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## Title IX & Disparate Impact: The Harmful Effects of Abstinence-Centric Education

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# TITLE IX & DISPARATE IMPACT: THE HARMFUL EFFECTS OF ABSTINENCE-CENTRIC EDUCATION

## ABSTRACT

Throughout the United States, schools are failing to provide students with comprehensive sex education that equips student with the life skills necessary for healthy relationships. This shortcoming has numerous psychological, emotional, and physical health consequences for the American youth. This Note will focus on how abstinence-centric curricula can influence sexual and teen dating violence. Presently, only one state requires instruction on consent, leaving most students to first encounter consent education or anti-harassment training in higher education institutions or the workplace. In light of the high rates of violence many young people experience before turning eighteen, this instruction often comes too little, too late.<sup>1</sup> Moreover, abstinence-centric education reinforces feelings of shame and fear that are common among victims of violence. This shaming disproportionately impacts female students who face higher rate of assault compared to their male counterparts. This Note will argue that abstinence-centric education therefore violates Title IX under a disparate impact theory; and, as such, the federal government should condition funding for health programs on comprehensive sex education that includes consent instruction.

## INTRODUCTION

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1. Eleven million, or forty-three percent, of female victims of completed or attempted rape reported that it first occurred *prior to age eighteen*. Sharon G. Smith, Xinjian Zhang, Kathleen C. Basile, Melissa T. Merrick, Jing Wang, Marcie-jo Kresnow & Jieru Chen, *The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief—Updated Release*, CTRS. FOR DISEASE CONTROL AND PREVENTION, 4 (2018).

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## INTRODUCTION

Sex education that solely or mainly focuses on abstinence presents numerous risks to students' psychological, emotional, and physical health. These curricula tend to stress abstinence as the only moral standard, and often reinforce gendered stereotypes.<sup>2</sup> Because the messaging tells students not to have sex, there are rarely discussions about healthy sexuality and navigating relationships.<sup>3</sup> This Note will argue that abstinence-centric education fails to promote healthy sexual development and to provide the resources and skills necessary to navigate and establish boundaries. This shortcoming has a disproportionate impact on female students, who face higher rates of sexual and teen dating violence. This Note will thus argue that, when applying a disparate impact analysis, abstinence-centric education violates female students' right to equal education under Title IX.

#### I. SEX EDUCATION IN SCHOOLS: DEFINING ABSTINENCE-CENTRIC EDUCATION AND ITS IMPLEMENTATION WITHIN SCHOOLS

There are two leading approaches in sex education: (1) abstinence-only, and (2) comprehensive (or "abstinence-plus") sex education.<sup>4</sup> Generally, abstinence-only education programs present abstinence until marriage as the expected standard of behavior for unmarried teens and the only way to prevent unintended pregnancy or sexually transmitted disease or infection (STDs/STIs).<sup>5</sup> Comprehensive sex

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2. Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. PA. J. CONST. L. 587, 587 (2011).

3. *Id.*

4. *Abstinence Education Programs: Definition, Funding, and Impact on Teen Sexual Behavior*, KAISER FAM. FOUND. (June 1, 2018) [hereinafter *Abstinence Education Programs*], <https://www.kff.org/womens-health-policy/fact-sheet/abstinence-education-programs-definition-funding-and-impact-on-teen-sexual-behavior> [https://perma.cc/L6PH-BAAM].

5. *Id.*; see, e.g., MISS. CODE ANN. § 37-13-171 (West 2021) (abstinence-only education: "teaches that abstinence from sexual activity before marriage, and fidelity within marriage, is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases and related health problems"); VA. CODE ANN. § 22.1-207.1 (West 2020)

education, on the other hand, includes information about contraception and STD/STI prevention as well as information on abstinence.<sup>6</sup> This section provides an overview of the current state laws regarding sex education in public schools and the history of federal funding for abstinence-only education. Because of the overlapping themes within abstinence-only and comprehensive (or “abstinence-plus”) sex education, this Note will refer to education that only or primarily focuses on abstinence as “abstinence-centric” education.

### A. Sex-Education Laws by State

Sex-education statutes vary widely by state. Each state has different limitations and requirements on what can be taught in public schools.<sup>7</sup> As of January 2022, thirty-nine states and the District of Columbia require sex education and/or HIV education.<sup>8</sup> When sex education is provided:

- thirty states and the District of Columbia require that sex and HIV education curricula meet certain general requirements;<sup>9</sup>
- twenty states and the District of Colombia require schools to include information on contraception use;<sup>10</sup>
- eighteen states and the District of Columbia require schools to include negative outcomes of teenage sex and pregnancy;<sup>11</sup> and
- thirty-nine states and the District of Colombia require that schools provide information on abstinence.<sup>12</sup>

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(“abstinence education’ means an educational or motivational component that has as its exclusive purpose teaching the social, psychological, and health gains to be realized by teenagers’ abstaining from sexual activity before marriage.”).

6. *Abstinence Education Programs*, *supra* note 4.

7. *See State Policies on Sex Education in Schools*, NAT’L CONF. STATE LEGIS. (Oct. 1, 2020), <https://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx> [<https://perma.cc/C5WF-ZB75>]; *Sex and HIV Education*, GUTTMACHER INST. (Mar. 1, 2021), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education#> [<https://perma.cc/H3KG-QHXU>].

8. *Sex and HIV Education*, *supra* note 7. Twenty-eight states mandate both sex education and HIV education; two states only mandate sex education; nine states only mandate HIV education. *Id.*

9. *Id.* General requirements may include medical accuracy and age appropriateness. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*; *see, e.g.*, ARK. CODE ANN. § 6-18-703 (West 2019) (“Schools that offer sex education in school-based health clinics shall include instruction in sexual abstinence . . .”).

Of the thirty-nine states requiring abstinence instruction, twenty-eight require it be stressed and eleven, as well as the District of Columbia, require that it be covered.<sup>13</sup> Only three states ban curricula from promoting religion.<sup>14</sup>

Sex education can also cover the life skills required for sexual consent, relationships, and prevention of dating and sexual violence.<sup>15</sup> For example, thirty-five states and the District of Columbia require that schools share information about skills for healthy romantic and sexual relationships, and twenty-seven of those states and the District of Columbia require instruction on self-control and decision making about sexuality.<sup>16</sup>

### *B. Federal Funding for Abstinence-Only Programs*

In the past, four federal statutes prohibited the federal government from prescribing state and local school curricula, leaving the federal government with a limited role to play in sex education in schools.<sup>17</sup> Therefore, the ultimate decision to provide sex education was left to the states, with more specific curricula decisions left to the school districts.<sup>18</sup> Beginning in the 1960s, however, efforts to incorporate family life in public school curricula sparked a national debate about whether that subject was appropriate for public education, and if so, what content should be included.<sup>19</sup> Within the following decades, conservative members of Congress succeeded in passing laws that provided states with financial incentives to teach abstinence-only curricula.<sup>20</sup>

The Adolescent Family Life Act (AFLA) of 1981 (also known as the “chastity law”) was the first federal legislation that addressed sex education,<sup>21</sup> providing funding to states for abstinence-only programs through federal matching grants.<sup>22</sup> Community organizations, schools,

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13. *Sex and HIV Education*, *supra* note 7.

14. *Id.* States include California, Colorado, and Louisiana. *Id.*

15. *Id.*

16. *Id.*

17. 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).

18. Samantha Sneen, *The Current State of Sex Education and Its Perpetuation of Rape Culture*, 49 CAL. W. INT'L L.J. 463, 474 (2019).

