

SEX EDUCATION IN SCHOOLS

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I. INTRODUCTION

The teaching of sex education in the public-school system is a controversial topic. As a result, state statutes regulating sex education as well as methodologies used in sex education curricula vary widely. Topics covered by the law include general health education, sexually transmitted diseases (“STDs”), HIV/AIDS, contraception, abortion, and human sexuality. The Trump Administration has made changes to the federal funding available for abstinence-only programs, including cuts to funding for organizations taking part in President Obama’s Teen Pregnancy Prevention Program. The Trump Administration and current officials at the Department of Health and Human Services have emphasized the

need to embed “sexual delay” in sex education, as seen in a report released during the summer of 2018.¹

Part I of this Article surveys different state sex education laws, describes the recent challenges and proposed changes to state statutes, and breaks down the distribution of federal funding for both abstinence-only and comprehensive sex education programs. Part II discusses the judicial history of the challenges to sex education statutes. It examines differences between challenges to statutes that require sex education and challenges to statutes that limit topics that may be covered in a sex education curriculum. Part III of this Article highlights the political developments during the 2016 election cycle and recent findings regarding the effectiveness of various sex education programs, concluding with a discussion of the Trump Administration’s early treatment of the issue and proposed Republican policy shifts.

II. VARIATIONS IN STATE SEX EDUCATION POLICY

A. CURRENT STATUS OF SEX EDUCATION POLICY BY STATE

Sex education statutes vary significantly among the fifty states and the District of Columbia. Each state has different limitations and requirements regarding what public schools must, may, and cannot teach students. Many states expressly regulate teaching topics like abstinence, sexuality, STD prevention, HIV/AIDS, and sexual orientation. Some states grant local school boards a great deal of discretion, resulting in little uniformity in the teaching of sexual education throughout the state.

The majority of states expressly regulate the teaching of sexual education in public schools. Thirty-four states and the District of Columbia require public schools to include education about STDs or HIV/AIDS in their curricula (see Appendix A for a chart of sexual education laws in the states).² Kansas requires the teaching of “human sexuality” and does not require specific inclusions, but

1. Jessie Hellmann, *Abstinence Only Education Making a Comeback Under Trump*, THE HILL (Mar. 8, 2018), <https://thehill.com/policy/healthcare/377304-abstinence-only-education-making-a-comeback-under-trump>.

2. Alabama, California, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, West Virginia, and Wisconsin. See, e.g., CAL. EDUC. CODE § 51934 (West, Westlaw through Ch. 1016 of 2018 Reg. Sess.); CONN. GEN. STAT. ANN. § 10-220(a) (West, Westlaw through Jan. 1, 2019.) (requiring districts to provide training to educators and administrators on correlation between alcohol and drugs and STDs); GA. CODE ANN. § 20-2-143 (West, Westlaw through Ch. 1016 of 2018 Reg. Sess.) (requiring sex education, including curricula devoted to abstinence, STDs, and HIV/AIDS prevention); 105 ILL. COMP. STAT. ANN. 110/3 (West, Westlaw through P.A. 100-1114 of the 2018 Reg. Sess.); IND. CODE ANN. § 20-30-5-12 (West, Westlaw through 2018 2d Reg. Sess.); IOWA CODE ANN. §§ 256.11(3), (4), (5j) (West, Westlaw through 2018 Reg. Sess.) (requiring STD education, including information on HPV and the availability of an HPV vaccine, for grades seven through twelve and HIV/AIDS education for grades one through twelve); ME. REV. STAT. ANN. tit. 22, §§ 1902, 1910 (West, Westlaw through 2017 2d Reg. Sess.) (requiring comprehensive family life education, including education about family planning and

the state board of education provides a voluntary model curriculum.³ Florida, Mississippi, and North Dakota mandate abstinence-only or abstinence-plus teaching in public schools.⁴ Six states have statutes or codes that permit, but do not require, sex education.⁵ Three states require that schools teach health generally

STDs); MICH. COMP. LAWS ANN. § 380.1169 (West, Westlaw through P.A. 2018, No. 341 of the 2018 Reg. Sess.); MINN. STAT. ANN. § 121A.23 (West, Westlaw through 2018 Reg. Sess.) (requiring that each district have a program to reduce HIV and HPV transmission as well as a curriculum that helps students abstain from sexual activity until marriage); NEV. REV. STAT. ANN. § 389.036 (West, Westlaw through 2017 79th Reg. Sess.) (requiring HIV/AIDS, human reproduction, sexual responsibility, and STD education); N.H. REV. STAT. ANN. § 189:10 (West, Westlaw through Ch. 379 of the 2018 Reg. Sess.); N.C. GEN. STAT. ANN. §§ 115C-81.30 (West, Westlaw through 2018 Reg. Sess.) (requiring STD prevention education, including education about HIV/AIDS and HPV, as well as the effectiveness of FDA-approved contraceptive methods); OHIO REV. CODE ANN. § 3313.60(A)(5)(c) (West, Westlaw through 2017-2018 Sess.); OKLA. STAT. ANN. tit. 70, § 11-103.3 (West, Westlaw through 2018 2d Reg. Sess.); OR. REV. STAT. § 336.455(1) (West, Westlaw through 2018 Reg. Sess.) (requiring sex education, including education about the prevention of HIV and other STDs, as well as information about contraceptives); R.I. GEN. LAWS § 16-22-17(a) (West, Westlaw through Ch. 353 of the 2018 Jan. Sess.); S.C. CODE ANN. § 59-32-30(A) (West, Westlaw through 2018 Act No. 292) (requiring sex education in six through twelfth grades including coverage of STD and pregnancy prevention, but prohibiting education of STDs in kindergarten through fifth grade); UTAH CODE ANN. § 53G-10-402 (West, Westlaw through 2018 2d Spec. Sess.) (requiring education on prevention of communicable diseases, stressing abstinence before marriage as prevention method and prohibiting encouragement of contraceptive use); VT. STAT. ANN. tit. 16, §§ 131(1), (4) (West, Westlaw through 2017-2018 Sess.); WASH. REV. CODE ANN. §§ 28A.230.020, 230.070(1), (6)-(7) (West, Westlaw through 2018 Reg. Sess.); W. VA. CODE ANN. § 18-2-9(b) (West, Westlaw through 2018 Extra. Sess.); WIS. STAT. ANN. § 115.35 (West, Westlaw through 2017 Act 370); ALA. CODE ANN. 1975 16-40A-2 (West, Westlaw through Act 2018-579) (required to emphasize that abstinence is the only effective protection against STDs and HIV/AIDS); 14 DEL. ADMIN. CODE § 851 (West, Westlaw through Jan. 1, 2019) (requiring comprehensive sexuality education and an HIV prevention program); D.C. MUN. REGS. sub. 5-E, § 2305 (West, Westlaw through Dec. 29, 2017, District of Columbia Reg., Vol. 64, No. 52) (requiring instruction on human sexuality and reproduction, including intercourse, pregnancy, childbirth, venereal disease, contraception, and abortion); HI ST § 321-11.1 (West, Westlaw through 2018 2d. Spec. Sess.) (requiring abstinence-based sexuality education that includes instruction on HIV prevention); KY. REV. STAT. ANN. § 158.1415. (West, Westlaw through 2018 Reg. Sess.) (requiring education on how decision-making relates to responsible sexual behavior); MD. CODE ANN. § 13A.04.18.01 (F), (I) (West, Westlaw through Dec. 7, 2018, Md. Reg. Vol. 45, Iss. 25) (requiring education on human sexuality and STDs); MO. ANN. STAT. § 170.015 (West, Westlaw through 2018 Reg. Sess.); MONT. CODE ANN. § 10.54.7013 (1)(d) (West, Westlaw through Issue 24 of 2018 Mont. Ad. Reg.); N.J. STAT. ANN. § 18A:35-4.20 (West, Westlaw through Jan. 2, 2002) (requiring education in HIV/AIDS, sexually transmitted infections, HPV, pregnancy, and contraception); N.M. STAT. ANN. § 6.12.2.10 (West, Westlaw through Sept. 2, 2018); N.Y. COMP. CODES R. & REGS. tit. 8, § 135.3 (West, Westlaw through Jan. 16, 2019); 22 PA. CODE § 4.29(a) (West, Westlaw through Dec. 29, 2018).

3. See KAN. ADMIN. REGS. § 91-31-32(c)(9)(G) (through Dec. 9, 2016); KAN. ST. DEP'T OF EDUC., KANSAS MODEL CURRICULAR STANDARDS FOR HEALTH EDUCATION 14-15 (2018).

4. Both abstinence-only and abstinence-plus education programs promote sexual abstinence as the only certain way to prevent pregnancy and STDs. However, abstinence-plus education acknowledges that some teens will be sexually active and also teaches contraception and condom use. See CHRIS COLLINS ET. AL., AIDS RESEARCH INSTITUTE, UNIV. OF CAL. SAN FRANCISCO, ABSTINENCE ONLY V. COMPREHENSIVE EDUCATION: WHAT ARE THE ARGUMENTS? WHAT IS THE EVIDENCE? 1 (2002); See also FLA. STAT. ANN. §§ 1003.42(2)(n) (West, Westlaw through 2018 Reg. Sess.); MISS. CODE ANN. § 37-13-171(2) (West, Westlaw through 2018 Reg. Sess. and 1st Extra. Sess.); N.D. CENT. CODE ANN. § 15.1-21-24 (West, Westlaw through 2017 Reg. Sess.).

5. Arizona, Colorado, Idaho, Louisiana, Massachusetts, and Virginia permit sex education. See ARIZ. REV. STAT. ANN. § 15-716(A) (West, Westlaw through 2018 1st Extra. Sess. and 2d Reg. Sess.); COLO.

while not specifically requiring sex education.⁶ The three remaining states remain silent on sex education, entrusting the decision to local school boards.⁷

Controversial topics, such as the prevention of STDs, contraception, abortion, and sexuality, are occasionally taught in classrooms. There is little uniformity among the states as to how such issues should be taught. Many states and the District of Columbia require schools to educate students on the prevention and transmission of STDs including and in addition to HIV/AIDS.⁸ Kansas, South

REV. STAT. ANN. § 22-25-104(1) (West, Westlaw through 2018 2d Reg. Sess.) (providing guidelines if sex education is implemented); IDAHO CODE ANN. § 33-1608 (West, Westlaw through 2018 2d Reg. Sess.); LA. REV. STAT. ANN. § 17:281 (West, Westlaw through 2018 3d. Extra. Sess.); MASS. GEN. LAWS ANN. ch. 69, § 1L (West, Westlaw through 2018 2d Ann. Sess.); 8 VA. ADMIN. CODE § 20-131-170 (West, Westlaw through July 9, 2018) (allowing schools to implement programs to attempt to reduce the incidence of pregnancy and STDs among teenagers).

6. Nebraska, Texas, and Wyoming require the teaching of general health. *See* NEB. REV. STAT. § 79-712 (West, Westlaw through 2018 2d Reg. Sess.) (comprehensive health program must address drug and alcohol abuse, but statute does not reference sex education); TEX. EDUC. CODE ANN. § 28.002(a)(2)(B) (West, Westlaw through 2017 Reg. Sess., 85th Leg.) (requiring health education with an emphasis on nutrition and exercise); WYO. STAT. ANN. § 21-9-101(b)(i)(G) (West, Westlaw through 2018 Budget Sess.) (each school district shall develop health and safety curriculum).

7. Alaska, Arkansas, and South Dakota. *See* ALASKA STAT. § 14.30.360(a) (West, Westlaw through 2018 2d Reg. Sess.) (districts are “encouraged” to conduct a health program); ARK. CODE ANN. § 6-16-132(c) (West, Westlaw through 2018 2d Extra. Sess.); S.D. CODIFIED LAWS § 13-1-12.1 (West, Westlaw through 2018 Reg. Sess. & S.C. Rule 18-15) (allowing school boards to submit curriculum plans to state board of education for funding approval).

8. Delaware, District of Columbia, Florida, Georgia, Hawaii, Iowa, Kentucky, Maine, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, West Virginia, and Wisconsin. *See* 14 DEL. ADMIN. CODE § 851.1.1.4 (West, Westlaw through Jan. 1, 2019) (requiring comprehensive sexuality education and an HIV prevention program); D.C. MUN. REGS. tit. 5, §§ 2304.3, 2305.1(a) (West, Westlaw through Jan. 11, 2019, District of Columbia Reg., Vol. 66, No. 2); FLA. STAT. ANN. §§ 1003.42(n), 43(3)(i), 46(1) (West, Westlaw through 2018 2d Reg. Sess.) (requiring education on the prevention and control of disease, with an option for schools to teach more specifically about AIDS and other STDs); GA. CODE ANN. § 20-2-143(b) (West, Westlaw through 2018 Reg. Sess.); HAW. REV. STAT. § 321-11.1(a) (West, Westlaw through 2018 2d. Spec. Sess.) (requiring sexuality health education programs provide medically accurate, age-appropriate factual information on disease prevention); IOWA CODE ANN. § 256.11(3), (4), (5)(j)(1) (West, Westlaw through 2018 Reg. Sess.); KY. DEP’T OF EDUC., KY. CORE ACAD. STDS. 652 (2015) (requiring education on how decision-making relates to responsible sexual behavior including preventing HIV and STDs); ME. REV. STAT. ANN. tit. 22, §§ 1902(1-A), 1910 (West, Westlaw through 2017 2d Reg. Sess. and 2d. Spec. Sess.) (requiring comprehensive family life education, including medically-accurate and age-appropriate education on STDs); MINN. STAT. ANN. § 121A.23 (West, Westlaw through 2018 Reg. Sess.) (requiring schools to develop and implement curricula on HPV and HIV/AIDS prevention, in addition to other STDs); Nev. Rev. Stat. Ann. § 389.065 (West, Westlaw through 2017 Reg. Sess.) (requiring factual instruction concerning AIDS, communicable diseases, and sexual responsibility); N.H. REV. STAT. ANN. § 189:10 (West, Westlaw through 2018 Reg. Sess.); N.C. GEN. STAT. ANN. §§ 115C-81(e1)(1)(k), (e1)(4), (e1)(4a) (West, Westlaw through 2013 Reg. Sess.) (requiring STD prevention education, including education about AIDS and HPV, as well as the effectiveness of FDA-approved contraceptive methods); OHIO REV. CODE ANN. § 3313.60(A)(5)(c) (West, Westlaw through June 20, 2014); OR. REV. STAT. § 336.455(2) (West, Westlaw through 2014 Reg. Sess.) (requiring medically accurate, age-appropriate education on the prevention of HIV and other STDs); 22 PA. CODE § 4.29(a) (2014) (requiring HIV/AIDS prevention education from primary through high school, allowing omission of sexual modes of transmission when teaching elementary grades); R.I. GEN. LAWS §§ 16-22-17(a), 18 (West, Westlaw

Carolina, South Dakota, and Utah require schools to teach about risks and prevention of STDs, without mandating HIV/AIDS instruction.⁹ Colorado, Illinois, Louisiana, and Virginia require schools electing to teach sexual education to include instruction on the transmission and prevention of STDs.¹⁰ Idaho requires schools electing to teach sex education to provide “scientific, physiological information for understanding sex and its relation to the miracle of life.”¹¹ Arizona and Arkansas permit, but do not require, curricula that include information on the transmission and prevention of HIV/AIDS and other STDs.¹² Massachusetts allows local school boards to decide whether to offer sex education, but any sex education course must include instruction on HIV/AIDS prevention.¹³ Alabama, California, Indiana, Maryland, Michigan, and Missouri require instruction on HIV/AIDS, but not for other STDs. They do, however, set minimum content standards for schools that elect to provide instruction on the transmission and prevention of STDs other than HIV.¹⁴ Connecticut requires instruction on HIV/

through 2014 Jan. Sess., ch. 555.) (requiring health and family life courses, with an emphasis on abstinence as the preferred method of the prevention of HIV/AIDS transmission and other STDs); VT. STAT. ANN. tit. 16, §§ 131(1), (4) (West, Westlaw through 2013-2014 Sess., No. 101); WASH. REV. CODE ANN. § § 28A.230.020, 230.070(1), (6)-(7) (West, Westlaw through 2014); W. VA. CODE § 18-2-9 (b) (West, Westlaw through 2014 2d Ex. Sess.); WIS. STAT. ANN. § 115.35 (West, Westlaw through 2013 Act 380); MONT. ADMIN. R. 10.54.7013 (2014); N.J. DEP’T OF EDUC., 2014 NEW JERSEY CORE CURRICULUM CONTENT STANDARDS FOR COMPREHENSIVE HEALTH AND PHYSICAL EDUCATION (2014) (requiring education in HIV/AIDS, STIs, HPV, pregnancy, and contraception).

