accurate by professional organizations and agencies like the Centers for Disease Control or the American Public Health Association.¹⁴⁵

Requiring some variation of medical accuracy seems to be a growing trend in state legislatures.¹⁴⁶ In 2012, five additional states had legislation pending that would require medical accuracy in sexual education curricula.¹⁴⁷

This trend also exists on the federal level. When Title V was added to the Patient Protection and Affordable Care Act, legislators included a requirement that sexual education information be medically accurate, meaning “verified or supported by the weight of research conducted in compliance with accepted scientific methods and published in peer-reviewed journals, or be comprised of information that leading professional organizations and agencies with relevant expertise in the field recognize as accurate, objective and complete.”¹⁴⁸

As evidenced by the complaint against the Clovis Unified School District, the addition of a medical accuracy requirement opens the door for new judicial challenges to abstinence-only education. These challenges have the potential to be successful because many of the larger abstinence-only programs continue to rely on information that is outdated or incorrect.¹⁴⁹ A report by the House of Representatives Committee on Government Reform found that eighty percent of abstinence-only curriculum used by federally funded programs contained false, misleading, or distorted information about reproductive health.¹⁵⁰ This information includes inflated condom failure rates, false characterizations of STD transmission, and exaggerated risks associated with abortion.¹⁵¹

The *Why kNOw* Abstinence Education program claims, “[i]n heterosexual sex, condoms fail to prevent HIV approximately [thirty-one percent] of the time.”¹⁵² However, consistent condom use reduces HIV/AIDS transmission by eighty-five percent.¹⁵³ Other abstinence-only

144. COLO. REV. STAT. § 22-1-110.5 (2013).

145. HAWAII REV. STAT. § 321-11.1 (2013).

146. Many of these laws requiring medical accuracy are new laws or were recently amended to include such a provision. *State Policies on Sex Education in Schools*, *supra* note 143.

147. *Id.*

148. *Title V State Abstinence Education Grant Program Fact Sheet*, *supra* note 5.

149. *See* COMM. ON GOV'T REFORM, *supra* note 36; KAY & JACKSON, *supra* note 2.

150. COMM. ON GOV'T REFORM, *supra* note 36.

151. KAY & JACKSON, *supra* note 2, at 14.

152. COMM. ON GOV'T REFORM, *supra* note 36, at 9.

153. *Effectiveness of Condoms*, AVERTING HIV AND AIDS, <http://www.avert.org/condoms.htm> (last visited Mar. 30, 2014).

educational materials claim that five to ten percent of women who have abortions become sterile.¹⁵⁴ The Mayo Clinic reports that abortions will not “cause fertility issues or complications in subsequent pregnancies.”¹⁵⁵ Abstinence-only educational materials in a Mississippi school district claim that birth control pills can cause cancer and pregnancy can result from touching another’s genitals.¹⁵⁶ These claims exaggerate and misrepresent scientific information.¹⁵⁷

Where other challenges to abstinence-only education have failed, challenges under a medical accuracy requirement could succeed. Judicial challenges to abstinence-only education under the Establishment Clause faltered due to the malleable standards articulated in *Lemon* and the ease with which curriculum can be slightly modified so as not to violate the *Lemon* test.¹⁵⁸ Challenges through the legislative branch have been thwarted by societal discomfort with addressing our children’s sexuality, and the residual power of the Religious Right.

However, the recent trend of legislators requiring medical accuracy in sexual education policies could enable new types of judicial challenges and invalidate abstinence-only education or at least their most discriminatory and ineffective aspects.¹⁵⁹ This is illustrated by *American Academy of Pediatrics v. Clovis Unified School District*. The challenge in California is the first of its kind since the state passed a law in 2003 requiring sexual health education in public schools be medically accurate.¹⁶⁰

Legislation requiring medical accuracy lays out the standards under which medical accuracy can be determined. Regardless of

154. KAY & JACKSON, *supra* note 2, at 24.

155. *Getting Pregnant*, MAYO CLINIC (Aug. 6, 2011), <http://www.mayoclinic.com/health/abortion/AN00633>.