19. Leslie M. Kantor, *Abstinence-Only Education Violating Students' Rights to Health Information*, 35 HUM. RTS. 12, 12 (2008).

20. LeClair, *supra* note 17, at 293.

21. 42 U.S.C.A. § 300z (West 1994).

22. James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665, 666 (2004); Kantor, *supra* note 19, at 12; LeClair, *supra* note 17, at 294–95.

and school districts were all eligible for AFLA funding.<sup>23</sup> The program was a response to the “severe adverse health, social, and economic consequences” caused by pregnancy and childbirth to unmarried teenagers.<sup>24</sup> There existed an underlying belief that the federal government had created a “contraceptive mentality” by funding family planning providers (such as Planned Parenthood), and that this new program was necessary to counter this spending.<sup>25</sup> The AFLA was intended to prevent adolescent sexual activity by (1) providing guidance to family members; (2) promoting self-discipline and other prudent approaches to premarital sexual relations; and (3) supporting research on societal consequences of premarital sexual relations and programs mitigating the consequences.<sup>26</sup>

In its implementation, the AFLA (as enacted) allowed the use of religious messaging, even in schools.<sup>27</sup> This use prompted litigation by the American Civil Liberties Union (ACLU), claiming the AFLA violated the separation of Church and State.<sup>28</sup> In *Bowen v. Kendrick*, the U.S. Supreme Court considered whether the state was advancing religion by providing grants to various religious organizations.<sup>29</sup> The Court found no constitutional violation because the program was not religious in nature, but merely “coincided” with religious moral values.<sup>30</sup> However, an out-of-court settlement required that programs supported by AFLA funds provide only medically accurate information; respect the “the principle of self-determination” for adolescents; avoid religious messaging; and remove religious sites for their programs.<sup>31</sup>

Dissatisfied with the revised AFLA requirements, Congress sought more restrictive programs.<sup>32</sup> Through the 1996 Welfare Reform Legislation, Congress expanded funding to states that promoted its abstinence-only message to welfare recipients through Title V AOUM (Abstinence-Only-Until-Marriage) grants.<sup>33</sup> Requirements for funding were more restrictive than AFLA’s.<sup>34</sup> To receive funding, states had to provide nearly \$40 million in matching funds and agree not to provide statewide curricula, simultaneously mandating a more

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23. LeClair, *supra* note 17, at 294–95.

24. McGrath, *supra* note 22, at 685.

25. LeClair, *supra* note 17, at 295.

26. 42 U.S.C.A. § 300z.

27. LeClair, *supra* note 17, at 296.

28. *Bowen v. Kendrick*, 487 U.S. 589, 597 (1988).

29. *Id.* at 593.

30. *Id.* at 605.

31. McGrath, *supra* note 22, at 686–87.

32. LeClair, *supra* note 17, at 296.

33. *Id.*; see McGrath, *supra* note 22, at 666.

34. LeClair, *supra* note 17, at 297.

comprehensive approach to sex education.<sup>35</sup> Moreover, the program created an eight-point definition of abstinence-only curricula:

1. the social, physiological, and health gains to be realized from abstinence;
2. that abstinence outside of marriage is the expected standard for all school-age children;
3. that abstinence is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
4. that a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity;
5. that sexual activity outside of marriage may have harmful psychological and physical effects;
6. that bearing children outside of wedlock is likely to have harmful consequences for the child, the child's parents, and society;
7. how to resist sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and
8. the importance of attaining self-sufficiency before engaging in sexual activity.<sup>36</sup>

While participants only had to adhere to at least one of these points, they could not violate any of them.<sup>37</sup>

In the Consolidated Appropriations Act of 2018, Title V AOUM was renamed the "Title V Sexual Risk Avoidance Education" program and legislative language was significantly revised.<sup>38</sup> Education on sexual risk avoidance teaches:

1. the holistic and societal benefits associated with personal responsibility, self-regulation, goal setting, healthy decision-making, and a focus on the future;
2. the advantage of refraining from non-marital sexual activity in order to impose the future prospects and physical and emotional health of youth;

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35. *Id.*

36. Title V, § 510, 42 U.S.C.S. § 710 (West 1996).

37. LeClair, *supra* note 17, at 298.

38. SEXUAL INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES (SEICUS), A HISTORY OF AOUM FUNDING 5 (May 2019) [hereinafter A HISTORY OF AOUM FUNDING], <https://siecus.org/wp-content/uploads/2019/05/AOUM-Funding-History-Report-5.2019.pdf> [<https://perma.cc/FR7N-ZWL2>].

3. the foundational components of healthy relationships and their impact on formation of healthy marriages and safe and stable families;
4. how other youth risk behaviors, such as drug and alcohol usage, increase the risk for teen sex; and
5. how to resist and avoid, and receive help regarding, sexual coercion and dating violence.<sup>39</sup>

Despite the name change, the program “echo[es] abstinence-only education by claiming its purpose ‘is to enable the State or other entity to implement education exclusively on sexual risk avoidance (meaning voluntarily refraining from sexual activity).’”<sup>40</sup> While the program purports to promote “‘healthy relationships’ and provide ‘youth empowerment[,]’ the terms are used in the context of federal program requirements that ‘ensure that the unambiguous and primary emphasis and context . . . is a message to youth that the optimal health behavior of avoiding non-marital sexual activity.’”<sup>41</sup>

In October 2000, the federal government created additional funding for abstinence education through Community-Based Abstinence Education (CBAE).<sup>42</sup> Under this funding stream, the federal government awarded grants directly to state and local organizations who were required to teach the eight-point federal definition of “abstinence education.”<sup>43</sup> In 2006, the Administration for Children and Families within the Department of Health and Human Services (HHS) identified its vision for CBAE programs.<sup>44</sup> The HHS guidance that was provided viewed sexual abstinence prior to marriage as an approach that would lead to:

a happier life, including having a healthier marriage and children, earning more money, and being more ‘honorable’ and ‘responsible’

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39. SEXUAL RISK AVOIDANCE EDUCATION: TRAINING AND TECHNICAL ASSISTANCE, SERIES TWO: PERSONAL RESPONSIBILITY HEALTHY DECISION-MAKING & FOCUS ON THE FUTURE (Admin. for Child. & Fams., Fam. & Youth Servs. Bureau) (May 26, 2021), [https://teenpregnancy.acf.hhs.gov/sites/default/files/resource-files/Series\\_Two\\_Personal%20Responsibility\\_\\_508.pdf](https://teenpregnancy.acf.hhs.gov/sites/default/files/resource-files/Series_Two_Personal%20Responsibility__508.pdf) [<https://perma.cc/YJ2G-7Y6Q>].

40. Sneen, *supra* note 18, at 474. While all states are eligible for funding, the program currently funds thirty-seven states. A HISTORY OF AOUM FUNDING, *supra* note 38, at 5.

41. Jessica Boyer, *New Name, Same Harm: Rebranding of Federal Abstinence-Only Programs*, GUTTMACHER INST. (Feb. 28, 2018), <https://www.guttmacher.org/gpr/2018/02/new-name-same-harm-rebranding-federal-abstinence-only-programs> [<https://perma.cc/7347-YR4D>].

42. A HISTORY OF AOUM FUNDING, *supra* note 38, at inside cover.

43. *Id.* at 2.