9. Kansas administrative regulations require the teaching of health and human sexuality generally but leave recommended model curricula to the State Board of Education. *See* KAN. ADMIN. REGS. § 91-31-32(c)(9)(G) (West, Westlaw through Dec. 27, 2018). The State Board of Education publishes the *Kansas Model Curricular Standards for Health Education*, which recommends instruction on the risks and prevention of sexually-transmitted infections. KAN. ST. DEP’T OF EDUC., KANSAS MODEL CURRICULAR STANDARDS FOR HEALTH EDUCATION 41 (2007). South Carolina requires instruction on STDs beginning in sixth grade. S.C. CODE ANN. § 59-32-30(A) (West, Westlaw through 2018 Reg. Sess.); S.D. CODIFIED LAWS § 13-33-1 (West, Westlaw through 2018 Reg. Sess. and S.C. Rule 14-10) (requiring “substantial conformity” to the accreditation standards adopted by the South Dakota Board of Education); S.D. DEP’T OF EDUC. AND CULTURAL AFFAIRS, SOUTH DAKOTA HEALTH EDUCATION STANDARDS (2018) (requiring instruction on sexuality and risky sexual behavior); UTAH CODE ANN. § 53G-10-402(2)(a) (West, Westlaw through 2018 2d Spec. Sess.) (requiring education on prevention of communicable diseases, stressing abstinence before marriage as prevention method).

10. COLO. REV. STAT. ANN. § 22-25-104(6)(a) (West, Westlaw through 2018 2d Reg. Sess.); 105 ILL. COMP. STAT. ANN. 5/27-9.1(c)(3), (5) (West, Westlaw through 2018 Reg. Sess., P.A. 100-1173); LA. REV. STAT. ANN. § 17:281(A)(2) (West, Westlaw through 2018 Reg. Sess.) (education must “emphasize that abstinence from sexual activity is a way to avoid unwanted pregnancy [and] STDs, including [AIDS] ...”); LA. Admin. Code pt LIX, 521(A)(4) (West, Westlaw through 2018); VA. CODE A. § 22.1-207.1 (West, Westlaw through 2018 Reg. Sess.).

11. IDAHO CODE ANN. § 33-1608(b) (West, Westlaw through 2018 2d Reg. Sess.).

12. ARIZ. REV. STAT. ANN. § 15-716 (West, Westlaw through 2018 1st Spec. Sess. and 2d Reg. Sess.); ARK. CODE ANN. § 6-18-703(d) (West, Westlaw through 2018 2d Extra. Sess.).

13. *See* MASS. GEN. LAWS ANN. ch. 69, § 1L (West, Westlaw through 2018 2d Ann. Sess., ch. 379).

14. *See* ALA. ST. DEP’T OF EDUC., ALA. COURSE OF STUDY: HEALTH EDUC. (2009) (requiring HIV/AIDS education in grades five through twelve); ALA. CODE § 16-40A-2 (West, Westlaw through 2018 Reg. Sess.); CAL. EDUC. CODE §§ 51933(b), 51934(b) (West, Westlaw through Ch. 931 of 2018 Reg. Sess., Res. Ch. 1 of 2017-2018 2d Extra. Sess.) (permitting HIV/AIDS prevention education in any grade and requiring it at least once in middle school and once in high school); CAL. HEALTH & SAFETY CODE §§ 151002(a)-(b) (West, Westlaw through Ch. 1016 of 2018 Reg. Sess.); IND. CODE ANN. § 20-30-

AIDS transmission and prevention and requires the state board of education to develop curriculum guides that cover “human sexuality,” without setting specific content guidelines.¹⁵ New Mexico, New York, and Oklahoma require HIV/AIDS instruction but do not mandate additional instruction on STDs.¹⁶ Tennessee is unique in requiring any county whose pregnancy rates have risen higher than 19.5 pregnancies per 1,000 females ages fifteen to seventeen to implement family life education in accordance with curriculum guidelines provided by the state board of education.¹⁷ If family life education is implemented, Tennessee’s *Health Education Standards* curriculum mandates teaching STD prevention, including the prevention of HIV/AIDS.¹⁸

Some states have limited what sex education programs can teach to certain principles only. For example, Alabama, Arkansas, Hawaii, Illinois, Mississippi, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, and Utah require that abstinence, typically until marriage, must be emphasized as the best way to prevent diseases whenever STD prevention is taught in schools.¹⁹ Nebraska’s law on comprehensive health education

5-13, 17 (West, Westlaw through 2018 2d Reg. Sess.) (requiring HIV/AIDS instruction and permitting instruction on other STDs); MD. CODE REGS. 13A.04.18.01(I)(3) (West, Westlaw through Dec. 2018, Md. Reg. Vol. 45, Iss. 25) (requiring education on HIV/AIDS); MICH. COMP. LAWS ANN. § 380.1169 (West, Westlaw through P.A. 2018, No. 399) (requiring disease prevention education for HIV/AIDS, and setting minimum standards for other dangerous communicable diseases); MICH. COMP. LAWS ANN. §§ 380.1507, 1507(b) (West, Westlaw through P.A. 2018, No. 399) (authorizing sex education based on minimum content standards); MO. DEP’T OF ELEMENTARY AND SECONDARY EDUC., MO. SCH. IMPROVEMENT PROGRAM: STANDARDS AND INDICATORS MANUAL (2006) (requiring HIV/AIDS prevention education); MO. ANN. STAT. § 170.015(2) (West, Westlaw through 2018 2d Reg. Sess.) (requiring schools that elect to teach sex education to provide students with the latest medical information regarding exposure to HIV/AIDS, hepatitis, and other STDs).

15. CONN. GEN. STAT. ANN. § 10-19(b) (West, Westlaw through 2018 Feb. Reg. Sess.).

16. N.M. STAT. ANN. 6.12.2(C)(3) (West, Westlaw through Dec. 16, 2018); N.Y. COMP. CODES R. & REGS. tit. 8, § 135.3 (West, Westlaw through Jan. 9, 2019); OKLA. STAT. ANN. tit. 70, § 11-103.3 (West, Westlaw through 2018 2d Reg. Sess.).

17. See TENN. CODE ANN. § 49-6-1302 (West, Westlaw through 2018 2d Reg. Sess.). Curiously, pregnancies in girls aged fourteen and younger are not counted by the statutory language.

18. TENN. ST. BD. OF EDUC., TENNESSEE HEALTH EDUCATION STANDARDS 3-5 (1998).

19. ALA. CODE § 16-40A-2(a)(1) (West, Westlaw through 2018 Reg. Sess.) (requiring any school that chooses to teach sex education emphasize that abstinence is the only completely effective way to prevent STDs, including HIV/AIDS); ARK. CODE ANN. § 6-18-703(d) (West, Westlaw through 2018 2d Extra. Sess.) (requiring any school that chooses to teach sex education emphasize that abstinence is the only sure way to prevent STDs, including HIV/AIDS); HAW. BD. OF EDUC. POL’Y 2110 (1995) (requiring abstinence-based sexuality education that includes instruction on HIV prevention); 105 ILL. COMP. STAT. ANN. 5/27-9.1(b) (West, Westlaw through 2018 Reg. Sess., P.A. 100-1173) (requiring any school that elects to teach sex education provide information that abstinence is the only 100% effective protection against STDs and HIV/AIDS when transmitted sexually); MISS. CODE ANN. § 37-13-171 (West, Westlaw through 2018 Reg. Sess. and 1st Extra. Sess.) (requiring school boards to adopt abstinence-only or abstinence-plus policies, which may include prevention of STDs, along with a factual presentation of the risks and failure rates of preventative methods); N.J. STAT. ANN. § 18A:35-4.20 (West, Westlaw through 2018 Legis., ch. 142) (requiring sex education courses and materials to stress abstinence as “the only completely reliable means of eliminating the sexual transmission of HIV/AIDS and other STDs” and teach skills and strategies for remaining abstinent in order to prevent STDs); N.C. GEN. STAT. ANN. §§ 115C-81(e1)(4) (West, Westlaw repealed 2017) (requiring schools to teach that

does not require or limit education on STDs, but the Nebraska State Board of Education has adopted abstinence guidelines.²⁰

Contraception education is another controversial area in which the states have vastly different laws. Hawaii, Maine, Maryland, Missouri, New Hampshire, New Jersey, Oregon, South Carolina, Tennessee, and Vermont require that sex education classes discuss contraception and abstinence.²¹ The District of Columbia requires instruction in “human sexuality and family planning” and contraception,

abstinence from sexual activity is the only certain means of avoiding STDs); N.D. CENT. CODE ANN. § 15.1-21-24 (West, Westlaw through 2017 Reg. Sess.) (requiring health education curriculum to include the risks of adolescent sex and the benefits of abstinence until marriage); OHIO REV. CODE ANN. § 3313.6011(B) (West, Westlaw through 2018) (requiring instruction that abstinence is the only method that is completely effective against STDs); OKLA. STAT. ANN. tit. 70, § 11-103.3(E) (West, Westlaw through 2018 2nd Reg. Sess.) (requiring instruction that abstinence is the only certain means for the prevention of contraction of the “AIDS virus [sic]”); R.I. GEN. LAWS § 16-22-18 (West, Westlaw through 2018 Jan. Sess., ch. 353) (requiring health and family life courses, with an emphasis on abstinence as the preferred method of the prevention of STDs); S.C. CODE ANN. § 59-32-10(2) (West, Westlaw through 2018 Reg. Sess.) (requiring emphasis on abstinence); See TENN. CODE ANN. § 49-6-1008 (West, Westlaw through 2018 2d Reg. Sess.) (requiring any materials concerning HIV/AIDS or STDs emphasize premarital abstinence); TEX. EDUC. CODE ANN. § 28.004(e) (West, Westlaw through 2017 Reg. Sess., 85th Leg.) (requiring schools that elect to teach sex education emphasize abstinence as the only certain method of preventing STDs and HIV/AIDS); UTAH CODE ANN. § 53G-10-402(1)(b)(i) (A) (West, Westlaw through 2018 Reg. Sess.) (requiring any school that chooses to teach sex education must emphasize abstinence before marriage and fidelity after marriage as methods for preventing STDs and prohibiting “advocacy” of contraception).

20. NEB. REV. STAT. ANN. § 79-712 (West, Westlaw through 2018 2d Reg. Sess.) (comprehensive health program must address drug and alcohol abuse, but statute does not reference sex education); NEB. ST. DEP’T OF EDUC., NEBRASKA HEALTH EDUCATION FRAMEWORKS 1 (1998) (guidelines on abstinence education).

21. HAW. REV. STAT. § 321-11.1(a) (West, Westlaw through 2014 Reg. Sess.) (requiring sexuality health education programs provide medically accurate, age-appropriate factual information on abstinence, contraception, and how to prevent unintended pregnancy); HAW. BD. OF EDUC. POL’Y 2110 (1995) (requiring instruction that abstinence from sexual intercourse is the surest way to prevent unintended pregnancies); ME. REV. STAT. ANN. tit. 22, §§ 1902(1-A), 1910 (West, Westlaw through 2013 2d Reg. Sess.) (requiring comprehensive family life education, including education on the use of contraception with an emphasis on abstinence); N.H. REV. STAT. ANN. § 189:10 (West, Westlaw through 2018 Reg. Sess.) (requiring general health education); N.H. STATE DEPT. OF EDUC., HEALTH EDUCATION CURRICULUM GUIDELINES 141-44 (2003) (issuing guidelines on contraception instruction); TENN. ST. BD. OF EDUC., TENNESSEE LIFETIME WELLNESS CURRICULUM STANDARDS GRADES 9-12 19 (requiring instruction on abstinence and contraception); N.J. STAT. ANN. §§ 18A:35-4.20, 4.21 (West, Westlaw through L.2018) (requiring sex education courses and materials to stress abstinence as the only completely reliable means of preventing pregnancy, to teach skills and strategies for remaining abstinent in order to prevent pregnancy, and to teach the failure rates of contraceptives); OR. REV. STAT. ANN. § 336.455(2) (West, Westlaw through 2018 Reg. Sess.) (requiring instruction on the effectiveness of contraceptives, in addition to abstinence); S.C. CODE ANN. §§ 59-32-30(A), 10(4) (West, Westlaw through 2018 Act No. 292) (requiring pregnancy prevention instruction emphasizing abstinence, mandating contraception education in grades nine through twelve, and prohibiting contraception education before sixth grade); TENN. CODE ANN. § 49-6-1302(a)(1) (West, Westlaw through end of 2018 2d Reg. Sess.) (requiring family life education in county public schools when teenage pregnancy rate in the county exceeds 19.5 pregnancies per 1,000 females aged fifteen through seventeen). VT. STAT. ANN. tit. 16, §§ 131(1), (4) (West, Westlaw through 2017-18 Vt. Gen. Assemb.) (requiring sex education including prevention of HIV/AIDS and other STDs).

but not abstinence.²² California recently passed the California Healthy Youth Act, which requires instruction about STDs and how to prevent them, including contraception, and does not require that schools stress abstinence.²³ Maryland requires that a course on human sexual behavior, including information on contraception and family planning, be offered in schools.²⁴ Delaware, Georgia, Louisiana, Michigan, North Dakota, Ohio, Rhode Island, and Virginia require that sexual education programs emphasize the benefits of abstinence, but they do not specify guidelines for contraception education.²⁵ North Carolina requires that schools electing to teach sexual education must instruct students that abstinence is the only certain way to prevent unintended pregnancy, while also providing medically accurate information on other contraception methods.²⁶ Missouri requires that schools either provide medically accurate information on contraception or follow federal abstinence education guidelines (which do not discuss contraception).²⁷ Alabama, Mississippi, Texas, and Washington permit discussion of contraception in classrooms, but the discussion must be limited to the relative effectiveness or ineffectiveness of the various methods.²⁸ Arizona, Arkansas,

22. D.C. Mun. Regs. tit. 5-E, §§ 2304.3(a)-(c), 2305.1(a) (West, Westlaw through D.C. Reg., Vol. 66, No. 2, Jan. 11, 2019).