156. *Mississippi Sex Education: Majority of School Districts Choose Abstinence-Only Curriculum*, HUFFINGTON POST (July 30, 2012), http://www.huffingtonpost.com/2012/07/30/mississippi-sex-education_n_1719882.html.

157. The National Cancer Institute found that current use of oral contraceptives slightly increase the risk of breast cancer, although the risk goes back to normal ten or more years after discontinuing oral contraceptive use. This is very different than claiming that birth control pills cause cancer. *Oral Contraceptives and Cancer Risks*, NAT’L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/Risk/oral-contraceptives> (last visited Mar. 30, 2014).

158. See *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); Shatz, *supra* note 4, at 499.

159. Adding medical accuracy requirements is considered to be non-controversial because it does not directly invoke a discussion on teenage sexuality. Additionally, it is difficult to argue that children should not be taught medically accurate information in their schools.

160. *American Academy of Pediatrics et al. v. Clovis Unified School District*, ACLU OF NORTHERN CALIFORNIA (Aug. 26, 2013), <https://www.aclunc.org/our-work/legal-docket/american-academy-pediatrics-et-al-v-clovis-unified-school-district>.

which medical accuracy definition is used, all of these standards are grounded in science. Unlike the test under *Lemon*, a standard based on science is less malleable or easily manipulated. It requires confirmation by published authorities on which medical professionals rely,¹⁶¹ or research recognized as accurate by professional organizations and agencies like the Center for Disease Control or the American Public Health Association.¹⁶² Information purporting inaccuracies in HIV/AIDS infection rates, false consequences of abortions, and exaggerated risks of oral contraceptives do not meet this standard.

The complaint against the Clovis Unified School demonstrates how simple it is for parents with basic medical knowledge, or even with access to the internet, to look at their children's sexual education materials and gauge its level of medical accuracy.¹⁶³ This lack of medical accuracy is also easily demonstrated to a court.

CONCLUSION

Abstinence-only education has fallen out of favor with the American public. Although it is ineffective and discriminatory against segments of the population, it is still supported and funded by the federal government. However, where past challenges to abstinence-only education have failed, the complaint against Clovis Unified School District and their sexual education curricula could succeed.

Laws requiring medical accuracy are a fairly new requirement.¹⁶⁴ Although it is not exactly clear how the judiciary will react to complaints of this nature, the challenge in California can be seen as an exemplary challenge. California is an optimal place to set the stage for future challenges because of its history with sexual education. California is the only state never to receive federal funds contingent upon their teaching an approved abstinence-only curricula.¹⁶⁵ This could mean less inertia in public opinion regarding sexual education, and perhaps a court more receptive to an abstinence-only challenge, especially one with such clear, concrete standards. Regardless of how the challenge in California unfolds, it is apparent that those looking to challenge abstinence-only education and change sexual education policies in the United States will be watching.

Regardless of the ultimate outcome, it is likely true that the Clovis Unified School District and other districts similarly using

161. COLO. REV. STAT. § 22-1-110.5 (2013).

162. HAWAII REV. STAT. § 321-11.1 (2013).

163. Parents of children in the Clovis Unified School District were the catalyst behind this suit. Verified Complaint, *supra* note 128.

164. *See supra* Part II.

165. Culp-Ressler, *supra* note 6.

outdated, ineffective, and prejudicial teaching materials, will be forced to update or eliminate these materials to meet state and federal requirements. Even if not mandated by a court, the negative publicity for Clovis Unified School District will likely be sufficient to pressure the district to change its sex education curriculum.

Although *American Academy of Pediatrics v. Clovis Unified School District* might not mean the immediate demise of abstinence-only education, it likely will abolish what have traditionally been the most offensive and discriminatory aspects of it.

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