44. See DEP’T HEALTH & HUM. SERVS., ADMIN. CHILD. & FAM., *Community-Based Abstinence Education Program* (HHS-2006-ACF-ACYF-AE -0099) (Jan. 25, 2006).



parents, having integrity, attaining a better education, having fewer psychological disorders, avoiding drug, alcohol and tobacco use, committing fewer crimes, and staying out of prison, and having a longer life span.<sup>45</sup>

The guidelines also prevented participants from providing any positive information about contraception or safe-sex practices, even in other settings and with non-CBAE funds, thus further restricting what educators could teach.<sup>46</sup>

Under the Obama Administration, there was a considerable shift away from abstinence-only education and toward more evidence-based sex education initiatives.<sup>47</sup> For example, new programs such as the Personal Responsibility Education Program (PREP) provided federal funds to schools that support evidence-based sex education that teach about both abstinence and contraception.<sup>48</sup> However, the support for abstinence education nevertheless remained.<sup>49</sup> In 2012, Congress incorporated the Title V AOUM program that expired in 2009 into the Affordable Care Act.<sup>50</sup> The Sexual Risk Avoidance Education (SRAE) program teaches youth to “voluntarily refrain from non-marital sexual activity and prevent other youth risk behaviors.”<sup>51</sup> In 2017, the federal funding for the Title V and SRAE program totaled \$90 million, with one-third of funding for sexual education programs going toward abstinence education.<sup>52</sup>

## II. HOW DOES SEX EDUCATION INTERACT WITH TEENAGE RELATIONSHIPS?

Curricula that only teach or prioritize abstinence in sex education create unrealistic expectations for youth, particularly girls, and leave them vulnerable to physical and emotional victimization.<sup>53</sup> Both abstinence-only and comprehensive (abstinence-plus) sex education

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45. SIECUS, A HISTORY OF FEDERAL FUNDING FOR ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS (Aug. 2018), <https://siecus.org/wp-content/uploads/2018/08/A-History-of-AOUM-Funding-Final-Draft.pdf> [<https://perma.cc/Q66G-FUME>].

46. A HISTORY OF AOUM FUNDING, *supra* note 38. Representative Henry Waxman (D-CA) released a report that documented eleven of the thirteen programs most widely used by CBAE grantees contained misinformation about reproductive health and contraceptives, as well as gender stereotypes. *Id.*

47. *Abstinence Education Programs*, *supra* note 4.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Hendricks & Howerton, *supra* note 2, at 590.

programs typically convey a similar message: that abstinence until marriage is the standard for human sexual activity.<sup>54</sup> Abstinence-only sex education suggests: “[y]ou should wait until marriage before engaging in sex . . . and sexual abstinence is the sure way to protect yourself from pregnancy and STDs.”<sup>55</sup> In a similar fashion, many comprehensive programs provide: “you should wait until marriage before engaging in sex . . . but if you do not wait, you should use condoms to protect yourself from pregnancy and STDs.”<sup>56</sup>

Both abstinence-only and comprehensive sex education curricula also continue to focus mostly or entirely on heterosexuality and reproduction; programs generally cover reproductive organs and the mechanics of heterosexual vaginal intercourse.<sup>57</sup> The Kaiser Family Foundation reports that abstinence-only and comprehensive sex education may offer similar student experiences.<sup>58</sup> For example:

At least some students and teachers in courses that they describe as having a main message of abstinence-only report that information was still included about how to use and where to get birth control or how to get tested for HIV/AIDS. Likewise, many sex education courses described as comprehensive appear to provide only surface-level information about birth control and HIV/AIDS and other STIs while not addressing more practical aspects of how to use birth control or talk with a partner about sexual health issues, or where to go to get tested for HIV or other STDs.<sup>59</sup>

Despite the difference in approaches, formal sex education in the United States does not adequately inform or prepare students to navigate healthy sexual relationships.<sup>60</sup> Rather, abstinence-only and most abstinence-plus programs attempt to deter students from sex through shame, guilt, and fear. The eight components of AOUM instilled strict criteria on how to educate adolescents, teaching that abstinence is the morally correct or “expected standard.”<sup>61</sup> Accordingly,

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54. Kantor, *supra* note 19, at 100.

55. Michelle J. Anderson, *Sex Education and Rape*, 17 MICH. J. GENDER & L. 83, 100 (2010).

56. *Id.* at 99.

57. *Id.* at 100.

58. *Id.*

59. *Id.* at 101.

60. See Jessica Boyer, *New Name, Same Harm: Rebranding of Federal Abstinence-Only Programs*, GUTTMACHER INST. (Feb. 28, 2018), <https://www.guttmacher.org/gpr/2018/02/new-name-same-harm-rebranding-federal-abstinence-only-programs> [<https://perma.cc/7347-YR4D>].

61. Michelle Fine & Sara I. McClelland, *Sexuality Education and Desire: Still Missing After All These Years*, 76 HARV. EDUC. REV. 297, 298 (2006); Sharon E. Hoefler

this standard implies that deviation from the expected standard—abstinence until marriage—is an immoral route.<sup>62</sup>

Today, these programs continue to exclusively focus on voluntarily refraining from sexual activity outside of marriage.<sup>63</sup> Prevailing abstinence narratives continue to instill fear in students, particularly girls, by stressing the dangers of sexuality.<sup>64</sup> In one qualitative study, participants almost universally reported that their sex education programming relied on instilling fear of sexual activity by only warning of STIs and pregnancy, and “shaming sexual activity and curiosity by refusing to answer student questions and referring to sexually active students as inferior to abstinent students.”<sup>65</sup>

Another study found that female sexuality is often represented as a “moment of victimization.”<sup>66</sup> This victimization discourse portrays young women as vulnerable to male predators, teaching that girls must learn to defend themselves against disease, pregnancy and “being used.”<sup>67</sup> In doing so, educators promote “saying no” and practicing abstinence to avoid the social and emotional risks of sexual intimacy, rather than teaching girls and boys, alike, how to navigate intimacy in a healthy and productive way.<sup>68</sup> Moreover, because these programs rely on feelings of fear, guilt and shame, a likely unintended consequence of this practice is the stigmatization of sexual assault survivors.<sup>69</sup> For instance, young women who have engaged in sexual activity are often judged or blamed by peers for situations that may have been out of their control.<sup>70</sup>

Abstinence-centric programs also promote damaging gender stereotypes, reinforcing ideas about how young men and women *should* act.<sup>71</sup> These ideas are ideological rather than educational,<sup>72</sup>

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& Richard Hoefler, *Worth the Wait? The Consequences of Abstinence-Only Sex Education for Marginalized Students*, 12 AM. J. SEXUALITY EDUC. 257, 258 (2017).

62. Fine & McClelland, *supra* note 61, at 298.

63. *Id.* at 299.

64. Michelle Fine, *Sexuality, Schooling and Adolescent Females: The Missing Discourse of Desire*, in BEYOND SILENCED VOICES: CLASS, RACE, AND GENDER IN THE UNITED STATES 75–99 (1993).

65. Hoefler & Hoefler, *supra* note 61, at 267–68.

66. Fine, *supra* note 64, at 77.

67. *Id.*

68. *Id.* (supporting the suggestion that these programs are ideological, is the fact that there is no scientific evidence that shows these programs reduce teen sexual activity—undermining the commonly stated objective of reducing teen pregnancy and STD/STI transmission); McGrath, *supra* note 22, at 667.

69. Anna Lanford, *Sex Education, Rape Culture, and Sexual Assault: The Vicious Cycle*, 27 FURMAN HUMS. REV. 61, 73 (2017).

70. *Id.* at 63.