23. CAL. EDUC. CODE § 51934 (West, Westlaw through ch. 1016 of 2018 Reg. Sess.).

24. MD. CODE REGS. 13A.04.18.01(M) (West, Westlaw through Md. Reg. Vol. 45, Iss. 25, December 7, 2018).

25. 14 DEL. ADMIN. CODE §§ 851(1.1.4) (West, Westlaw through Del. Reg. of Regs., Vol. 22, Iss. 7, Jan. 1, 2019) (requiring comprehensive sexuality education and an HIV prevention program); GA. CODE ANN. § 20-2-143(a) (West, Westlaw through 2018 Reg. Sess.) (requiring sexual education instruction that emphasizes the benefits of sexual abstinence); LA. STAT. ANN. § 17:281(A)(4) (West, Westlaw through 2018 3d. Extra. Sess.) (requiring that schools electing to teach sex education emphasize the benefits of abstinence); MICH. COMP. LAWS ANN. § 380.1507(1) (West, Westlaw through P.A. 2018, No. 399) (requiring schools that elect to teach sex education to stress that abstinence from sex is a responsible and effective method of preventing unplanned or out-of-wedlock pregnancy); N.D. CENT. CODE ANN. § 15.1-21-24 (West, Westlaw through 2017 Reg. Sess.) (requiring health education curriculum to include the risks of adolescent sex and the benefits of abstinence until marriage); OHIO REV. CODE ANN. § 3313.6011(B) (West, Westlaw through Gen. Ass. 2017-2018) (requiring instruction that abstinence is the only 100% effective protection against unwanted pregnancy); 16 R.I. GEN. LAWS ANN. § 16-22-18(a) (West, Westlaw through 2018 Jan. Sess., ch. 353) (requiring health and family life courses, with an emphasis on abstinence as the preferred method of the prevention of STDs); 8 VA. ADMIN. CODE § 20-131-170 (West, Westlaw through Sept. 3, 2018) (requiring that when schools elect to teach sex education, they follow the Board of Education guidelines that have the goal of reducing the incidence of pregnancy and STDs).

26. N.C. GEN. STAT. ANN. § 115C-81.30(a) (West, Westlaw through S.L. 2018-145) (requiring schools to teach that abstinence from sexual activity is the only certain means of avoiding out-of-wedlock pregnancy, while also teaching about the effectiveness and safety of all FDA-approved contraceptive methods).

27. MO. ANN. STAT. § 170.015(1)(3) (West, Westlaw through 2018 2d Reg. Sess.).

28. ALA. CODE § 16-40A-2 (West, Westlaw through Act 2018-579) (stating that if a school chooses to teach sex education, it should teach the statistical reliability of the various forms of contraception, while also emphasizing the increase in protection against pregnancy afforded by the use of various contraceptive measures); MISS. CODE ANN. § 37-13-171 (West, Westlaw through 2018 Reg. Sess. and 1st Extra. Sess.) (requiring school boards to adopt abstinence-only or abstinence-plus policies, which may include discussion of contraception only if that discussion includes a factual presentation of the risks and failure rates of those contraceptives); TEX. EDUC. CODE ANN. § 28.004(e) (Vernon, Westlaw

Florida, Illinois, and Indiana require that when schools elect to teach sexual education, they must emphasize abstinence as the only sure method for avoiding pregnancy (without requiring or prohibiting the teaching of other contraceptive methods).²⁹ Utah provides general limits on what may be taught regarding contraception.³⁰ Some states' laws are silent on contraception but require general instruction on family life and human development.³¹ Nebraska's comprehensive health education law does not mention contraception, but the Nebraska State Board of Education adopted abstinence guidelines in 1998.³² New Mexico's laws are silent on contraception, but the state's *Health Education Standards with Benchmarks and Performance Standards* sets standards for instruction on

through end of 2017 Reg. and 1st Called Sess. of 85th Leg.) (requiring emphasis on abstinence and instruction on the "human use reality rates" of the effectiveness of contraception, as opposed to the theoretical rates); WASH. REV. CODE ANN. §§ 28A.230.070(6)(b), (7) (West, Westlaw through 2018 Reg. Sess.) (requiring teaching that condoms or birth control are not a completely effective means of preventing HIV/AIDS).

29. ARIZ. ADMIN. CODE § R7-2-303(A)(3)(b)(ii) (West, Westlaw through Ariz. Admin. Reg. Vol. 24, Iss. 52, Dec. 28, 2018) (requiring emphasis on abstinence as the only certain method of preventing pregnancy, without setting guidelines for the teaching of other forms of contraception); ARK. CODE ANN. § 6-18-703(d) (West, Westlaw through 2018 Fisc. Sess. and 2d Extra. Sess.); FLA. STAT. ANN. §§ 1003.42(2)(n), 46(2) (West, Westlaw through 2018 2d Reg. Sess.) (requiring sexual education courses to emphasize abstinence as the expected standard of behavior outside of marriage and the only certain way to prevent pregnancy); 105 ILL. COMP. STAT. ANN. 5/27-9.1(b) (West, Westlaw through P.A. 100-1174 of 2018 Reg. Sess.) (requiring that if sex education is taught, abstinence must be taught); IND. CODE ANN. § 20-30-5-13 (West, Westlaw through 2018 2d Reg. Sess.) (requiring that where sex education is taught, teachers must emphasize abstinence as the only certain way to avoid out-of-wedlock pregnancies).

30. UTAH CODE ANN. § 53G-10-402 (West, Westlaw through 2018 2d Special Sess.) (permitting contraceptive education but prohibiting advocating or encouraging the use of contraceptives).

31. IDAHO CODE ANN. § 33-1608(b) (West, Westlaw through 2018 2d Reg. Sess.) (indicating that sex education should impart "knowledge of the power of the sex drive and the necessity of controlling that drive by self-discipline"); IOWA CODE ANN. § 256.11(5)(j)(1) (West, Westlaw through 2018 Reg. Sess.) (requiring instruction on "family life [and] age-appropriate and research-based human growth and development."); KAN. ST. DEPT. OF EDUC., KANSAS MODEL CURRICULAR STANDARDS FOR HEALTH EDUCATION 41 (2007) (requiring instruction on "family life and sexuality"); KY. CORE ACAD. STDS. 305, 315, 325, 502 (2010) (requiring education on how decision-making relates to responsible sexual behavior, including preventing pregnancy); MONT. ADMIN. R. 10.54.7013(1)(b) (West, Westlaw through Iss. 24 of 2018 Mont. Admin. Reg., Dec. 21, 2018) (requiring instruction on the "impact of personal health behaviors on the functioning of body systems, including the reproductive system"); NEV. REV. STAT. ANN. § 389.036 (West, Westlaw through end of 79th Reg. Sess., 2017) (requiring instruction on the human reproductive system and sexual responsibility); S.D. CODIFIED LAWS § 13-33-1 (West, Westlaw through 2018 Reg. and Special Sess.) (requiring substantial conformity to the accreditation standards adopted by the South Dakota Board of Education); S.D. DEPT. OF EDUC. AND CULTURAL AFF., SOUTH DAKOTA HEALTH EDUCATION STANDARDS: A RESOURCE GUIDE FOR ACHIEVING HEALTH LITERACY 5 (2018) (requiring instruction on sexuality and family health).

32. NEB. REV. STAT. ANN. § 79-712 (West, Westlaw through end of 2d Reg. Sess. Of 105th Leg., 2018) (comprehensive health program must address drug and alcohol abuse, but statute does not reference sex education); NEB. ST. DEPT. OF EDUC., NEBRASKA HEALTH EDUCATION FRAMEWORKS 1 (1998) (indicating that the Nebraska State Board of Education has adopted guidelines on abstinence regarding pregnancy prevention).

contraception.³³ Alaska, Massachusetts, Minnesota, and Pennsylvania are silent on the issue of contraception education altogether.

Most states remain silent on the issue of abortion education as part of the sex education program. Vermont and the District of Columbia are the only jurisdictions that require sex education programs to include teaching about abortion.³⁴ While no state expressly prohibits discussion of abortion in the classroom, six states have restricted what can be taught with respect to abortion.³⁵ These states either prohibit discussion of abortion as a method of family planning, prohibit abortion referral, or limit any discussion of abortion to the complications and negative impacts that may arise from the procedure.

Sex education statutes also regulate teaching regarding lesbian, gay, bisexual, and transgender (LGBT) sexuality. Seven states explicitly regulate the teaching of LGBT sexuality issues.³⁶ Alabama, Arizona, and South Carolina prohibit schools from teaching “homosexuality” as an acceptable lifestyle. Arizona and Mississippi mandate that schools teach about their states’ sodomy laws, which criminalize “homosexuality” (despite the unconstitutionality of these laws).³⁷

33. N.M. PUB. EDUC. DEPT., HEALTH EDUCATION STANDARDS WITH BENCHMARKS AND PERFORMANCE STANDARDS § 6.29.6.10 (2009) (suggesting that high school students be able to demonstrate knowledge of pregnancy prevention through the use of various methods of contraception).

34. VT. STAT. ANN. tit. 16, § 131(8) (West, Westlaw through all acts of Adjourned Sess. Of 2017-2018 Vt. Gen. Ass., 2018) (requiring education on abortion); D.C. Mun. Regs. tit. 5, § 2305.1(a) (West, Westlaw through D.C. Reg., Vol. 66, No. 2, Jan. 11, 2019) (requiring instruction in human sexuality that includes information on abortion).

35. Arkansas, Connecticut, Louisiana, Michigan, Mississippi, and South Carolina restrict what may be taught about abortion. See ARK. CODE ANN. § 6-18-703(a)(3) (West, Westlaw through 2018 Fisc. Sess. and 2d. Extra. Sess.) (prohibiting school health clinics from using funds for abortion referrals); CONN. GEN. STAT. ANN. § 10-16c (West, Westlaw through Gen. Stats. Of Conn., Jan. 1, 2019) (prohibiting teaching abortion as an alternative to family planning); LA. STAT. ANN. § 17:281(F) (West, Westlaw through 2018 3d Extra. Sess.) (prohibiting counseling or advocating abortion); MICH. COMP. LAWS ANN. § 380.1507(8) (West, Westlaw through P.A. 2018, No. 399) (prohibiting teaching abortion as a method of family planning or a method of reproductive health); MISS. CODE ANN. § 37-13-171(6) (West, Westlaw through 2018 Reg. and 1st Extra. Sess.) (forbidding teaching that abortion can be used to prevent the birth of a baby); S.C. CODE ANN. § 59-32-30(D) (West, Westlaw through 2018 Act No. 292) (restricting education on abortion to complications which may arise from abortions).

36. Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, and Utah have statutes addressing teaching about non-heterosexual orientations in public schools. See ALA. CODE § 16-40A-2(c)(8) (West, Westlaw through Act 2018-579) (requiring that teachers emphasize that same-sex sexual activity is not acceptable to the general public, and is considered a criminal offense); ARIZ. REV. STAT. ANN. § 15-716(C) (West, Westlaw through 1st Special and 2d Reg. Sess. of 53d Leg., 2018) (prohibiting schools from teaching that same-sex sexual activity is acceptable); LA. STAT. ANN. § 17:281(A)(3) (West, Westlaw through 2018 3d Extra. Sess.) (prohibiting schools from using materials that depict same-sex sexual activity); MISS. CODE ANN. § 37-13-171(2)(e) (West, Westlaw through 2018 Reg. and 1st Extra. Sess.) (requiring educators to teach state law prohibitions on same-sex sexual activity); OKLA. STAT. ANN. tit. 70, § 11-103.3(D)(1) (West, Westlaw through 2d Reg. Sess. of 56th Leg., 2018) (requiring HIV/AIDS prevention curricula to teach that same-sex sexual activity is the primary way to come into contact with the HIV/AIDS virus); S.C. CODE ANN. § 59-32-30(A)(5) (West, Westlaw through 2018 Act No. 292) (prohibiting discussion of non-heterosexual relationships).

37. See MISS. CODE ANN. § 37-13-171(2)(e) (West, Westlaw through 2018 Reg. and 1st Extra. Sess.) (requiring teaching the state law on same-sex sexual activity), MISS. CODE ANN. § 97-29-59 (West, Westlaw through 2018 Reg. and 1st Extra. Sess.) (allowing for up to ten years imprisonment for a

Oklahoma requires that HIV/AIDS curricula teach that the primary way to contract the virus is through same-sex sexual conduct. Louisiana prohibits teaching with any materials that depict same-sex sexual activity.³⁸

Many states with statutes that regulate sex education recognize the controversial nature of the issue and provide either “opt-out” or “opt-in” provisions. Opt-out provisions allow parents to remove their children from the classroom during sex education instruction for religious, moral, or family reasons. Opt-in provisions, on the other hand, require affirmative parental consent, such as a permission slip, before children can participate in a sex education program. Of the forty-four states and the District of Columbia that require or permit sex education, thirty-three of their state statutes or codes, and the regulations of the District of Columbia, contain opt-out provisions, some for religious reasons only, others for moral or other objections as well.³⁹ Four state statutes contain opt-in

sodomy conviction)); see also *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that laws criminalizing consensual same-sex sexual activity are unconstitutional).

38. LA. STAT. ANN. § 17:281(A)(3) (West, Westlaw through 2018 3d Extra. Sess.).

39. Alabama, Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wisconsin. See ALA. CODE § 16-41-6 (West, Westlaw through Act 2018-579) (opt-out allowed if the materials “conflict with the teachings of [the student’s] church”); ARIZ. REV. STAT. ANN. § 15-716(F) (West, Westlaw through 1st Special and 2d Reg. Sess. of 53d Leg., 2018) (requiring school districts to notify parents of their opt-out rights); CAL. EDUC. CODE § 51937 (West, Westlaw through Ch. 1016 of 2018 Reg. Sess.) (creating a “streamlined process to make it easier for parents and guardians to review materials and evaluation tools related to comprehensive sexual health education and HIV prevention education,” and excuse their children from participation in all or part of that instruction if they wish); CONN. GEN. STAT. ANN. § 10-16e (West, Westlaw through 2018 Feb. Reg. Sess.) (providing that a parent or guardian may exempt their student from participation in any “family like program” by written notification to the local or regional school board); FLA. STAT. ANN. § 1003.42(3) (West, Westlaw through 2018 2d Reg. Sess.) (providing that “[a]ny student whose parent makes written request to the school principal shall be exempted from the teaching of reproductive health or any disease); GA. CODE ANN. § 20-2-143(d) (West, Westlaw through 2018 Reg. and Special Leg. Sess.) (giving any parent or legal guardian the right to elect, in writing, that their child not receive instruction in sex education and AIDS prevention); IDAHO CODE ANN. § 33-1611 (West, Westlaw through 2018 2d Reg. Sess.) (allowing an exemption with parent’s written request); 105 ILL. COMP. STAT. ANN. 5/27-9.1(a) (West, Westlaw through 2018 Reg. Sess., P.A. 100-1114); IOWA CODE ANN. § 256.11(6)(a) (West, Westlaw through 2018 Reg. Sess.) (only allowing an exemption for religious reasons); LA. REV. STAT. ANN. § 17:281(D) (West, Westlaw through 2018 Reg. Sess.); MASS. GEN. LAWS ANN. CH. 71, § 32A (West, Westlaw through 2018 2d Ann. Sess., ch. 228); ME. REV. STAT. ANN. tit. 22, § 1911 (West, Westlaw through 2017 2d Reg. Sess.); MICH. COMP. LAWS ANN. § 380.1507(4) (West, Westlaw through P.A. 2018, No. 341); MINN. STAT. ANN. § 120B.20 (West, Westlaw through 2018 Reg. Sess.) (allowing a student’s parent or guardian to arrange for alternative instruction on any subject); MO. ANN. STAT. § 170.015(5)(2) (West, Westlaw through 2018 2d Reg. Sess.); N.J. STAT. ANN. § 18A:35-4.7 (West, Westlaw through L.2018, ch. 119 and J.R. No. 9) (allowing a child to be excused from sex education on moral or religious grounds); N.C. GEN. STAT. § 115C-81.30(b) (West, Westlaw through 2018 Extra. Sess. and 2d Extra Sess.) (allowing local school boards to adopt policy allowing parents to either consent to sex education or exempt child from program); OHIO REV. CODE ANN. § 3313.60(A)(5)(c) (West, Westlaw through 2108 State Issue 1); OKLA. STAT. ANN. tit. 70, § 11-103.3(C) (West, Westlaw through 2018 ed Reg. Sess.); OR. REV. STAT. § 336.465(1)(b) (West, Westlaw through 2018 Reg. Sess. and Spec. Sess.); R.I. GEN. LAWS § 16-22-17(c) (West, Westlaw through 2014 Jan. Sess., ch. 555); S.C. CODE ANN. § 59-32-50 (West, Westlaw through

provisions.⁴⁰ The laws of Texas and Wyoming, which are otherwise silent on sex education, contain opt-out provisions for schools choosing to implement sex education.⁴¹ This leaves five states with laws that expressly regulate sex education—Delaware, Hawaii, Indiana, Kentucky, and Montana—with no provisions for exempting a child from sexual education requirements.

While sex education curricula vary widely among the states, courts have not recognized a parental right to refuse to allow a child to complete an assigned reading or other mandatory requirement, even if the assignment is contrary to the parent or child's religious beliefs.⁴² If a parent feels that a given curriculum is hostile to his or her religion, the main remedy available to him is to remove his children from the public school and to either home school his children, or place them in a private school that conforms to the teachings of their religion.⁴³

B. RECENT CHALLENGES AND PROPOSED CHANGES TO STATE STATUTES

State legislatures frequently seek to amend or repeal sex education statutes. As of October 1, 2018, thirty-three states have introduced bills related to sex

ch. 353 of Jan. Sess.) (allowing an exemption if instruction conflicts with family beliefs); TENN. CODE ANN. §49-6-1305 (West, Westlaw through 2018 2d Reg. Sess.); VA. CODE ANN. § 22.1-207.2 (West, Westlaw through 2018 Reg. Sess.) (requiring school boards to notify parents of their right to remove their child from all or part of family life education); VT. STAT. ANN. tit. 16, § 134 (West, Westlaw through 2017-2018 Sess.) (only allowing an exemption for religious reasons); WASH. REV. CODE ANN. § 28A.230.070(4) (West, Westlaw through 2018 Reg. Sess.); W. VA. CODE ANN. § 18-2-9(c) (West, Westlaw through 2018 Extra. Sess.); WIS. STAT. ANN. § 118.019(4) (West, Westlaw through 2017 Act 367); D.C. MUN. REGS. tit. 5, § 2305.5 (West, Westlaw through Sept. 2018, District of Columbia Reg., Vol. 65, No. 39); KAN. ADMIN. REGS. § 91-31-35(a)(5)(b) (through Sept. 27, 2018) (only allowing an exemption for religious reasons); MD. CODE REGS. 13A.04.18.01(F)(5) (West, Westlaw through Sept. 2018, Md. Reg. Vol. 45, Iss. 19); N.M. PUB. EDUC. DEP'T, HEALTH EDUCATION STANDARDS WITH BENCHMARKS AND PERFORMANCE STANDARDS § 6.29.6.11(2009) (requiring school districts to implement policies for parental exemption from sexuality performance standards); N.M. CODE R. § 6.29.6 (2018); N.Y. COMP. CODES R. & REGS. tit. 8, § 135.3 (Westlaw through Oct. 10, 2018) (allowing a student to be exempt from HIV/AIDS education if the student's parent or guardian has filed a written notice and assured that the student will receive HIV/AIDS education at home); 22 PA. CODE § 4.29(c) (West, Westlaw through Oct. 6, 2018).

40. Colorado, Mississippi, Nevada, and Utah require parental consent. *See* COLO. REV. STAT. ANN. § 22-25-104(6)(d) (West, Westlaw through 2018 2d Reg. Sess.); MISS. CODE ANN. § 37-13-173 (West, Westlaw through 2018 Reg. Sess. and Extra. Sess.) (mandating that parents be notified of their right to include child in human sexuality instruction); NEV. REV. STAT. ANN. § 389.036(4) (West, Westlaw through 2017 Reg. Sess.); UTAH CODE ANN. § 53E-9-203(3) (West, Westlaw through 2018 2d Spec. Sess.).

41. *See* TEX. EDUC. CODE ANN. § 28.004(i)(2)(B) (Vernon, Westlaw through 2013 3d Call. Sess., 83d Leg.) (requiring districts to inform parents of their right to remove their children from any part of sexuality education); WYO. DEP'T. OF EDUC., HIV/AIDS MODEL POL'Y FOR WYO. PUB. SCH. (1998) (allowing parents to request that their child not receive HIV instruction at school).

42. *See* *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1058 (6th Cir. 1987); *Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008).

43. *See* *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (holding that parents have a constitutional right to home school their children, if they comply with certain state requirements); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 510 (1925) (holding that parents have a constitutional right to send their children to private school, rather than public school).

education.⁴⁴ These bills reveal a trend of states moving towards incorporating consent and healthy relationship development into sexual education. In the wake of the #MeToo movement, conversations around sexual assault and abuse were pervasive in the media, the entertainment industry, the workforce, and across social media. Lawmakers realized they needed to address these issues in their legislation. Some of the resulting bills are extremely progressive in their treatment and definition of consent. For example, Maryland passed a bill requiring the instruction of affirmative consent as an “unambiguous and voluntary agreement.”⁴⁵ Similarly, Michigan introduced a “Yes Means Yes” bill that would require schools to teach that before sexual activity begins, “partners must get affirmative consent from each other and that simply not protesting or resisting the encounter does not constitute consent.”⁴⁶ Other states, such as Missouri, simply proposed instruction on developing “skills in communication, decision making, and conflict resolution” and “healthy relationships and prevention of sexual violence.”⁴⁷ The recent midterm elections may affect the outcome of legislation that is still pending.

C. DISTRIBUTION OF FEDERAL FUNDING FOR ABSTINENCE-ONLY PROGRAMS

Since the 1981 passage of the Adolescent Family Life Act (“AFLA”), the federal government has set aside funds for abstinence-only-until-marriage education.⁴⁸ For federal fiscal year (“FY”) 2018, the federal government allocated just over \$100 million for abstinence-only-until-marriage programs.⁴⁹ The height of federal funding for such programs occurred during fiscal year 2008, when the designated federal funding totaled \$177 million. Despite dipping down to \$50 million in fiscal year 2010 and remaining fairly consistent for the next five years, federal funding for abstinence-only-until-marriage programs began to climb again in 2016.⁵⁰

44. *2018 Sex Ed State Legislative Mid-Year Report*, SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, <https://siecus.org/wp-content/uploads/2018/07/2018-Mid-Year-Leg-Rep.pdf>.

45. Sarah Shapiro and Catherine Brown, *Sex Education Standards Across the States*, CENTER FOR AMERICAN PROGRESS (May 9, 2018).

46. Kathleen Gray, *Yes Means Yes: Affirmative Consent to Sex Would Be Taught in Schools*, DETROIT FREE PRESS (March 25, 2018).

47. Sarah Shapiro and Catherine Brown, *Sex Education Standards Across the States*, CENTER FOR AMERICAN PROGRESS (May 9, 2018).

48. A HISTORY OF FEDERAL FUNDING FOR ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS, SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES (SIECUS) (Aug. 2018), <https://siecus.org/wp-content/uploads/2018/08/A-History-of-AOUM-Funding-Final-Draft.pdf> [hereinafter SIECUS HISTORY].

49. *Id.*

50. DEDICATED FEDERAL ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS FUNDING BY FISCAL YEAR (FY) 1982-2018, SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES (SIECUS) (April 2018), <https://siecus.org/wp-content/uploads/2018/07/AOUM-Funding-Table-FY18-April-2018.pdf> [hereinafter SIECUS FUNDING].

Fiscal year 2010 marked a significant shift in federal funding for abstinence-only programs because the Obama administration and Congress eliminated two discretionary federal funding streams. The Consolidated Appropriations Act of 2010 eliminated the abstinence-only portion of AFLA and the Community-Based Abstinence Education (“CBAE”) grant program, which was created in 2000.⁵¹ Additionally, Congress allowed the abstinence-only-until-marriage program of the Title V-Welfare Reform Act to expire in 2009, but the program was resurrected under the Affordable Care Act of 2010.⁵²

In fiscal year 2012, abstinence-only-until-marriage funding received a boost from the creation of the discretionary “Competitive Abstinence Education” (“CAE”) grant program.⁵³ Although this program was rebranded in FY 2016 as the “Sexual Risk Avoidance Education” (“SRAE”) program, it retained its original intent on abstinence.⁵⁴ As of FY 2018, SRAE was funded at \$25 million—more than double its original allocation a mere two years earlier.⁵⁵ SRAE programs must include the “benefits associated with self-regulation, success sequencing for poverty prevention, healthy relationships, goal setting, and resisting sexual coercion, dating violence, and other youth risk behaviors such as underage drinking or illicit drug use, without normalizing teen sexual activity.”⁵⁶

Title V is currently the primary source of federal funding for state “Sexual Risk Avoidance” programs.⁵⁷ After briefly expiring in September 2017, the Title V abstinence-only state-grant program was renewed in February 2018 for two more years and renamed the “Sexual Risk Avoidance Education” program.⁵⁸ Also known as the Temporary Assistance for Needy Families Act of 1996 (“TANF”), Title V funding allocates up to \$75 million each year to participating states based on a formula related to the number of low-income youth in each state.⁵⁹ Beginning in FY 2018, the state-match provision is no longer required and federal funding has been extended through FY 2019.⁶⁰ This funding is available each year for sex education programs that comply with the federal eight-point statutory definition of abstinence education.⁶¹ Qualifying sexual risk

51. *Id.* See also Adolescent Family Life Act, 42 U.S.C.A. §§ 300z to 300z-10 (West, Westlaw through P.L. 113-127).

52. SIECUS HISTORY, *supra* note 48.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. SIECUS FUNDING, *supra* note 50.

58. 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>.

59. SIECUS HISTORY, *supra* note 48. See also Title V of the Social Security Act, 42 U.S.C.A. § 710 (West, Westlaw through P.L. 113-127).

60. SIECUS HISTORY, *supra* note 48.

61. To meet the federal definition of “Sexual Risk Avoidance,” a program must address each of the following topics: (1) the holistic individual and societal benefits associated with personal responsibility, self-regulation, goal setting, healthy decision-making, and a focus on the future; (2) the advantage of

avoidance programs must also ensure that any information provided on contraception is medically accurate and complete and ensures that students understand that contraception offers physical risk reduction, but not risk elimination.⁶² However, the education must not include demonstrations, simulations, or distribution of contraceptive devices.⁶³

Every state except California has at one time accepted Title V abstinence-only-until-marriage funds.⁶⁴ In fiscal year 2018, thirty-seven states and two territories received Title V abstinence-only federal funding.⁶⁵ Until FY 2018, the unused funds from those states that chose not to apply for Title V funding would revert back to the treasury.⁶⁶ However, HHS may now allot those unclaimed funds to one or more entities in that state through a competitive grant process.⁶⁷

D. DISTRIBUTION OF FEDERAL FUNDING FOR COMPREHENSIVE SEX EDUCATION PROGRAMS

In FY 2010, the Obama Administration and Congress created two sources of federal funding for evidence-based approaches to teen pregnancy prevention and comprehensive sex education programs. The Consolidated Appropriations Act of 2010, signed into law in December 2009, created the Teen Pregnancy Prevention Program (“TPPP”),⁶⁸ while the Affordable Care Act created the Personal Responsibility Education Program (“PREP”).⁶⁹ In total, nearly \$190 million was allocated to these new initiatives.⁷⁰

The first source of funding for comprehensive sex education programs, TPPP, funds medically accurate and age appropriate programs to reduce teen pregnancy.⁷¹ It is administered by the Office of Adolescent Health within the Office of the Secretary of Health and Human Services.⁷² TPPP funds are allocated as grants to two kinds of public and private entities: those managing or replicating

refraining from non-marital sexual activity in order to improve the future prospects and physical and emotional health of youth; (3) the increased likelihood of avoiding poverty when youth attain self-sufficiency and emotional maturity before engaging in sexual activity; (4) the foundational components of healthy relationships and their impact on the formation of healthy marriages and safe and stable families; (5) how other youth risk behaviors, such as drug and alcohol usage, increase the risk for teen sex (6) how to resist and avoid, and receive help regarding, sexual coercion and dating violence, recognizing that even with consent teen sex remains a youth risk behavior. 42 U.S.C.A. § 710 (West, Westlaw through P.L. 115-231).

62. *Id.*

63. *Id.*

64. SIECUS HISTORY, *supra* note 48.

65. *Id.*

66. *Id.*

67. *Id.*

68. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, tit. II, 123 Stat 3034, 3251 (2009).