71. *Id.* at 65.

72. Kantor, *supra* note 19, at 14.

and “propagate[d] sexist, racist, and classist notions of society.”<sup>73</sup> The underlying messaging of abstinence-centric curricula takes the “form of lesson[s] on proper attire and behavior, prescribed male aggressiveness versus female submissiveness, and discourses painting women as in need of protection.”<sup>74</sup> In other words, programs tend to “reinforce stereotypes about feminine passivity and sexual restraint, while linking masculinity with an intense sex drive, lack of emotional involvement and aggressiveness.”<sup>75</sup>

Sexist and unhealthy attitudes about female sexuality can further impact the beliefs that women have about their own sexuality; many women feel they must suppress their sexual desire to maintain a “pure” reputation.<sup>76</sup> Ultimately, these messages may contribute to a “conspiracy of silence” around sexuality by discouraging questions about healthy relationships and intimacy while contributing to a culture of male entitlement and perceived female culpability.<sup>77</sup>

Abstinence-centric programs not only reinforce harmful stereotypes, but also fail to equip students with the tools needed to navigate healthy relationships and sex.<sup>78</sup> Without a fully comprehensive sex education that includes discussions of sexuality, many young people do not understand how to discuss desire, pleasure, and consent with their partners.<sup>79</sup> Abstinence education rarely positions students to think critically about what would and would not make them feel

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73. Dana A. Raphael, *The Effect of Sexual Education on Sexual Assault Prevention*, WOMENNC CSW RSCH. PAPER 9 (2015); see also Hoefler & Hoefler, *supra* note 61, at 265 (reporting a male student remembering an abstinence speaker saying “‘guys are like waffles and women are like pancakes, because [men] could compartmentalize’ and were therefore more able to engage in sexual activity without experiencing heartbreak and anguish.”).

74. Hoefler & Hoefler, *supra* note 61, at 260, 270 (according to one study, participants reported that messages they were taught in sex education programs contributed to school culture in which young men “were allowed to exercise romantic autonomy while young women were not, and in which young women were often shamed for their clothing choices or promiscuity while young men were not.”).

75. Boyer, *supra* note 41.

76. *Id.*; see, e.g., LeClair, *supra* note 17, at 303 (describing a radio advertisement where a Nevada’s abstinence-only coordinator stated that: “girls would feel ‘dirty and cheap’ when they ‘lose’ their boyfriends after having [premarital] sex.”).

77. Hoefler & Hoefler, *supra* note 61, at 257–76.

78. Lanford, *supra* note 69, at 73.

Young adults who have no real sex education, many armed with abstinence-only teachings and the instruction of pornography, go to college with no idea how real sexual relationships are supposed to work and attempt to navigate their newfound sexual freedom. The lack of a good sex education, one that includes discussion of communicative sexuality, leaves rape culture assumptions unchallenged and perpetuates the negative stereotypes of male and female sexuality.

*Id.*

79. *Id.*; Fine, *supra* note 64, at 83.

uncomfortable, and rarely encourages students to think about how to articulate those boundaries.<sup>80</sup> Subsequently, current sex education programs do not provide students with the skills necessary to assert one's own sexual boundaries or find out about a partner's sexual boundaries.<sup>81</sup>

Like many higher education institutions already do, middle schools and high schools should incorporate proper consent education so that students can better understand boundaries and navigate them accordingly.<sup>82</sup> For example, California and New York adopted consent standards for their public universities as part of a multidisciplinary effort to address issues involving domestic violence, sexual assault, and stalking.<sup>83</sup> California defines consent as an "affirmative, conscious, and voluntary agreement to engage in sexual activity."<sup>84</sup> The definition goes further to make clear that consent cannot be inferred from lack of protest, lack of resistance, or silence.<sup>85</sup> Moreover, it requires that consent be ongoing throughout the sexual encounter, can be revoked at any time, and a dating relationship or sexual relationship cannot "by itself be assumed to be an indicator of consent."<sup>86</sup> Similarly, New York education laws define consent as "a knowing, voluntary, and mutual decision among all participants to engage in sexual activity."<sup>87</sup> New York addresses what consent might look like by stating that it "can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity."<sup>88</sup>

The negative effects of abstinence-centric curricula are particularly harmful to young women, who face increasingly higher rates of harassment, dating violence, and sexual assault.<sup>89</sup> When states—or federal programs conditioning grants—censor sex education, "people become the instruments . . . of state policies that deprive them of the knowledge and information necessary to make and implement decisions about their reproduction and to express their sexuality safely."<sup>90</sup> Further, abstinence-centric programs tend to entirely overlook the

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80. Anderson, *supra* note 55, at 107.

81. *Id.* at 103.

82. Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH L. REV. 1, 26 (2016).

83. *Id.* at 8; CAL. EDUC. CODE § 67386 (West 2014).

84. CAL. EDUC. CODE § 67386(a)(1).

85. *Id.*

86. *Id.*

87. N.Y. EDUC. LAW § 6441(1) (Consol. 2015).

88. Leary, *supra* note 82, at 7; N.Y. EDUC. LAW § 6441(1).

89. Kantor, *supra* note 19, at 15.

90. *Id.* at 12.

issue of sexual assault.<sup>91</sup> Instead, messaging focuses on blanket statements about the impermissibility of any sexual behavior prior to marriage.<sup>92</sup> The failure to provide information not only leaves students vulnerable to abusive relationships but can exacerbate pain or confusion for those who have had involuntary experiences.<sup>93</sup>

In sum, abstinence-centric education teaches that the only moral option for students is to avoid sexual relations. Girls, in particular, are taught that abstinence is the only way to protect themselves from pregnancy, sexually transmitted disease, or infection.<sup>94</sup> The messaging often reinforces gendered stereotypes: weak and emotional girls must protect themselves from the aggressive boys who cannot control themselves. In relying on feelings of guilt and shame, these curricula discourage discussions about sexuality and dating. This shortcoming leaves female students, who already face a disproportionate rate of violence as compared to their male counterparts, without the support and necessary resources to navigate healthy relationships and, therefore, subjects female students to a heightened risk of victimization.<sup>95</sup> As such, schools are actively failing to safeguard female students' access to education by creating hostile and discriminatory learning environments while perpetuating underlying causes of teen sexual and dating violence.

### III. UNDERSTANDING TITLE IX: SEX DISCRIMINATION WITHIN SCHOOLS

The operative language of Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>96</sup> Title IX applies broadly to any program that receives federal funding:

[T]he receipt of any amount of federal financial assistance is sufficient to trigger the broad nondiscrimination obligation embodied in the statute. This nondiscrimination obligation extends institution-wide to all education programs or activities operated

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91. *Id.*

92. *Id.*

93. *Id.* at 15.

94. *Id.* at 12.