69. Protecting Access to Medicaid Care Act of 2014, 42 U.S.C.A. § 713(b)(2) (West, West law through P.L. 113-93).

70. *Id.*

71. TEEN PREGNANCY PREVENTION PROGRAM (TPP), HHS, <https://www.hhs.gov/ash/oah/grant-programs/teen-pregnancy-prevention-program-tpp/about/index.html> (last visited Feb. 5, 2019).

72. *Id.*

evidence-based and innovative programs to prevent unintended teen pregnancy and address underlying behavioral risk factors, and those developing and testing innovative new models.⁷³

In both FY 2018 and 2019, President Trump's budget proposed to eliminate the TPPP.⁷⁴ This led to the filing of eight lawsuits (including a class action suit) against the Trump administration for unlawfully terminating the TPPP grants.⁷⁵ All cases were decided in favor of the plaintiffs/grantees and HHS was ordered to accept and process the grantees' funding applications.⁷⁶ The final appropriations bill signed on September 28, 2018 allocated \$101 million in funding to TPPP and an additional \$6.8 million for evaluation of teen pregnancy prevention approaches.⁷⁷ However, the Trump administration also announced two new Funding Opportunity Announcements ("FOAs").⁷⁸ The new FOAs eliminated evidence-based guidance which previously provided funding applicants with forty-four replicable program models proven effective through rigorous evaluation.⁷⁹ Instead, TPPP recipients must now implement one of two abstinence-only programs.⁸⁰ Emphasizing that "teen sex is a risk behavior," recipients are expected to promote avoidance of—i.e. abstinence from—this behavior and teach "skills to help those youth already engaged in sexual risk to return toward risk-free choices in the future."⁸¹ In essence, the Trump administration has succeeded in converting TPPP into a third dedicated federal funding stream for abstinence-only programs.

The second new source of federal funding, PREP, was created by the Affordable Care Act.⁸² PREP grants funds to states that implement "personal responsibility education programs," defined as those that teach adolescents both abstinence and contraception to prevent pregnancy and STDs, as well as at least three of six "adulthood preparation subjects."^{83,84} To receive funding, state programs must be effective or proven, on the basis of rigorous scientific research, to

73. *Id.*

74. *Evidence-Based Teen Pregnancy Prevention Education Resources*, POWER TO DECIDE, https://powertodecide.org/sites/default/files/resources/supporting-materials/fpac_teen_pregnancy_prevention_education.pdf.

75. *Id.*

76. *Id.*

77. *Id.*

78. Jessica Boyer, *The Teen Pregnancy Prevention Program Was on the Right Track, Now It's Being Dismantled*, GUTTMACHER INST. (May 24, 2018), <https://www.guttmacher.org/article/2018/05/teen-pregnancy-prevention-program-was-right-track-now-its-being-dismantled>.

79. *Id.*

80. *Id.*

81. *Id.*

82. 42 U.S.C.A. § 713(c)(1) (West, Westlaw through P.L. 115-231).

83. 42 U.S.C.A. § 713(b)(2)(A) (West, Westlaw through P.L. 115-231).

84. These "adulthood preparation subjects" are: (1) Healthy relationships, including marriage and family interactions; (2) adolescent development, such as the development of healthy attitudes and values about adolescent growth and development, body image, racial and ethnic diversity, and other related subjects; (3) financial literacy; (4) parent-child communication; (5) educational and career success, such as developing skills for employment preparation, job seeking, independent living, financial self-

change behavior; be medically accurate, age appropriate, and culturally sensitive; and teach both abstinence and contraception.⁸⁵ Forty-four states applied for and received PREP funding during FY 2017.⁸⁶ In February 2018, President Trump signed the Bipartisan Budget Act of 2018 that, among other things, extended the current \$75 million annual funding of for PREP for two years.⁸⁷

III. LEGAL CHALLENGES TO SEX EDUCATION PROGRAMS

There are no federal laws regulating sexual education in public schools.⁸⁸ Because regulation of sex education takes place at the state and local level, educational content varies widely in scope.⁸⁹ The controversial nature of these programs has led to several legal challenges, most of which revolve around the relationship between public education and parental decision-making, as well as religious freedom. Many challenges have directly targeted statutes or school programs requiring participation in sex education, while others have challenged laws limiting the accessibility or program content of sex education. New legal challenges deal with programs that have implemented guidance on broader issues of human sexuality, particularly LGBTQ education.

A. OBJECTIONS TO LAWS THAT REQUIRE SEX EDUCATION

Required sex education programs have been challenged on various constitutional grounds, including religious freedom,⁹⁰ the right to privacy,⁹¹ and parental

sufficiency, and workplace productivity; (6) healthy life skills, such as goal-setting, decision making, negotiation, communication and interpersonal skills, and stress management. *Id.* § 713(b)(2)(C).

85. *Id.* § 713(b)(2)(B).

86. 2017 State Personal Responsibility Education Program (PREP) Awards, Family & Youth Services Bureau, <https://www.acf.hhs.gov/fysb/resource/2017-state-prep-awards#>; The following states did not apply for PREP funding in FY 2017: Florida, Indiana, Kansas, North Dakota, Texas, and Virginia. *Id.*

87. Power to Decide, *supra* note 74.

88. “Sex Education Laws and State Attacks, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/sex-education/sex-education-laws-and-state-attacks> (last visited Oct. 14, 2018) (“no federal laws dictate what sex education should look like or how it should be taught in schools.”).

89. *See, e.g.*, Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J. L. FEM. 496, 507 (2007) (outlining the two primary types of sex education used in U.S. public schools).

90. *See, e.g.*, *Smith v. Ricci*, 446 A.2d 501, 503 (N.J. 1982) (allowing State Board of Education to implement sex education when the program does not inhibit free exercise of religion); *Medeiros v. Kiyosaki*, 478 P.2d 314, 315 (Haw. 1970) (affirming the continuation of a sex education film series implemented by state education officials because it does not burden plaintiffs’ exercise of religion).

91. *See Fields v. Palmdale School Dist.*, 427 F.3d 1197, 1199 (9th Cir. 2005) (claiming that a district’s inclusion of questions about sexual topics in a survey violated the parent’s privacy right to make intimate familial decisions); *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 530 (1st Cir. 1995); *Citizens for Parental Rights v. San Mateo Cty. Bd. of Educ.*, 82 A.L.R.3d 544, 547 (Cal. Ct. App. 1975) (in which plaintiff’s claimed that sex education curricula would violate parent’s privacy rights by requiring students to reveal intimate familial details).

control of child education.⁹² Courts have found sex education and family life programs constitutional when there was an adequate provision for excusal from the program, based on moral, conscious, or religiously objectionable beliefs.⁹³

In *Smith v. Ricci*, the Supreme Court of New Jersey upheld the state board of education's regulation requiring local school districts to develop family-life education programs.⁹⁴ Appellants argued that because the regulation required their children to learn about "human reproduction, sexuality, and the development of personal and social values," it exposed them to beliefs contrary to their own and their parents, thereby interfering with the practice of their religion.⁹⁵ The court found that because the program included a provision allowing parents to remove their children from parts they felt violated their beliefs, there was no infringement upon their religious freedom.⁹⁶

The *Smith* decision highlights the delicate balance courts have struck between the recognized right of parents to direct the education and upbringing of their children,⁹⁷ and the strong interest of states and local principalities in providing effective education and mental welfare to public school students.⁹⁸ Courts have consistently held that school systems have the right and responsibility to determine curricula.⁹⁹ Parental control is generally outweighed by the state's interest in providing effective education or protecting the public health of children.¹⁰⁰ As such, courts have given strong deference to the state in forming their education policy, including sex education programs.

92. *Meyer v. Nebraska*, 262 U.S. 390, 392 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57, 59 (2000).

93. *See, e.g., Smith v. Ricci*, 446 A.2d 501, 503 (N.J. 1982); *Medeiros v. Kiyosaki*, 478 P.2d 314, 316 (Haw. 1970); *Citizens for Parental Rights v. San Mateo Cty. Bd. of Educ.*, 82 A.L.R.3d 544, 548 (Cal. Ct. App. 1975).

94. *See, e.g., Smith*, 46 A.2d at 504.

95. *Id.* at 520.

96. *Id.*

97. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57, 59 (2000).

98. *See, e.g., Leebaert v. Harrington*, 332 F.3d 134, 139 (2d Cir. 2003); *Fields v. Palmdale School Dist.*, 427 F.3d 1197, 1199 (9th Cir. 2005).

99. *See, e.g., Leebaert v. Harrington*, 332 F.3d 134, 137 (2d Cir. 2003) (upholding mandatory sex education when there is an opt-out provision); *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 530 (1st Cir. 1995) (finding that under Massachusetts statute, the school board was allowed to determine the appropriateness of a sex education assembly); *Hopkins v. Hamden Bd. of Educ.*, 289 A.2d 914, 916 (Conn. 1971) (holding that a Connecticut statute mandating the teaching of health education could include distribution of materials related to sex education and health); *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 759 (Mass. 1995) (holding condom distribution program in public school did not violate parental rights even when there was no opt-out provision or parental notification); *Hobolth v. Greenway*, 218 N.W.2d 98, 99 (Mich. Ct. App. 1974) (discussing Michigan statute that allowed the Board of Education to make sex education determinations).

100. *Prince v. Massachusetts*, 321 U.S. 158, 169 (1944); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005).

In *Brown v. Hot, Sexy, and Safer Productions*,¹⁰¹ a high school required its students to attend an HIV/AIDS awareness program produced by an independent educational company. Two students and their parents sued the school and the company, alleging the material was profane, lewd, contained offensive monologues, and advocated for oral sex, masturbation, same-sex activity, and condom use for premarital sex.¹⁰² The First Circuit held that a one-time sex education program performed at an assembly did not violate students' right to privacy or due process. Plaintiffs claimed that the school violated their Fourteenth Amendment privacy right to rear their children in accordance with their values,¹⁰³ but the First Circuit rejected this argument.¹⁰⁴ The court held that parents can choose to enroll their children in a different school, but they do not have the right to command school systems to change curricula based on their personal moral views.¹⁰⁵ The court reasoned that if an individual parent had a fundamental right to dictate the school program, then schools would be unduly burdened by having to fashion a curriculum for each student instead of applying a standard curriculum for all.¹⁰⁶

In a similar case, *Leebaert v. Harrington*, Connecticut parents challenged a health and hygiene education requirement that included sexual health.¹⁰⁷ The school's program allowed parents to opt-out their children from the six-day sexual health unit, but not from the rest of the forty-five day program.¹⁰⁸ After exempting his child from the sexual health unit, a father challenged the validity of the entire program by arguing that it violated his religious freedom and privacy as guaranteed by the First and Fourteenth Amendments.¹⁰⁹ The Second Circuit ruled that the plaintiff did not have a fundamental right to remove his son from the entire program, reasoning, much like the court in *Brown*, that schools would be unduly burdened if they had to tailor each child's curriculum to his or her parents' particular desires.¹¹⁰ The court also acknowledged that the school district's requirement that students attend sex health education classes was furthering the state's legitimate interest in promoting the health and welfare of children and the program thus passed rational basis review.¹¹¹

101. *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 527 (1st Cir. 1995), *abrogated on other grounds* by *Martinez v. Cui*, 608 F.3d 54, 58 (1st Cir. 2010).

102. *Id.*

103. *Id.* at 532 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

104. *Id.* at 533.

105. *Id.*

106. *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995).

107. *Leebaert v. Harrington*, 332 F.3d 134, 136 (2d Cir. 2003).

108. *Id.*

109. *Id.* at 135.

110. *Id.* at 141.

111. *Id.* at 143. While courts have found that parents enjoy a fundamental right to control the upbringing of their children, that right does not extend to dictating the curriculum of public schools. As such, parental rights in these circumstances have not been found to be subject to strict scrutiny review. *Compare* *Troxel v. Granville*, 530 U.S. 57 (2000) (suggesting that parents' have a fundamental right to make decisions concerning the care, custody, and control of their children) *with* *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (finding that a parent's freedom to choose

Courts have consistently upheld the constitutionality of sex education programs, dismissing First and Fourteenth Amendment objections when programs have not contained “opt out” provisions. The rights of religious free exercise and privacy have not been found to shield individuals from learning about beliefs or opinions that may run contrary to their own, particularly when a public school determines something will further its interest in the health and education of children. This has been increasingly important as courts begin to hear challenges to sex education and public-school curriculum now implementing LGBTQ education.

In *Parker v. Hurley*, the First Circuit affirmed a lower court ruling that dismissed parents’ challenge to a public school curriculum that taught “homosexuality” as an accepted family style.¹¹² The parents sued the school district after their children were presented with books that portray diverse families, including those of same sex couples.¹¹³ The complaint alleged that the public schools were indoctrinating the children with beliefs about homosexuality that ran contrary to the parent’s religious beliefs, in violation of the First and Fourteenth Amendment.¹¹⁴ The parents also reasoned that the school district did not provide them with prior notice, and therefore they were deprived an opportunity to exempt their children from instruction, in violation of Massachusetts law.¹¹⁵

The First Circuit found that exposure to the materials in dispute would not interfere with the parent’s ability to raise their children in their religious belief,¹¹⁶ and the parents had notice of the books, as well as the school’s intent to promote toleration of same-sex marriage.¹¹⁷ The court also emphasized the district court’s ruling that parents may not dictate public school curricula.¹¹⁸ Distinguishing between the parent’s free exercise rights¹¹⁹ and their children’s, the court also found that the children’s free exercise rights were not burdened. In one circumstance, the child was not required to read the books at issue, and there is no recognized right to be free of reference “to the existence of families in which the parents are of different gender combinations.”¹²⁰ In another, although the child was required to sit through a reading, and the book positively portrayed

specific educational opportunities for their children does not encompass “a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children). As such, courts have employed rational basis review to these constitutional challenges. *See id.* at 143 (finding that where parents seek to exempt their child from an educational requirement, rational basis review applies).

112. *See Parker v. Hurley*, 514 F.3d 87, 88 (1st. Cir. 2008)

113. *Id.* at 90.

114. *Id.* at 103.

115. *Id.* at 90.

116. *Id.* at 105.

117. *Id.* at 106.

118. *Id.* at 105 (“The mere fact that a child is exposed on occasion in public school to a concept offensive to a parent’s religious belief does not inhibit the parent from instructing the parent differently.”). *See also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005).

119. *Id.* at 106.

120. *Id.*

homosexuality and gay marriage, there was no evidence of indoctrination or a school imposed requirement to agree with or affirm those beliefs.¹²¹

In contrast, *Citizens for a Responsible Curriculum v. Montgomery County Public Schools* involved a successful curriculum challenge brought by two non-profit organizations.¹²² The plaintiffs objected to a curriculum with a unit on LGBT persons.¹²³ The district court granted the plaintiff organizations' motion for a temporary restraining order to keep the schools from implementing the program.¹²⁴ The court's decision was partially based on concern that the curriculum would violate plaintiffs' free speech rights under the First Amendment by offering a portrayal of LGBTQ persons as living a morally correct lifestyle without allowing for other perspectives.¹²⁵ The court was also concerned that the curriculum violated the Establishment Clause of the First Amendment by expressing an overt preference for religious sects that are "friendly towards the homosexual lifestyle."¹²⁶ The restraining order was granted in spite of the fact that students could avoid the curriculum via an opt-out provision.¹²⁷

The decisions in *Citizens* and *Parker* suggest that, should a required sex education or public-school curriculum 1) explicitly endorse homosexuality and same-sex marriage; 2) ask students or parents to affirm those beliefs; or 3) show preference for particular religious groups affirming those beliefs, that program would run afoul of the First Amendment.¹²⁸ In *Parker*, the First Circuit found that the books at issue did not violate the Free Exercise Clause because the school did not compel either the children or the parents to disavow their religious beliefs, nor promote particular religions through positive portrayals of same-sex marriage and homosexuality. In contrast, in *Citizens*, the Maryland District Court granted the restraining order in large part because of the suggestion that the sex education curriculum looked more favorably on religious groups that had a positive outlook on homosexuality,¹²⁹ and the curriculum instruction provided no opportunity to voice alternative opinions, effectively asking the students to affirm the beliefs provided to them.¹³⁰

121. *Id.*

122. *Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Schs.*, 2005 WL 1075634, at *1 (D. Md. May 5, 2005).

123. *Id.*

124. *Id.* at *12-13.

125. *Id.* at *12.

126. *Id.* at *10-11.

127. *Id.* at *6.

128. *See also* *Coleman v. Caddo Parish Sch. Bd.*, 665 So. 2d 1238 (La. Ct. App. 1994) (in which the court upheld the trial court's decision to strike passages from a school board education curricula that discussed spirituality and looked at the moral judgment of sexual acts in a religious manner); *see generally* Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J. L. FEM. 496, 499 (2007) (analyzing the constitutionality of abstinence-only education).

129. *Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Schs.*, 2005 WL 1075634, at *11 (D. Md. May 5, 2005).

130. *Id.* at *12.

The federal recognition of same-sex marriage¹³¹ has led to greater integration of LGBTQ topics into public school sex education curriculum across the country. It is likely that other programs incorporating LGBTQ education will face legal challenges like those in *Citizens* and *Parker*. Courts will have to grapple with whether this new content, if provided in programs with “opt out” provisions, is afforded the same level of discretion courts have typically given to states administering sex education programs. They will need to provide clarity as to when and what topics can be addressed, and what limitations are placed on particular programs in educating students on LGBTQ content.

B. LEGAL OBJECTIONS TO LIMITS ON SEX EDUCATION

While there have been a series of challenges to laws requiring sex education,¹³² there have been few challenges to laws that limit or restrict sex education. To date, only one case has been brought suggesting that a school board has violated state law by providing inadequate comprehensive sexual education.¹³³

In *American Academy of Pediatrics v. Clovis Unified School District*, petitioners asserted that the school district’s sex-ed curriculum violated California law by failing to provide comprehensive sexual education as required by statute. The program emphasized abstinence-only instruction and used outdated sex education materials that were no longer compliant with Education Code requirements.¹³⁴ After the district revised its curriculum, plaintiffs voluntarily dismissed the case, but sought fees by claiming “they were the catalyst in motivating the District to provide the relief sought.”¹³⁵ The Superior Court of California found that the school district’s sex ed curriculum violated California law for many years before plaintiff parents complained, and some changes in part were motivated by plaintiffs’ suit.¹³⁶ In assessing the sufficiency of the educational program, the court found that the district had not been providing comprehensive sex education, as instructors and materials “provided instruction on abstinence only or delivered instruction with intentional gender or sexual orientation bias,” and did not adequately instruct on sexually-transmitted disease prevention.¹³⁷

While *Clovis* dealt with restrictions on sex education, the state law was not challenged by the plaintiffs; rather, plaintiffs sued because they believed the school board’s noncompliance with the requirements set out by California was harming their children’s right to comprehensive sex education. There have not been any direct challenges to state laws alleging that their guidelines unconstitutionally restrict student’s access to sex education.

131. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

132. See generally *Obergefell*, *supra* note 131, Part II.A.

133. *American Academy of Pediatrics v. Clovis Unified School Dist.*, 2015 WL 2298565 (Ca. Super. Ct. 2015).

134. *Id.* at *3.

135. *Id.* at *9-11.

136. *Id.* at *1.

137. *Id.* at *14.

There are several potential reasons for this dearth of case law. In communities where abstinence-until-marriage programs are in place, it is possible that a significant portion of the population supports those types of sex education programs and does not advocate for an expanded role of schools in this field. This may also be true of communities implementing comprehensive sex education plans. Parents who are dissatisfied with limited programs might also simply choose to instruct their children at home.¹³⁸ The rising growth of LGBTQ history in public schools, as well as broader coverage of human sexuality, may also lead to new challenges on the sufficiency of existing sex education programs.¹³⁹

Ultimately, individuals may be reluctant to bring suit for concerns that they will be no more successful than those who objected to required sex-education programs. The strong deference to state control of public health and education has made courts reluctant to dictate how schools should conduct their sex-education programs. That deference would likely extend to attempts at requiring schools to add material to their curriculum.

Advocates have taken alternative routes to fight insufficient sex education programs, primarily through legal challenges to federal funding programs prioritizing abstinence-only education.¹⁴⁰ Since 2010 Congress has used the Teen Pregnancy Prevention Program (TPPP) to fund sex education programs that reduce teen pregnancy, and “Congress has maintained separate funding streams for evidence-based programs and abstinence-only education programs.”¹⁴¹ Funds are allocated through two categories; Tier 1 grants are awarded for replicating programs that have been proven effective through rigorous evaluation to reduce teen pregnancy, and Tier 2 grants are awarded “for research and demonstration grants to develop. . .innovative strategies for preventing teen pregnancy.”¹⁴²

President Trump’s FY 2018 proposed budget called for the elimination of the TPPP and sought investment in extending abstinence only education.¹⁴³ In July 2017, the U.S. Department of Health and Human Services (“HHS”) issued notices to TPP projects that funding would end two years earlier than expected

138. Parents’ right to send their children to private schools or to homeschool is constitutionally protected. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

139. *See generally supra* Part II.B.

140. Press Release, Planned Parenthood Sues Trump-Pence Administration to Protect Young People’s Access to Information, Education in Teen Pregnancy Prevention Program (June 22, 2018), available at <https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-sues-trump-pence-administration-to-protect-young-peoples-access-to-information-education-in-teen-pregnancy-prevention-program>.

141. *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 328 F. Supp. 3d 1133, 1138 (E.D. Wash. 2018).

142. *Planned Parenthood of New York City, Inc. v. HHS*, 337 F. Supp. 3d 308, 314 (S.D. N.Y. 2018).

143. *See e.g.*, *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 328 F. Supp. 3d 1133, 1135 (E.D. Wash. 2018); *King Cty. v. Azar*, 320 F. Supp. 3d 1167, 1168 (W.D. Wash. 2018); *Pol’y & Research, LLC v. HHS*, 313 F.Supp.3d 62 (D.D.C. 2018); *Healthy Teen Network v. Azar*, 322 F. Supp.3d 647, 649 (D. Md. 2018); *Planned Parenthood of New York City, Inc. v. HHS*, 337 F. Supp. 3d 308, 317 (S.D. N.Y. 2018); *Multnomah Cty. v. Azar*, 340 F. Supp. 3d 1046, 1047 (D. Or. 2018).

and HHS would not provide additional funding for subsequent years.¹⁴⁴ TPPP grantees filed suit in various district courts to challenge the termination, whereby all courts granted relief for the plaintiffs and ordered HHS continue TPPP funding.¹⁴⁵

Although Congress fully funded the TPPP for FY 2018, past TPPP beneficiaries filed suit against the Department of Health and Human Services HHS, challenging HHS implementation of TPPP grants.¹⁴⁶ Plaintiffs in these cases have argued that the TPPP requirements for 2018 have been repurposed to fund abstinence-only content and eliminate funding for evidence-based programs, in violation of federal statutes.¹⁴⁷ So far, in at least two of these cases, the courts declined to answer whether or not the administration's policy objectives were to create program restrictions on grantees that provide comprehensive sex education.¹⁴⁸ The courts did find, however, that the new Tier 1 terms, which gave grantees only two possible programs to replicate, were insufficient and did not comply with the 2018 Congressional Appropriations Act ("2018 CAA").¹⁴⁹ Specifically, the courts found that the programs outlined in the FY 2018 budget had not been "proven effective through rigorous evaluation," defined elsewhere in the statute as "evidence based and effective." As Congress continues to work on the FY 2019 budget,¹⁵⁰ if there are changes to the current standards requiring evidence-based evaluations for the Tier 1 program, it may jeopardize grantees who currently rely on federal funding to provide comprehensive sex education.

Supporters of comprehensive sex education have also been fairly successful in non-litigation-based advocacy. Students have been particularly successful at lobbying for inclusive student organizations that advocate for increased awareness

144. See *e.g.*, *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 328 F. Supp. 3d 1133 (E.D. Wash. 2018); *King Cty. v. Azar*, 320 F.Supp.3d 1167 (W.D. Wash. 2018); *Pol'y & Research, LLC v. HHS*, 313 F.Supp.3d 62 (D.D.C. 2018); *Healthy Teen Network v. Azar*, 322 F.Supp.3d 647 (D. Md. 2018); *Planned Parenthood of New York City, Inc. v. HHS*, 337 F. Supp. 3d 308, 317 (S.D. N.Y. 2018); *Multnomah Cty. v. Azar*, 340 F. Supp. 3d 1046 (D. Or. 2018).

145. See *e.g.*, *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 328 F. Supp. 3d 1133, 1135 (E.D. Wash. 2018); *King Cty. v. Azar*, 320 F.Supp.3d 1167 (W.D. Wash. 2018); *Pol'y & Research, LLC v. HHS*, 313 F.Supp.3d 62, 64 (D.D.C. 2018); *Healthy Teen Network v. Azar*, 322 F.Supp.3d 647 (D. Md. 2018).

146. See *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 328 F. Supp. 3d 1133 at *1 (E.D. Wash. 2018); *Planned Parenthood of New York City, Inc. v. HHS*, 337 F. Supp. 3d 308, 317 (S.D. N.Y. 2018).

147. See *Multnomah Cty. v. Azar*, 340 F. Supp. 3d 1046, 1048 (D. Or. 2018).

148. See *Planned Parenthood of New York City, Inc. v. HHS*, 337 F. Supp. 3d 308, 341 (S.D. N.Y. 2018); *Multnomah Cty. v. Azar*, 340 F. Supp. 3d 1046 at *18 (D. Or. 2018). *But see* *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 328 F. Supp. 3d 1133, 1155 (E.D. Wash. 2018) (in which the court declined to interpret FY 2018 FOA requirements to mean that HHS was requiring abstinence-only programs).

149. *Planned Parenthood of New York City, Inc. v. HHS*, 337 F.Supp.3d 308, 324 (S.D. N.Y. 2018).

150. *Appropriations Watch: FY 2019*, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Sept. 28, 2018), <http://www.crfb.org/blogs/appropriations-watch-fy-2019>.

of sexuality and more robust sexual health curricula.¹⁵¹ In *Colin v. Orange Unified School District*,¹⁵² students at a California high school felt there was a need to promote awareness of, and develop support for, issues of sexuality.¹⁵³ Upon receiving the group's request for official recognition from the school, the principal conditioned school recognition on the acceptance of proposed alterations to the group's constitution, including a statement that "sex, sexuality, [and] sex education" will not be discussed at the group's meetings.¹⁵⁴ The court held that the school had violated the federal Equal Access Act by denying the club official recognition.¹⁵⁵

In *Straights and Gays for Equality*, a LGBT group successfully challenged their school under the Equal Access Act for favoring other non-curriculum related groups, such as the cheerleading squad and the synchronized swimming team.¹⁵⁶ Plaintiffs argued that their LGBT group, designated as "noncurricular" by the school district, were afforded fewer resources and communication opportunities than other groups considered "curricular," specifically cheerleading and synchronized swimming.¹⁵⁷ "Noncurricular" groups were prohibited from making announcements in the yearbook or on the school's PA system, and were not allowed to fundraise or take field trips.¹⁵⁸ The Eighth Circuit found that the LGBT group did not have equal access to these communication channels, and were entitled to a presumption of irreparable harm through the prohibitions put in place by the school.¹⁵⁹ The court reached its holding by honoring the primary purpose of the Equal Access Act, allowing equal opportunities for expressive liberties. While the court made no explicit reference to the importance of SAGE's role in influencing awareness of sexuality and sex education at school, its adherence to the Equal Access Act seems to have a positive effect on encouraging more discussions on sex education in public schools.¹⁶⁰

151. *Gender and Sexuality Alliances*, GLSEN, <https://www.glsen.org/participate/student-action/gsa> (last visited Oct. 14, 2018).

152. *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1137 (C.D. Cal. 2000).

153. *Id.* at 1138.

154. *Id.* at 1140.

155. 83 F. Supp. 2d at 1151. In several cases involving recognition of LGBT groups, claims alleging First Amendment violation of association and expression have been brought. Courts have generally declined to discuss the First Amendment claim. *See id.* at 1149; *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty.*, 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003). *But see Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau Cnty.*, 602 F. Supp. 2d 1233, 1235 (M.D. Fla. 2009) (finding that Congress effectively codified the First Amendment rights of non-curricular student groups).

156. *Straights & Gays for Equality v. Osseo Area Sch.*, 471 F.3d 908, 909 (8th Cir. 2006).

157. *Id.*

158. *Id.* at 913.