95. Kantor, *supra* note 19, at 15.

96. 20 U.S.C. § 1681(a).

by the recipient of the federal funds, even if some of the education programs or activities themselves are not funded with federal dollars.<sup>97</sup>

Title IX looks beyond formal equality and reaches into the realm of substantive equality.<sup>98</sup> Theories of substantive equality look to “a rule’s results or effects” and “take account of [sex-associated] differences to avoid differential impacts that are considered unfair.”<sup>99</sup>

#### A. Legislative History: Title IX Purpose and Scope

In the early 1970s, Oregon Congresswoman Edith Green introduced legislation containing language calling for gender equity in education.<sup>100</sup> After hearings on the issue, the Senate passed amendments banning sex discrimination in educational institutions that receive federal funding.<sup>101</sup> On June 23, 1972, President Nixon signed Title IX of the Education Amendments into law.<sup>102</sup> Congress tasked the Department of Health, Education and Welfare with determining the Act’s implementation, and the Office for Civil Rights (OCR) with overseeing its enforcement.<sup>103</sup> Courts have consistently deferred to OCR’s regulations declared pursuant to Title IX legislation,<sup>104</sup> but have afforded varying levels of deference to OCR Policy Guidance and other administrative documents.<sup>105</sup>

Title IX passed with two objectives in mind: to avoid the use of federal resources to support discriminatory practices, and “to provide individual citizens effective protection against those practices.”<sup>106</sup> In support of the Amendment, Senator Bayh stated:

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97. *Id.*; LeClair, *supra* note 17, at 314.

98. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217, 263 (2005).

99. *Id.*

100. LeClair, *supra* note 17, at 314.

101. *Id.*

102. *Id.*

103. *See, e.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 647 (1999).

104. *See, e.g., id.* at 643–44 (recognizing peer sexual harassment as actionable in part because the regulatory scheme provided notice to Title IX recipients of potential liability for discriminatory acts of non-agents).

105. *See Doe v. Claiborne County*, 103 F.3d 495, 514 (6th Cir. 1996) (holding OCR guidance does not have “force of law” but merits consideration). *Compare Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993) (affording substantial deference to OCR Policy Interpretation because it is an agency’s interpretation of its own regulations), *with Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1033 (7th Cir. 1997) (not affording substantial deference to OCR Policy Interpretation because it was neither regulation nor founded on the text of Title IX).

106. Margaret Juliano, *Forty Years of Title IX: History and New Applicants*, 14 DEL. L. REV. 1, 83 (2013); *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 (1979).

While the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choices with equal pay for equal work.<sup>107</sup>

In this way, Title IX functions not as an affirmative action statute, but rather as an anti-discrimination statute modeled after Title VI and Title VII.<sup>108</sup> However, Title IX's objectives are distinct: Title IX is intended to prevent federal resources from supporting discriminatory practices in educational programs and protecting individuals against those practices.<sup>109</sup>

The first purpose—to avoid federal funding for discriminatory practices—is generally served by the public remedy which terminates federal funding for findings of discrimination on the basis of sex within educational programs.<sup>110</sup> However, in *Canon v. University of Chicago*, the Supreme Court recognized an implied private cause of action under Title IX for victims of prohibited discrimination.<sup>111</sup> As such, the Court suggested less severe remedial measures may be more appropriate for cases with isolated incidents.<sup>112</sup> For example, a violation might be remedied by an order requiring acceptance of an improperly excluded applicant.<sup>113</sup> Given an individual's interest is to obtain a benefit for themselves, the Court recognized that a private right of action is necessary to carry out the intentions of Title IX.<sup>114</sup> Moreover, an alternative remedy to an elimination of federal funding is advantageous for individuals in that it does not require the plaintiff to demonstrate that “an institution's practices are so pervasively discriminatory that a complete cut-off of federal funding is appropriate.”<sup>115</sup>

In recognizing that Title IX is enforceable through an implied right of action, the Supreme Court later held in *Franklin v. Winnett County Public Schools* that a damages remedy is available to plaintiffs,

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107. 118 CONG. REC. 5806–07 (daily ed. Feb. 28, 1972); see Paul C. Sweeney, *Abuse & Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 62 (1997).

108. Juliano, *supra* note 106; see Cannon 441 U.S. at 695 (“Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the words ‘race, color, or national origin’ in Title VI, the two statutes use identical language to describe the benefited class.”).

109. See *Cannon*, 441 U.S. at 704.

110. *Id.*

111. *Id.* at 703.

112. *Id.* at 704.

113. *Id.* at 705.

114. *Id.* at 704.

115. *Cannon*, 441 U.S. at 705.



thereby incentivizing plaintiffs to litigate cases.<sup>116</sup> In its holding, the Court stated: “[u]nless Congress expressly legislates a more limited remedial policy with respect to rights of action it does not know its creating, it intends the full gamut of remedies to be applied.”<sup>117</sup> As demonstrated by the respective cases, the Supreme Court has broadly interpreted Title IX to further Congress’ goal of eliminating sex-based discrimination.<sup>118</sup>

To bring a claim under Title IX, an individual must prove that they were subjected to exclusion from participation in, denied educational benefits of, or discriminated against by “any education program or activity receiving Federal financial assistance[.]”<sup>119</sup> Therefore, any recipient of federal funding for education can be liable for sex discrimination. “The most common defendants are educational institutions and school boards.”<sup>120</sup> The specific elements of a Title IX claim vary depending on the type of claim brought and the facts of the particular case.<sup>121</sup>

### *B. Disparate Impact Under Title IX*

Generally, anti-discrimination laws protect members of the protected class against both disparate treatment and disparate impact.<sup>122</sup> In a disparate impact case, the plaintiff must prove that a “particular practice has caused a significant adverse effect on a protected group.”<sup>123</sup> Unlike a disparate treatment claim, a disparate impact claim would not require the plaintiff to show that a defendant had a discriminatory purpose.<sup>124</sup> Disparate impact, instead, focuses “on the consequences of the complained-of practice.”<sup>125</sup> A disparate impact analysis, therefore, will consist mainly of statistical evidence to demonstrate the adverse effect.<sup>126</sup>

Two cases have alleged disparate impact as a basis for relief under Title IX, and each had inconclusive results.<sup>127</sup> In *Cannon*, a

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116. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 65–66 (1992).

117. *Id.* at 77.

118. *Id.* at 62.

119. 20 U.S.C.S. § 1681(a).

120. Hayley Macon, Lisa Mottet, Julia Mujal & Lara Cartwright-Smith, *Introduction to Title IX*, 1 GEO. J. GENDER & L. 417, 420–21 (2000).

121. *Id.* at 421–22.

122. James S. Wrona, *Eradicating Sex Discrimination in Education: Extending Disparate-Impact Analysis to Title IX Litigation*, 21 PEPP. L. REV. 1, 8 (1993).

123. *Id.* at 3.

124. *Id.* at 11; *see* *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

125. Wrona, *supra* note 122, at 11.

126. *Id.* at 15.

127. *See Cannon*, 441 U.S. at 688–90; *De la Cruz v. Tormey*, 582 F.2d 45, 50–51 (9th Cir. 1978).

female applicant to a medical school argued that the school's policy of not admitting persons over the age of thirty unless they possess an advanced degree has a disparate impact on women and therefore violated Title IX.<sup>128</sup> The plaintiff argued that invidious intent is not required, but the district court dismissed the complaint for failure to allege purposeful discrimination.<sup>129</sup> In *De la Cruz v. Tormey*, the plaintiffs claimed that the school district's failure to provide students with child care facilities had a disparate impact on women.<sup>130</sup> The Court of Appeals for the Ninth Circuit held that the pleadings stated a claim upon which relief could be granted under Title IX, but left unresolved whether proof of discriminatory intent is necessary for a claim to succeed.<sup>131</sup> While Congress clearly intended Title IX to eliminate explicit sex discrimination in educational programs, these cases demonstrate that the standard for determining disparate impact under Title IX remains unclear.<sup>132</sup>

Given the ambiguous nature of disparate impact analyses, some courts have used Title VI and Title VII principles to analyze Title IX cases.<sup>133</sup> Title VI of the Civil Rights Act of 1964 prohibits federally funded programs, activities and institutions from discriminating based on race, color, or national origin.<sup>134</sup> Congress deliberately drafted Title VI and Title IX with nearly identical language, structure, and form.<sup>135</sup>

Meanwhile, Title VII of the Civil Rights Act of 1964 prohibits discrimination against any individual with respect to that individual's terms and conditions of employment because of race, color, religion, sex, or national origin.<sup>136</sup> Title VII applies to private, federal government, state government, and local government employers that employ fifteen or more employees.<sup>137</sup> While Title VII and Title IX have different standards by which defendants can be found liable,<sup>138</sup> Title VII cases can serve as a useful framework for guiding

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128. *Cannon*, 441 U.S. at 688–90.

129. *Id.*

130. *De la Cruz*, 582 F.2d at 47.

131. *Id.* at 49, 54 n.6.

132. *See, e.g., id.* at 60–61.

133. *See Jeldness v. Pearce*, 30 F.3d 1220, 1227, 1233 (9th Cir. 1994).

134. *See* 42 U.S.C.A. § 2000(d) (West 1964).

135. Macon et al., *supra* note 120, at 422.

136. 42 U.S.C. § 2000e-2 (explaining that Title VII also prohibits harassment and retaliation for protected activity).

137. *Id.*

138. Jennifer A. Harper, *What Athletic Directors Need to Know: A Title IX & Title VII Primer*, WINTHROP (Oct. 29, 2012), <https://winthropintelligence.com/2012/10/29/what-athletic-directors-need-to-know-a-title-vii-title-ix-primer> [<https://perma.cc/KHD5-UZDP>] (explaining that Title IX prevents federal funding of discriminatory actions, while Title VII has a compensatory scheme that protects employees and applicants from discrimination).

sex discrimination cases under Title IX.<sup>139</sup> Under Title VII, the leading case involving disparate-impact analysis is *Griggs v. Duke Power*.<sup>140</sup> In *Griggs*, employees challenged a facially neutral testing policy as a racially discriminatory practice under Title VII.<sup>141</sup> The Supreme Court stated that “the Act proscribes not only overt discrimination but also practices that are unfair in form, but discriminatory in operation.”<sup>142</sup> In *Connecticut v. Teal*, the Court established the *Griggs* impact into a three-prong test:

To establish a prima facie case of discrimination, [1] a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. [2] If that showing is made, the employer must then demonstrate that ‘any given requirement [has] a manifest relationship to the employment in question,’ in order to avoid a finding of discrimination. [3] Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.<sup>143</sup>

The second prong refers to the business-necessity defense.<sup>144</sup> Here, the employer carries the burden of producing evidence of a business justification for the employment practice.<sup>145</sup> A plaintiff can show a policy was not neutral, but rather pretext for discrimination, by demonstrating there were alternative policies available that would have a less discriminatory impact on the protected class.<sup>146</sup>

Assuming that the disparate impact test is extended to Title IX cases as it is in Title VII, courts would apply the *Griggs* analysis for disparate impact cases. Like the business necessity defense under Title VII, courts could afford defendants a chance to proffer a legitimate non-discriminatory reason for a practice so long as it is consistent with business necessity, or under Title IX, educational necessity. To accomplish Congress’ goal of eliminating sex-based discrimination, an educational necessity defense under Title IX must be narrowly construed and scrutinized closely.

Failing to extend a disparate impact theory under Title IX will render the legislation largely ineffective, for it would only cover the

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139. *See id.*

140. Wrona, *supra* note 122, at 11–12.

141. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971).

142. *Id.* at 431.

143. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

144. *Id.*

145. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 649 (1989).

146. Wrona, *supra* note 122, at 15 (“Other tests or selection devices, without a similarly undesirable racial effect, would serve the employers’ legitimate [hiring] interest[s].”).

most explicit forms of sex discrimination in education.<sup>147</sup> To meet its mandate of eliminating sex discrimination under Title IX, the Department of Education placed regulations on facially neutral policies.<sup>148</sup> Other policies which do not fall directly under the regulations include restrictions on part-time attendance, restrictions on part-time employment benefits, and nepotism rules for married couples.<sup>149</sup>

#### IV. APPLYING A DISPARATE IMPACT ANALYSIS TO ABSTINENCE-CENTRIC EDUCATION

The prevalence of sexual assault and its subsequent long-lasting, negative impacts on victims' educational and economic opportunities makes sexual assault a serious barrier to women's equal access to education.<sup>150</sup> Negative effects on victims' access to education include: impact on grades, ability to stay at the institution of one's choice, ability to graduate on time, and even ability to continue one's education.<sup>151</sup> In addition, sexual assault, along with all forms of sexual harassment, negatively impacts a victim's mental health, thereby leading to increased risk of depression, post-traumatic stress disorder, and suicidality.<sup>152</sup> In recognizing this barrier to educational access, Title IX now requires post-secondary schools to address sexual assault as a form of sex discrimination.<sup>153</sup>

The crux of this Note argues that to achieve Congress' mandate—ending sex discrimination in educational institutions—schools must be held accountable for the ways in which they propagate “rape culture” and further the disproportionate victimization of female students.<sup>154</sup> Moreover, post-secondary schools are not alone in their

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147. *See id.* at 16–17.

148. Kim Rubin, *Disparate Impact Suit under Title IX*, 33 STAN. L. REV. 737, 738–39 (1981).

149. *Id.* at 740.

150. Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 637 (2018).

151. *Id.* at 638.

152. *Id.*

153. *Id.*

154. *See* Holly Jeanine Boux & Courtenay W. Daum, *At the Intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge the Real Rape Myth in the Criminal Justice System*, 2015 U. ILL. J.L. TECH. & POL'Y 149, 153 (2015). “Rape culture,” is the set of social attitudes about sexual assault that leads to survivors being treated with skepticism and even hostility, while perpetrators are shown empathy and imbued with credibility not conferred on people accused of other serious crimes. *Id.*

While there is no definition or exhaustive listing of the various components that constitute rape culture in the United States, various socio-cultural and legal elements intersect to construct and substantiate rape culture. Sexual violence and rape being validated, justified, and obfuscated, and the constraints on women and their behavior, are key parts of rape culture.

*Id.*

responsibility to students. All students deserve protection from sex discrimination at the hands of the school as well as their peers. Thus, middle and high school curricula that perpetuate or reinforce gender stereotypes and victim blaming, like abstinence-centric education does, are inconsistent with the goals of Title IX.

*A. Abstinence-Centric Education and Its Disparate Impact on Female Students*

In a disparate impact analysis under Title IX, the educational policy in question is the practice of providing students with information that advances an abstinence-centric agenda.<sup>155</sup> The disparate impact of the policy is the increased victimization of female students to sexual and dating violence.<sup>156</sup>

Youth sexual victimization is an established problem. Nearly one in six (16.3%) adolescents ages fourteen to seventeen were sexually victimized in 2008, and more than one in four (27.3%) were victimized during their lifetimes.<sup>157</sup> Of those victimized, eighty-two percent were female.<sup>158</sup> Girls aged sixteen to nineteen are *four times more likely than the general population* to be victims of rape, attempted rape, or sexual assault.<sup>159</sup>

As discussed in a previous section, abstinence-centric programs that often indoctrinate feelings of shame, fear, and guilt likely contribute to under-reporting of the already higher rates of violence amongst young women as compared to their male counterparts.<sup>160</sup> This programming lends itself to victim blaming by sending the message that young women should not have been engaging in intimate relationships to begin with: it is the girl's fault for placing herself in the position to be abused.<sup>161</sup> Abstinence-centric education can compound existing feelings of shame that are all too familiar to victims of sexual assault, further hindering reporting.<sup>162</sup>

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155. Cf. Harper, *supra* note 138.