159. *Id.*

160. *See also, e.g., Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty.*, 258 F. Supp. 2d 667, 669 (E.D. Ky. 2003) (mandating school board grant the Gay-Straight Alliance equal access to activities of other student groups, including the opportunity to meet before and after school and during home room); *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau Cnty.*, 602 F. Supp. 2d 1233, 1234 (M.D. Fla. 2009) (granting plaintiffs' preliminary injunction to have school officially recognize the Gay-Straight Alliance student group); *Gay-Straight Alliance of Okeechobee High Sch. v.*

IV. POLITICAL CONTEXT AND SOCIAL SCIENCE DEVELOPMENTS

A. THE EFFECTIVENESS OF SEX EDUCATION PROGRAMS

Uncertainty of the effectiveness of different approaches to sex education provides yet another source of debate. One recent study concluded that state-mandated programs that emphasize abstinence have no beneficial effect on the infection rates of chlamydia and gonorrhea, both common STDs.¹⁶¹ Programs that mandate coverage of abstinence among other approaches can have a beneficial effect in states that previously had elevated infection rates.¹⁶² However, the authors note that the study is limited and more research is needed.¹⁶³

The most recent study on abstinence-only education and its effects showed statistically significant differences in state teen pregnancy outcomes based on the type of sex education that the state provides.¹⁶⁴ The study showed that abstinence-only education did not contribute to reductions in teen pregnancy and may have increased teen pregnancy.¹⁶⁵ Comprehensive sex education which includes abstinence as a desired behavior was correlated with the lowest teen pregnancy rates.¹⁶⁶ A 2017 review article by the Journal of Adolescent Health reaffirmed these findings.¹⁶⁷

Studies which seek to correlate whether particular sex education programs achieve their effect should also be carefully scrutinized. Efficacy correlations that compare state populations are limited in that they do not take into consideration all of the factors that impact the effect of sex education besides curriculum, especially the opt-out rates for a program and general community religious and moral values. Nor do these efficacy correlations control for other factors, such as wealth and race, found to correlate with sex education success variables. For example, a study associated with the Centers for Disease Control and Prevention found that states with a higher proportion of African-American residents had a higher

Sch. Bd. of Okeechobee Cnty., 483 F. Supp. 2d 1224, 1226-27 (S.D. Fla. 2007) (requiring school to recognize the Gay-Straight Alliance and grant it the same access and privileges it grants to other non-curricular clubs); *Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cnty. Sch. Corp.*, No. IP01-1518 C-M/S, 2002 WL 32097530 (S.D. Ind. Aug. 30, 2002) (granting summary judgment for plaintiffs upon determination that the club meeting period was a limited open and public forum requiring equal access to the Gay-Straight Alliance). *But see* *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 552 (N.D. Tex. 2004) (denying gay-straight student association's claims that school's refusal to recognize group violated the Equal Access Act due to the law's exceptions for avoiding disruption and protecting the well-being of students).

161. Matthew Hogben et al., *Sexuality Education Policies and Sexually Transmitted Disease Rates in the United States of America*, 21 INT'L J. STD & AIDS 293, 296 (2010).

162. *Id.*

163. *Id.*

164. Kathrin F. Stanger-Hall et al., *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6 PLoS ONE 10: e24658 (2011) at 4.

165. *Id.*

166. *Id.*

167. John S. Santelli et al., *Abstinence-Only-Until-Marriage: An Updated Review of U.S. Policies and Programs and Their Impact*, 61 J. OF ADOLESCENT HEALTH, 273, 276 (2017).

incidence of STDs.¹⁶⁸ Other studies have found a per capita income correlation with STD rates¹⁶⁹ and teen pregnancy.¹⁷⁰

Studies that analyze meta-data of sex education programs from smaller localities yield more conclusive results and have typically been relied upon to demonstrate the inferiority of abstinence-only education relative to comprehensive programs, albeit in only limited and discrete aspects. For example, the American Medical Association reported that there is no evidence to suggest that abstinence-until-marriage curricula for sex education are effective in delaying the onset of intercourse.¹⁷¹ Studies conducted by private researchers also reported the inefficacy of abstinence-only curricula.¹⁷² Some studies showed that a range of sex education programs, each more comprehensive in nature than abstinence-until-marriage programs, may actually better delay the age of first sexual activity, reduce the number of sexual partners, and reduce STD and unplanned pregnancy rates.¹⁷³ Several sources determined no correlation between comprehensive sex education programs and an increase in teenage sexual activity.¹⁷⁴

Two widely acclaimed studies have made broad, definite conclusions about the superior effectiveness of comprehensive sex education. A 2007 meta-analysis of several other sex education studies from across the nation found that abstinence-only programs that met the federal eight-point definition did not delay teen sexual activity or reduce STDs.¹⁷⁵ Comprehensive programs, in contrast, were found to

168. Salaam Semaan et al., *Social Capital and Rates of Gonorrhea and Syphilis in the United States: Spatial Regression Analyses of State-Level Associations*, 64 *SOC. SCI. & MED.* 2324, 2325 (2007).

169. Craig A. Gallet, *A Note on the Determinants of Sexually Transmitted Disease Rates*, 39 *SOC. SCI. J.* 613, 615 (2002).

170. Susheela Singh et al., *Socioeconomic Disadvantages and Adolescent Women's Sexual and Reproductive Behavior*, 33 *FAM. PLAN. PERSP.* 251, 255 (2001).

171. See Council of Scientific Affairs, Report of the Council on Scientific Affairs [Action of the AMA House of Delegates 1999 Interim Meeting, SCA Report 7-I-99] (1999), available at https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/mss/mss-proceedings-all_0.pdf; see also Christopher Trenholm et al., *Impacts of Four Title V, Section 510 Abstinence Education Programs* at 60 (2007).

172. See Debra Hauser, *Five Years of Abstinence-Only-Until-Marriage Education: Assessing the Impact* (2004), <http://www.advocatesforyouth.org/PUBLICATIONS/stateevaluations.pdf> (revealing that the five-year abstinence-only-until-marriage education programs implemented in ten states provide little or no sustained impact on actual attitudes toward sexual behavior);

173. *Advocates for Youth, Myths & Facts About Sex Education*, <http://www.advocatesforyouth.org/storage/advfy/documents/cse-myths-and-facts.pdf> (last visited Sept. 30, 2018). A study by the World Health Organization reviewed forty-seven sex education programs in the United States and other countries: In fifteen studies, sex and HIV/AIDS education neither increased nor decreased sexual activity and rates of pregnancy and sexually transmitted diseases. However, in seventeen studies, HIV and/or sex education delayed the onset of sexual activity, reduced the number of sexual partners, and/or reduced unplanned pregnancy and sexually transmitted disease rates.

174. See Douglas Kirby, *Emerging Answers: Research Findings on Programs to Reduce Teen Pregnancy* (2007), available at <https://powertodecide.org/sites/default/files/resources/primary-download/emerging-answers.pdf> (last visited Sept. 30, 2018) (finding that sexuality and HIV education do not hasten sexual activity, education about abstinence and contraception are compatible rather than in conflict with each other and making condoms available does not increase sexual behavior).

175. *Id.* at 113 (The eight-point definition requires: "A. Have as its exclusive purpose teaching the social, psychological, and health gains to be realized by abstaining from sexual activity B. Teach

produce behavioral changes in two-thirds of the forty-eight programs reviewed.¹⁷⁶ Forty percent of the programs delayed the initiation of sex, 30% reduced the frequency of sex, and 60% reduced the incidence of unprotected sex.¹⁷⁷ Another study, the first ever to compare abstinence-only and comprehensive sex education programs among a national sample of teenagers, found that those who received comprehensive sex education were half as likely to become teen parents as those who received abstinence-only education.¹⁷⁸

As one example, California stands out as a success story for comprehensive sex education. While in 1992 it had the nation's highest teenage pregnancy rate, by 2005 it had reduced that rate by over half. In comparison, the national average during the same period was a reduction by only 37%.¹⁷⁹ Advocates credit the state's adoption of comprehensive sex education for the impressive turnaround, embodied in the 2003 California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act.¹⁸⁰ While the Act only mandates instruction in HIV/AIDS prevention,¹⁸¹ it requires schools electing to teach comprehensive sex education to provide instruction that is medically accurate, age appropriate, and comprehensive. The programs must include information about abstinence, "while also providing medically accurate information on other methods of preventing pregnancy and STDs."¹⁸² In 2016, California enacted the Healthy Youth Act, which renamed the previous 2003 legislation.¹⁸³ The Healthy Youth Act requires school districts to provide comprehensive sexual health and HIV prevention information to students at least once in both middle and high school.¹⁸⁴

abstinence from sexual activity outside marriage as the expected standard for all school-age children C. Teach that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems D. Teach that a mutually faithful, monogamous relationship in the context of marriage is the expected standard of sexual activity E. Teach that sexual activity outside the context of marriage is likely to have harmful psychological and physical effects F. Teach that bearing children out of wedlock is likely to have harmful consequences for the child, the child's parents, and society G. Teach young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances H. Teach the importance of attaining self-sufficiency before engaging in sexual activity.").

176. *Id.* at 15.

177. *Id.*

178. Norman A. Constantine, *Converging Evidence Leaves Policy Behind: Sex Education in the United States*, 42 J. ADOLESCENT HEALTH 321, 325 (2008).

179. Heather D. Boonstra, *Winning Campaign: California's Concerted Effort to Reduce its Teen Pregnancy Rate*, 13 GUTTMACHER Pol'y Rev. (2010), available at <http://www.guttmacher.org/pubs/gpr/13/2/gpr130218.html> (last visited Sept. 30, 2018).

180. CAL. EDUC. CODE § 51930-39 (West, Westlaw through Ch. 403 of 2014 Reg. Sess., Res. Ch. 1 of 2013-2014 2d Extra. Sess.).

181. CAL. EDUC. CODE § 51934 (West, Westlaw through Ch. 931 of 2014 Reg. Sess., Res. Ch. 1 of 2013-2014 2d Extra. Sess.) (requiring HIV/AIDS prevention education in grades seven through ten).

182. CAL. EDUC. CODE § 51934 (West, Westlaw through Ch. 931 of 2014 Reg. Sess., Res. Ch. 1 of 2013-2014 2d Extra. Sess.). See CAL. EDUC. CODE § 51933 (West, Westlaw through Ch. 403 of 2014 Reg. Sess., Res. Ch. 1 of 2013-2014 2d Extra. Sess.).

183. California Department of Education, *Comprehensive Sexual Health & HIV/AIDS Instruction*, <https://www.cde.ca.gov/ls/he/se/> (last visited Sept. 30, 2018).

184. *Id.*

A 2010 study has offered support for an experimental type of abstinence-only education that avoided the rigid federal eight-point criteria for programs that were eligible for federal abstinence-only-until-marriage funding. This abstinence-only program “did not contain inaccurate information, portray sex in a negative light, or use a moralistic tone.”¹⁸⁵ The study tracked 662 African-American students in grades six and seven for two years after they had completed one of five types of sex education programs over the course of a weekend.¹⁸⁶ The participants in the experimental abstinence-only program were the only students who refrained to a significant degree from sexual initiation relative to the control group: only 32.6% of the abstinence-only participants, compared with 46.6% of those in the control group, reported sexual activity two years after completing the program.¹⁸⁷ However, the comprehensive program significantly reduced the instance of multiple sexual partners while the abstinence-only program did not.¹⁸⁸

Almost all sex education programs emphasize that abstinence is the only certain way to prevent unintended pregnancy and STDs.¹⁸⁹ There are two ways to measure the effectiveness of contraception methods: “perfect use” and “typical use.”¹⁹⁰ When educators and legislators state that abstinence is “100% effective” for preventing STDs and pregnancy, they are implicitly citing “perfect use” rates of abstinence from all sexual activity.¹⁹¹ However, some programs compare the 100% effectiveness of abstinence with the “typical use” rates of other contraceptives.¹⁹² These comparisons are misleading because the “typical use” effectiveness of contraceptive methods reflects the fact that the contraception may not be used consistently.¹⁹³ If abstinence were subjected to the same research method, it would logically have a “typical use” effectiveness rate of less than 100%. While little research has been done on this topic, one study found that 60% of college students who had pledged virginity broke their vow during college.¹⁹⁴

185. John B. Jemmott III et al., *Efficacy of a Theory-Based Abstinence-Only Intervention Over 24 Months: A Randomized Controlled Trial With Young Adolescents*, 164 ARCH. PEDIATR. & ADOLESC. MED. 152, 153 (2010).

186. The programs were: an eight-hour abstinence-only intervention, an eight-hour safer sex-only intervention, an eight-hour comprehensive intervention, a twelve-hour comprehensive intervention, or an eight-hour intervention promoting general health (which served as the control group).

187. Jemmott, *supra* note 185, at 156.

188. *Id.* at 157.

189. *See supra* notes 23-35 and accompanying text.

190. “‘Perfect use’ measures the effectiveness when a contraceptive is used exactly according to clinical guidelines. In contrast, ‘typical use’ measures how effective a method is for the average person who does not always use the method correctly or consistently.” Cynthia Dailard, *Understanding ‘Abstinence’: Implications for Individuals, Programs and Policies*, The Guttmacher Report on Pub. Pol’y, Dec. 2003, at 4.

191. *Id.*

192. *See, e.g.*, TEX. EDUC. CODE ANN. § 28.004(3) (Vernon, Westlaw through 2013 3d Call. Sess., 83d Leg.) (requiring emphasis on abstinence and instruction on the “human use reality rates” of the effectiveness of contraception, as opposed to the theoretical rates).

193. *See Dailard, supra* note 190 at 4 (typical use includes people who do not always use the method consistently).

194. *See id.* at 5.

An investigation into the content of federally funded abstinence-only programs revealed that many of the most popular curricula are misleading.¹⁹⁵ The report found that over 80% of the curricula used by grantees of the abstinence-until-marriage federal funds contained “false, misleading, or distorted information about reproductive health.”¹⁹⁶ Specifically, the curricula contained inaccurate information about condoms and their effectiveness, abortion, HIV and STD transmission and infection rates, and even basic scientific facts, such as human genetics.¹⁹⁷ Additionally, several of these curricula blur religion and science, particularly regarding abortion, and present gender stereotypes as fact.¹⁹⁸ In response to the report, advocacy groups have expressed concern that abstinence-until-marriage sex education programs that contain misleading and inaccurate information about sex, pregnancy, birth control, STDs, and abortion put teenagers’ health in jeopardy and may cause them to engage in risky sexual behaviors because the misinformation does not allow teenagers to make informed decisions about their sexual health.¹⁹⁹

LGBTQ youth present another set of issues and needs for sexual education in school, including lack of representation and information pertinent to queer individuals.²⁰⁰ A 2015 survey reported that only 12% of students had sex education classes which included same-sex relationships.²⁰¹ Eight states explicitly restrict the teaching of LGBTQ-related content in schools and only four states require sexual education be LGBTQ-inclusive.²⁰² The Human Rights Campaign states that, at minimum, LGBTQ-inclusive curriculum should include information that is accurate and age appropriate, depicts same-sex couples in a positive light, uses

195. *Comm. on Gov’t Reform, The Content of Federally Funded Abstinence-Only Education Programs* (2004).

196. *Id.* at i.

197. *Id.* at 21. For example, one program stated that human cells have twenty-four chromosomes from each parent. They actually have twenty-three from each parent, for a total of forty-six.

198. *Id.* at 15-18. For example, one program stated that “[o]ccasional suggestions and assistance [from a woman] may be alright, but too much of it will lessen a man’s confidence or even turn him away from his princess.”

199. See Susan Yudt, *Reality Bites: The Truth About Sex, Teens, and Abstinence-Only Education*, PLANNED PARENTHOOD, (Dec. 3, 2004), available at <http://web.archive.org/web/20080113134754/http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/teen-pregnancy-sex-education/abstinence-only-14845.htm>; Press Release: NARAL Pro-Choice America, *New Report Exposes Dangers of Bush Administration’s Abstinence-Only Programming* (Dec. 2, 2004), http://web.archive.org/web/20100102161115/http://www.prochoiceamerica.org/news/press-releases/2004/pr120204_abstinence.html.

200. Human Rights Campaign, *A Call to Action: LGBTQ Youth Need Inclusive Sex Education*, <http://answer.rutgers.edu/file/A%20Call%20to%20Action%20LGBTQ%20Youth%20Need%20Inclusive%20Sex%20Education%20FINAL.pdf> (last visited Sept. 30, 2018).

201. Robert P. Jones and Daniel Cox, *How Race and Religion Shape Millennial Attitudes on Sexuality and Reproductive Health* 113 (2015).

202. Human Rights Campaign, *A Call to Action: LGBTQ Youth Need Inclusive Sex Education*, <http://answer.rutgers.edu/file/A%20Call%20to%20Action%20LGBTQ%20Youth%20Need%20Inclusive%20Sex%20Education%20FINAL.pdf> (last visited Sept. 30, 2018) (citing the eight states prohibiting as Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah, and the four requiring as California, Colorado, Iowa, and Washington).

gender-neutral terms whenever possible, and avoids making assumptions about students' sexual orientation or gender identity.²⁰³ A recent article published in the *Journal of Adolescent Health* reported that abstinence-only education programs potentially have an "profoundly negative" effect on LGBTQ youth.²⁰⁴ The article cited issues such as stigma, heteronormative preferences, and contributing to existing feelings of isolation.²⁰⁵

B. TREATMENT IN THE 2016 PRESIDENTIAL ELECTION CYCLE

Republican presidential candidates typically emphasize their "pro-life" stance, and many have been openly supportive of abstinence-only education. In an October 2010 interview, Republican presidential candidate and Texas Governor Rick Perry was asked why Texas continues to pay for abstinence-only education when it does not seem to be effective, given that Texas's teen pregnancy rate was (and still is) the third-highest in the nation. Governor Perry responded, "It does work . . . maybe it's the way it's being taught or applied out there, but as a matter of fact it's the best form . . . to teach our children." When pressed for statistics on the efficacy of abstinence-only education, or whether this is money well spent, Perry indicated that "in my personal experience, abstinence works."²⁰⁶ Republican platforms for sex education in the 2016 presidential cycle were fairly inconspicuous. A 2016 article by Planned Parenthood urging voters to avoid Republicans' general support of abstinence-only programs cited only positions from candidates 2012 and prior.²⁰⁷ The Trump administration itself only began pursuing a platform for abstinence-only education in earnest in 2018.²⁰⁸

Democrats offered a relatively united front in the 2016 election. Although the left is ordinarily associated with more liberal views, including support for comprehensive sexual education, both Democrat presidential and vice-presidential nominees, Hillary Clinton and Tim Kaine, had previously supported abstinence-only platforms.²⁰⁹ Within the 2016 presidential campaign, however, both supported comprehensive sexual education.²¹⁰ While running as a candidate for the Democratic party's nomination, Bernie Sanders championed an open and frank

203. *Id.*

204. John S. Santelli et al., *Abstinence-Only-Until-Marriage: An Updated Review of U.S. Policies and Programs and Their Impact*, 61 J. OF ADOLESCENT HEALTH, 273, 278 (2017).

205. *Id.*

206. Justin Dehn, *Video: Perry on Abstinence*, TEX. TRIB. (Aug. 29, 2011), <http://www.texastribune.org/texas-people/rick-perry/perry-abstinence/>.

207. Avatara Smith-Carrington, *What's at Stake in the 2016 Election?*, Planned Parenthood, (Feb. 5, 2016), <https://www.plannedparenthoodaction.org/blog/whats-stake-sex-education-2016-election>.

208. See Pam Belluck, *Trump Administration Pushes Abstinence in Teen Pregnancy Programs*, N.Y. TIMES, Apr. 23, 2018, <https://www.nytimes.com/2018/04/23/health/trump-teen-pregnancy-abstinence.html>.

209. Abby Johnston, *Tim Kaine's Sex Education Position is Hillary Clinton on Gay Marriage All over Again*, Bustle, (Oct. 2, 2016), <https://www.bustle.com/articles/187013-tim-kaines-sex-education-position-is-hillary-clinton-on-gay-marriage-all-over-again>.

210. *Id.*

dialogue for sexual education and dismissed abstinence-only education as “certainly not the only answer.”²¹¹

C. TREATMENT BY THE TRUMP ADMINISTRATION

President Trump’s administration began a move towards favoring abstinence-only sex education in early 2018.²¹² The administration first embraced abstinence-only programs by placing conservatives in the Department of Health and Human Services, who then encouraged organizations applying for Title X federal family planning funds to place a “meaningful emphasis” to avoiding sex and “normal[izing] sexual risk behaviors.”²¹³ Valerie Huber, the newly appointed Chief of Staff within the Department of Health and Human Services, was quoted as saying, “[a]s public health experts and policymakers, we must normalize sexual delay more than we normalize teen sex, even with contraception.”²¹⁴ In April 2018, the Department of Health and Human Services announced new requirements for grants within the Teen Pregnancy Prevention Program (TPPP).²¹⁵

On June 27, 2018, Justice Anthony Kennedy announced his plans to retire from the Supreme Court.²¹⁶ Justice Kennedy historically served as a swing vote in many landmark Supreme Court cases, including *Roe v. Wade*.²¹⁷ On October 6, 2018, Justice Kennedy’s successor, Brett Kavanaugh, was confirmed by the Senate.²¹⁸ Although Kavanaugh stated he understands the importance of precedent in *Roe v. Wade*, spectators voice their doubt that Kavanaugh and the more conservative Court would forego the opportunity to overrule the case.²¹⁹

V. CONCLUSION

The topics and content of sex education curricula vary widely from state to state as a result of broad state statutory language and liberal discretion amongst local school boards. There appears to be increasing awareness of the benefits of comprehensive sex education and growing criticism of an abstinence-only-until-

211. Ross Barbkam, *Here’s What Bernie Sanders Thinks about Sex Education*, THE OBSERVER, (Jan 28, 2016), <https://observer.com/2016/01/heres-what-bernie-sanders-thinks-about-sex-education/>.

212. Jessie Helman, *Abstinence-Only Education Making a Comeback Under Trump*, THE HILL, (Mar. 8, 2018), <https://thehill.com/policy/healthcare/377304-abstinence-only-education-making-a-comeback-under-trump>.

213. *Id.*

214. *Id.*

215. Jessie Hellman, *Trump admin announces abstinence-focused overhaul of teen pregnancy program*, THE HILL, (Apr. 20, 2018), <https://thehill.com/policy/healthcare/384208-trump-admin-announces-abstinence-focused-overhaul-of-teen-pregnancy>.

216. Jacob Pramuk, *Anthony Kennedy Retiring from Supreme Court*, CNBC, (June 27, 2018), <https://www.cnn.com/2018/06/27/anthony-kennedy-retiring-from-supreme-court.html>.

217. *Id.*

218. Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES, (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>.

219. Dylan Matthews, *Brett Kavanaugh likely gives the Supreme Court the votes to overturn Roe. Here’s how they’d do it.*, VOX, Oct. 5, 2018, <https://www.vox.com/policy-and-politics/2018/7/10/17551644/brett-kavanaugh-roe-wade-abortion-trump>.

marriage approach, especially when medically inaccurate information is included in such programs. A possible middle ground for some states, pending additional studies, may be abstinence-only education that employs medically accurate information and forgoes a moralizing tone.

This awareness has resulted in a fundamental paradigm shift on the federal level, as well as in states and communities across the country that are in the process of introducing legislation for comprehensive sex education. Such legislation, however, also invites increased opposition from advocates of abstinence-only-until-marriage education. Republican candidates, by and large supportive of abstinence-only education, set the tone of the debate during the 2016 election. As expected, President Trump has pushed for a return to a federally funded abstinence-only education despite its demonstrated lack of effectiveness.

A distinctive paradigm shift will almost certainly be visible on the judicial level as well. With Justice Anthony Kennedy's retirement from the Supreme Court and the confirmation of Brett Kavanaugh, Kennedy's swing vote role in support of preserving *Roe v. Wade* now stands to be replaced by the possibility of Kavanaugh voting against abortion rights. The Court's view on abortion will likely shift, regardless of Justice Kavanaugh's insistence towards following Supreme Court precedent and the future of *Roe v. Wade* will hang in the balance.

Appendix A²²⁰

STATE	STATUTE OR CODE MANDATES STD OR HIV/AIDS EDUCATION	MANDATES ABSTINENCE-ONLY SEX EDUCATION	MANDATES GENERAL HEALTH EDUCATION	PERMITS, BUT DOES NOT REQUIRE, SEX EDUCATION	NO STATUTE OR CODE REGULATING SEX EDUCATION
Alabama	x			X (HIV/AIDS only)	
Alaska					x
Arizona				x	
Arkansas				x	x
California				X (HIV/AIDS only)	
Colorado				x	
Connecticut	x				
Delaware	x				
District of Columbia	x				
Florida		x			
Georgia	x				
Hawaii	x				
Idaho				x	

220. See *supra* notes 1-40 and accompanying text.

(CONTINUED)

STATE	STATUTE OR CODE MANDATES STD OR HIV/AIDS EDUCATION	MANDATES ABSTINENCE-ONLY SEX EDUCATION	MANDATES GENERAL HEALTH EDUCATION	PERMITS, BUT DOES NOT REQUIRE, SEX EDUCATION	NO STATUTE OR CODE REGULATING SEX EDUCATION
Illinois	x				
Indiana	x				
Iowa	x				
Kansas	x ²²¹				
Kentucky	x				
Louisiana				x	
Maine	x				
Maryland	x				
Massachusetts				x	
Michigan	x				
Minnesota	x				
Mississippi		x			
Missouri	x				
Montana	x				
Nebraska		x			
Nevada	x				
New Hampshire	x				

221. Kansas requires that "human sexuality" be taught but does not specifically mention STDs or HIV/AIDS.

(CONTINUED)

STATE	STATUTE OR CODE MANDATES STD OR HIV/AIDS EDUCATION	MANDATES ABSTINENCE-ONLY SEX EDUCATION	MANDATES GENERAL HEALTH EDUCATION	PERMITS, BUT DOES NOT REQUIRE, SEX EDUCATION	NO STATUTE OR CODE REGULATING SEX EDUCATION
New Jersey	x				
New Mexico	x				
New York	x				
North Carolina	x				
North Dakota		x			
Ohio	x				
Oklahoma	x				
Oregon	x				
Pennsylvania	x				
Rhode Island	x				
South Carolina	x				
South Dakota					x
Tennessee	x ²²²				
Texas			x		
Utah	x				
Vermont	x				

222. Tennessee requires sex education only in counties with teen pregnancy rates at or above 19.5 pregnancies per 1,000 females age 15 to 17.

(CONTINUED)

STATE	STATUTE OR CODE MANDATES STD OR HIV/AIDS EDUCATION	MANDATES ABSTINENCE-ONLY SEX EDUCATION	MANDATES GENERAL HEALTH EDUCATION	PERMITS, BUT DOES NOT REQUIRE, SEX EDUCATION	NO STATUTE OR CODE REGULATING SEX EDUCATION
Virginia				x	
Washington	x				
West Virginia	x				
Wisconsin	x				
Wyoming	x				
Total =	35 + DC	3	3	9	3

Appendix B²²³

STATE	STATUTE OR CODE MANDATES TEACHING ABOUT ABORTION	RESTRICTS ABORTION TEACHING	OPT-IN OR CONSENT PROVISION	RECEIVED FEDERAL FUNDING FOR PREP COMPREHENSIVE SEX EDUCATION IN FY 2010	RECEIVED FEDERAL FUNDING FOR ABSTINENCE-ONLY EDUCATION IN FY 2010
Alabama			Opt-out	x	x
Alaska				x	
Arizona			Opt-out	x	x
Arkansas		x		x	x
California			Opt-out	x	
Colorado			Consent	x	x
Connecticut		x	Opt-out	x	
Delaware				x	
District of Columbia	x		Opt-out	x	
Florida			Opt-out	x ²²⁴	x
Georgia			Opt-out	x	x
Hawaii				x	

223. *Id.*

224. Florida was awarded FY 2010 PREP funds but later returned those funds to the federal government.

(CONTINUED)

STATE	STATUTE OR CODE MANDATES ABOUT ABORTION	RESTRICTS ABORTION TEACHING	OPT-IN OR CONSENT PROVISION	RECEIVED FEDERAL FUNDING FOR PREP COMPREHENSIVE SEX EDUCATION IN FY 2010	RECEIVED FEDERAL FUNDING FOR ABSTINENCE-ONLY EDUCATION IN FY 2010
Idaho			Opt-out	x	
Illinois			Opt-out	x	
Indiana					
Iowa			Opt-out	x	
Kansas			Opt-out	x	x
Kentucky				x	x
Louisiana		x	Opt-out	x	x
Maine			Opt-out	x	
Maryland			Opt-out	x	x
Massachusetts		x	Opt-out	x	
Michigan			Opt-out	x	x
Minnesota			Opt-out		x
Mississippi		x	Consent	x	x
Missouri			Opt-out	x	x
Montana				x	
Nebraska				x	x
Nevada			Consent	x	
New Hampshire			Opt-out	x	x

(CONTINUED)

STATE	STATUTE OR CODE MANDATES TEACHING ABOUT ABORTION	RESTRICTS ABORTION TEACHING	OPT-IN OR CONSENT PROVISION	RECEIVED FEDERAL FUNDING FOR PREP COMPREHENSIVE SEX EDUCATION IN FY 2010	RECEIVED FEDERAL FUNDING FOR ABSTINENCE-ONLY EDUCATION IN FY 2010
New Jersey			Opt-out	x	x
New Mexico			Opt-out	x	
New York			Opt-out	x	x
North Carolina			Opt-out	x	x
North Dakota					x
Ohio			Opt-out	x	
Oklahoma			Opt-out	x	
Oregon			Opt-out	x	x
Pennsylvania			Opt-out	x	x
Rhode Island			Opt-out	x	
South Carolina		x	Opt-out	x	x
South Dakota				x	x
Tennessee			Opt-out	x	x
Texas			Opt-out		x
Utah			Consent	x	x
Vermont	x		Opt-out	x	
Virginia			Opt-out	x	x

(CONTINUED)

STATE	STATUTE OR CODE MANDATES TEACHING ABOUT ABORTION	RESTRICTS ABORTION TEACHING	OPT-IN OR CONSENT PROVISION	RECEIVED FEDERAL FUNDING FOR PREP COMPREHE- NSIVE SEX EDUCATION IN FY 2010	RECEIVED FEDERAL FUNDING FOR ABSTINENCE- ONLY EDUCATION IN FY 2010
Washington			Opt-out	x	x
West Virginia			Opt-out	x	x
Wisconsin			Opt-out	x	
Wyoming			Opt-out	x	
Total =	1 + DC	6	40 + DC	46 + DC	30