156. Cf. *id.*

157. David Finkelhor, Heather Turner, Richard Ormrod, Sherry Hamby & Kristen Kracke, CHILDREN'S EXPOSURE TO VIOLENCE: A COMPREHENSIVE NATIONAL SURVEY 5–6 (U.S. Dep't of Just.: Off. of Juv. Just. & Delinquency Protection Oct. 2009), <https://ojjdp.ojp.gov/library/publications/childrens-exposure-violence-comprehensive-national-survey> [<https://perma.cc/5DQY-PJHP>]. Sexual victimization includes attempted and completed rape; sexual assault by a known adult, an adult stranger, or a peer; flashing or sexual exposure by an adult or peer; sexual harassment; and statutory sexual offenses. *Id.*

158. *Children and Teens: Statistics, RAPE, ABUSE, & INCEST NAT'L NETWORK*, <https://www.rainn.org/statistics/children-and-teens> [<https://perma.cc/8GEV-6TTK>] (last visited Apr. 7, 2022).

159. *Id.*

160. See Fine & McClelland, *supra* note 61, at 298.

161. See Fine, *supra* note 64, at 77.

162. See Lanford, *supra* note 69, at 73.

Teen dating violence is another significant problem among youth.<sup>163</sup> Studies show that nearly one in eleven female high school students and approximately one in fifteen male high school students report having experienced physical dating violence in the last year.<sup>164</sup> Together, nearly ten percent of high school students experienced physical harm, including but not limited to, being hit, slammed, or injured with an object.<sup>165</sup> About one in nine female and one in thirty-six male high school students experience sexual dating violence.<sup>166</sup> Moreover, twenty-six percent of women and fifteen percent of men who were victims of sexual violence, physical violence, and/or stalking by an intimate partner in their lifetime, first experienced these or other forms of violence by that partner before the age of eighteen.<sup>167</sup> While studies indicate that both males and females perpetrate adolescent dating violence, females are more likely than males to experience heightened fear and more severe forms of physical and sexual violence than males.<sup>168</sup>

Teen dating violence operates in a unique social context insofar as dating “functions to allow rehearsal of the roles teens expect to assume in adult relationships.”<sup>169</sup> Therefore, when adolescents begin exploring their sexuality through intimate relationships, they may conform to extreme stereotypical gender roles.<sup>170</sup> In such instances, males typically assume the dominant role, and females relegate themselves to a position of submissiveness.<sup>171</sup>

Peers expect a “boyfriend” to be sexually aggressive in, domineering in, and controlling of all aspects of the relationship. Males

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163. Stacy Brustin, *Legal Responses to Teen Dating Violence*, 29 FAM. L. Q. 331, 331–32 (1995). Teen dating violence is defined broadly as physical, psychological, or sexual abuse occurring between individuals, at least one of whom is under eighteen, who are married, living together, have children together, or are involved in a dating relationship or in an attempted dating relationship. *Id.*

164. *Preventing Teen Dating Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/teendatingviolence/fastfact.html> [<https://perma.cc/PEW7-RMT5>] (last visited Apr. 7, 2022).

165. Centers for Disease Control and Prevention, *Youth Risk Behavior Surveillance—United States, 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. (supp.) 1, 31 (Aug. 21, 2020).

166. *Id.*

167. Michele C. Black, Kathleen C. Basile, Matthew J. Breiding, Sharon G. Smith, Mikel L. Walters, Melissa T. Merrick, Jieru Chen & Mark R. Stevens, *NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT*, 2 (Ctrs. for Disease Control and Prevention Nov. 2011), [https://www.cdc.gov/violenceprevention/pdf/NISVS\\_Executive\\_Summary-a.pdf](https://www.cdc.gov/violenceprevention/pdf/NISVS_Executive_Summary-a.pdf) [<https://perma.cc/95E5-NYGM>].

168. Brustin, *supra* note 163, at 334.

169. See Katheryn E. Suarez, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 CAL. L. REV. 423, 427 (1994).

170. *Id.*

171. *Id.*

inflict violence to demonstrate masculinity. On the other hand, girlfriends are expected to be caretakers, responsible for the success of the relationship and dependent upon the boyfriend for social acceptance and self-esteem.<sup>172</sup>

“Because of the sexism inherent in this role playing, teen dating provides an environment [prone to] abuse.”<sup>173</sup> Further, the social pressure for adolescents to conform to norms renders teens even more susceptible to violence.<sup>174</sup>

The scholarship on teenage dating violence provides various explanations for the violence.<sup>175</sup> Studies suggest that adolescents receive encouragement through both the media and social norms that men should dominate women in relationships, including the right to use physically and sexually aggressive behavior.<sup>176</sup> Additionally, other studies indicate that violence is a learned behavior, likely connected to relationships that occur within the home.<sup>177</sup>

According to the Centers for Disease Control, preventing teen dating violence requires “supporting the development of healthy, respectful, and nonviolent relationships.”<sup>178</sup> During adolescence, it is imperative that youth learn the necessary skills to create and maintain health relationships.<sup>179</sup> This development requires educators to be able to speak freely about healthy sexuality and work to end toxic gender norms, and not perpetuate them through abstinence-centric education.<sup>180</sup>

Another challenge for adolescent victims of sexual and dating violence is “normative confusion.”<sup>181</sup> Unfamiliar with the norms of sexuality and intimacy, adolescents may not identify a relationship as abusive, but rather interpret violence as a sign of jealousy, and jealousy as a sign of love.<sup>182</sup> Even in cases where abuse is recognized, adolescents then tend to rationalize it by attributing the abuse to some other difficulty in the relationship; “if only those other problems would go away . . . then so would the abuse.”<sup>183</sup> Over-rationalizations such as this—along with the pressures to conform to peer expectation,

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172. *Id.*

173. *Id.*

174. *Id.*

175. Brustin, *supra* note 163, at 335.

176. *Id.*

177. *Id.* at 335–36.

178. *Preventing Teen Dating Violence*, *supra* note 164.

179. *Id.*

180. *Id.*

181. Suarez, *supra* note 169, at 429.

182. *Id.*

183. *Id.*

lack of experience with intimate relationships, a perceived need to adhere to gender roles, low self-esteem, and a reluctance to seek assistance from adults—help explain why adolescents stay in abusive relationships.<sup>184</sup>

Adolescent victims of violence undergo lasting physical, psychological, and emotional harm.<sup>185</sup> “They suffer from difficulties with attachment, regressive behavior, anxiety, depression, aggression, and conduct problems.”<sup>186</sup> In addition, “they may be more prone to dating violence, delinquency, further victimization, and involvement with the child welfare and juvenile justice systems.”<sup>187</sup>

Taken together, abstinence-centric education increases risk of victimization by perpetuating gendered stereotypes—female passivity and male aggressiveness—that are disproportionately harmful to female students. These educational programs ignore the fact that many teens experience sexual violence, leaving students that cannot or have not chosen abstinence to feel guilty for their experiences rather than supported by the schools. Moreover, by reinforcing gendered stereotypes, these programs contribute to rape culture by normalizing and promoting male aggression.

### *B. Educational Necessity Defense*

Assuming the connection between abstinence-centric education and increased sexual and dating violence succeeds in establishing a disparate impact on female students, schools implementing abstinence-centric education will assert an education necessity defense.<sup>188</sup> Here, schools will likely argue the typical justifications for abstinence programs: that abstinence is the most effective way to prevent teen pregnancy and reduce the transmission of sexually transmitted disease or infections.<sup>189</sup> In other words, teaching abstinence

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184. Brustin, *supra* note 163, at 336–37.

185. Finkelhor et al., *supra* note 157, at 2.

186. *Id.* at 2.

187. *Id.*

188. *Cf. Teal*, 457 U.S. at 446.

189. *See, e.g.*, George W. Bush, State of the Union Address 88 (Jan. 21, 2004) (transcript available online at the National Archives: Public Papers of the President), <https://www.govinfo.gov/content/pkg/PPP-2004-book1/html/PPP-2004-book1-doc-pg81-2.html> [<https://perma.cc/3MZJ-57ES>].

To encourage right choices, we must be willing to confront the dangers young people face . . . Each year, about three million teenagers contract sexually transmitted diseases that can harm them, kill them, or prevent them from ever becoming parents. In my budget, I propose a grassroots campaign to help inform families about these medical risks. We will double Federal funding for abstinence programs, so that schools can teach this fact



serves an important governmental interest in safeguarding students from harm that can come from risky sexual behavior; for example, proponents of abstinence-only education often warn of harmful psychological effects, particularly for female adolescents, that result from premarital sex.<sup>190</sup>

*C. Pretext for Discrimination: Alternative Methods with Less Discriminatory Effects*

A plaintiff in this hypothetical situation will likely demonstrate that the educational defense fails because it is ineffective, and there are alternative ways to serve the educational institutions' goals with a less disparate impact.<sup>191</sup> While it may be true that if every teen abstained from sex, pregnancy and STD/STIs would be nonexistent among youth, studies have failed to show that abstinence education is effective in reducing teen sexual activity or the rate of teen pregnancy and STD/STI transmission.<sup>192</sup> Moreover, considerable evidence suggests that a comprehensive approach to sex education produces more favorable results as compared to abstinence-centric programs.<sup>193</sup> According to a 2012 meta-analysis by the Centers for Disease Control and Prevention, comprehensive education programs had positive effects on self-reported current sexual activity, finding higher use of protection and lower transmission of disease and rates of pregnancy.<sup>194</sup> Conversely, the meta-analysis of abstinence-centric programs found that there was insufficient change in sexual activity and sexual health outcomes.<sup>195</sup> In addition, the plaintiff will cite

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of life: Abstinence for young people is the only certain way to avoid sexually transmitted diseases.

*Id.*

190. *Contra* Julie F. Kay & Ashley Jackson, *Sex, Lies & Stereotypes: How Abstinence-Only Programs Harm Women and Girls*, LEGAL MOMENTUM, 20 (2008), [https://hrp.law.harvard.edu/wp-content/uploads/2013/03/sexlies\\_stereotypes2008.pdf](https://hrp.law.harvard.edu/wp-content/uploads/2013/03/sexlies_stereotypes2008.pdf) [<https://perma.cc/CLG9-UAW7>].

191. *Id.* at 27.

192. *See id.* at 11.

193. Douglas Kirby, *Emerging Answers: Research Findings on Programs to Reduce Teen Pregnancy and Sexually Transmitted Diseases*, NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, 15–16 (2007), <https://powertodecide.org/sites/default/files/resources/primary-download/emerging-answers.pdf> [<https://perma.cc/BVT6-4E88>].

194. John S. Santelli, Stephanie A. Grilo, Laura D. Lindberg, Ilene S. Speizer, Amy Schalet, Jennifer Heitel, Leslie M. Kantor, Terry McGovern, Mary A. Ott, Maureen E. Lyon, Jennifer Rogers, Craig J. He & Amanda J. Mason-Jones, *Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine*, 61 J. ADOLESCENT HEALTH 400, 401 (2017).

195. *Id.*; *see also* McGrath, *supra* note 22, at 669–70 (“Comprehensive programs offering multiple strategies to avoid [disease and pregnancy] have been documented effective, but there have been no peer-reviewed studies that have shown abstinence-only programs are effective for their stated purpose.”).

that there is no evidence that consensual sex between adolescents is psychologically harmful.<sup>196</sup>

Not only is abstinence-centric education ineffective, but there are also alternative methods schools can use to achieve the goal of protecting youth that have fewer discriminatory effects.<sup>197</sup> For example, comprehensive sex education can provide accurate information on contraceptives, how to use contraceptives, and where students can be tested for STI/STDs.<sup>198</sup> Moreover, programs can go further in protecting female students from sexual assault and dating violence by including information on healthy relationship building.<sup>199</sup> The Sexuality Information and Education Council of the United States has identified characteristics of effective comprehensive sex education:

- is research-based and theory-driven;
- focuses on clear health goals and specific behavioral outcomes;
- provides functional knowledge that is basic, accurate, and directly contributes to health-promoting decisions and behaviors;
- provides opportunities to reinforce essential skills that are necessary to adopt, practice, and maintain positive health behaviors;
- addresses individual values, attitudes, and beliefs and group norms that support health-enhancing behaviors;
- focuses on increasing personal perceptions of risk and harmfulness of engaging in specific unhealthy practices and behaviors, as well as reinforcing protective factors;
- addresses social pressures and influences;
- builds personal competence, social competence, and self-efficacy by addressing skills;
- uses strategies designed to personalize information and engage students;
- provides age and development-appropriate information, learning strategies, teaching methods, and materials;
- engages in cooperative and active learning strategies;

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196. Santelli et al., *supra* note 194, at 401.

197. Kay & Jackson, *supra* note 190, at 27.

198. See Committee on Adolescent Health Care, *Comprehensive Sexuality Education*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (2020), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/11/comprehensive-sexuality-education> [<https://perma.cc/F8RA-HGXM>].

199. See, e.g., FUTURE OF SEX EDUCATION, *National Sex Education Standards: Core Content and Skills, K–12*, 14 (2d ed. 2020), <https://siecus.org/wp-content/uploads/2020/03/NSES-2020-2.pdf> [<https://perma.cc/3JW4-PMDR>].

- incorporates learning strategies, teaching methods, and materials that are trauma-informed, culturally inclusive, sex positive, and grounded in social justice and equity;
- provides adequate time for instruction and learning and for students to practice skills relating to sex education;
- provides opportunities to make connections with other influential persons;
- encourages the use of technology to access multiple valid sources of information, recognizing the significant role that technology plays in young people's lives; and
- includes teacher information and a plan for professional development and training to enhance effectiveness of instruction and student learning.<sup>200</sup>

Given educational institutions have alternative methods available to protect students from pregnancy and STD/STIs that not only have less discriminatory effects but also provide added benefits, the educational necessity defense will likely fail.

#### CONCLUSION

Sex education should be comprehensive and allow for discussion of healthy sexuality. By failing to provide this education, schools fail to protect students, particularly female students, from sexual and teen dating violence.<sup>201</sup> Moreover, schools actively exacerbate the problem by propagating rape culture through the promotion of harmful gender stereotypes that often shape teenage dating relationships. Sex education should, therefore, focus on equalizing “the interests of women and men in sexual interactions, teaching that it is everyone’s responsibility to elicit [their] partner’s sexual boundaries and [abide by] them.”<sup>202</sup>

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200. *Id.* at 12–13.

201. *See* Committee on Adolescent Health Care, *supra* note 198.

202. Anderson, *supra* note 55, at 105.

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