

## JUST SAY NO?: REDEFINING THE FOUNDATION OF ABSTINENCE EDUCATION IN THE UNITED STATES

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## I. INTRODUCTION

Any child of the 1980s is likely to remember Nancy Reagan's 'Just Say NO!' campaign.<sup>1</sup> Beginning as a public health initiative against adolescent drug and substance use, the campaign's message of abstinence soon reached other facets of adolescent education.<sup>2</sup> Through legislative acts and funding, the United States government began to take an active role in promoting adolescent sex education.<sup>3</sup> These efforts specifically targeted youth in school and community settings.<sup>4</sup> While early programs aimed to discourage pre-marital sex and to reduce teenage pregnancy rates, they also offered services through which pregnant and nursing teenagers could receive appropriate pre- and post-natal care.<sup>5</sup> The federal government has since shifted away from these dual-nature initiatives; in a series of legislation beginning in 1996 with Title V, Section 510 of the Social Security Act, federal financing has been dedicated to programs promoting abstinence-only or abstinence-until-marriage education.<sup>6</sup>

Currently, no standard national curriculum exists for sex education; each state develops its own education code.<sup>7</sup> Yet, if states wish to receive federal funding for sex education, they must abide by a se-

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<sup>1</sup> Richard I. Evans, *Just-Say-No Campaign*, in 2 ENCYCLOPEDIA OF PUB. HEALTH 666 (Lester Breslow ed., New York: Macmillan 2002).

<sup>2</sup> See *id.*

<sup>3</sup> SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES (SIECUS), A BRIEF HISTORY OF FEDERAL ABSTINENCE ONLY-UNTIL MARRIAGE FUNDING in STATE PROFILES: A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES 1-2 (2006)[hereinafter BRIEF HISTORY].

<sup>4</sup> *Id.*

<sup>5</sup> Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z et seq. (1981).

<sup>6</sup> BRIEF HISTORY, *supra* note 3, at 1-2; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 912, 110 Stat. 2105 (1996) (current version as Maternal and Child Health Services Block Grant, 42 U.S.C. § 710 (2003)); "[T]hese programs promote abstinence from all sexual activity, usually until marriage, as the only way to reduce the risks of pregnancy, disease, and other potential consequences of sex." H.R. COMM. ON GOV'T REFORM-MINORITY STAFF, SPECIAL INVESTIGATIONS DIVISION, PREPARED FOR REP. HENRY A. WAXMAN, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-EDUCATION PROGRAMS 1 (2004), available at <http://oversight.house.gov/documents/20041201102153-50247.pdf> [hereinafter WAXMAN REPORT].

<sup>7</sup> Debra Sorgan, *Sexuality, Gender and Curricula*, 5 GEO. J. GENDER & L. 343, 343 (2004).

ries of statutory guidelines.<sup>8</sup> Though the guidelines limit the use of federal monies to the promotion of abstinence education, grantees (states, local school boards, and community-based entities) exercise discretion as to the actual content of these programs.<sup>9</sup> As a result, considerable variation has developed throughout the nation in terms of the type and extent of information available to youth.<sup>10</sup> This variety has caused abstinence education to fall under scrutiny.<sup>11</sup>

Various independent and government-sponsored groups have examined the efficacy, content, and purpose of these programs.<sup>12</sup> The results of these studies fail to definitively link abstinence-only education with increases in prevalence rates of teenage pregnancy and sexually transmitted infections (STIs).<sup>13</sup> Many studies, though, have revealed abstinence-focused curricula often mischaracterize and misconstrue scientific and medical facts, particularly the effectiveness of contraceptive devices and the nature of STIs.<sup>14</sup> With the backdrop of this controversy, states have begun refusing federal abstinence-only education funding, opting instead to offer more comprehensive, medically accurate, and age-appropriate curricula.<sup>15</sup>

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<sup>8</sup> 42 U.S.C. § 710 (2003).

<sup>9</sup> 42 U.S.C. § 705(a)(5)(A) (2003).

<sup>10</sup> Alyssa Varley, *Sexuality in Education*, 6 GEO. J. GENDER & L. 533, 533-38 (2005).

<sup>11</sup> *Id.* at 539.

<sup>12</sup> *Id.* at 539-41; see WAXMAN REPORT, *supra* note 6; see CHRISTOPHER TRENHOLM ET AL., MATHEMATICA POLICY RESEARCH, INC., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS: A FINAL REPORT xviii (2007), available at <http://www.mathematica-mpr.com/publications/pdfs/impactabstinence.pdf> [hereinafter IMPACTS].

<sup>13</sup> David Steib, *Eighth Annual Review of Gender and Sexuality Law: Education Law Chapter: Sex Education in Schools*, 8 GEO. J. GENDER & L. 447, 454-55 (2007); see also Press Release, SIECUS, Data Show Teen Birthrate on the Rise: Failed Abstinence-Only-Until-Marriage Programs May be Part of the Problem (Dec.2007) (revealing a three percent increase in the teenage birthrate in the United States between the years 2005 and 2006, the first increase in fifteen years); see also Lindsey Tanner & Todd Ackerman, *1 in 4 Girls Has Sex Disease*, HOUSTON CHRON., Mar. 12, 2008, at Health & Medicine (discussing results of a federal study by the Centers for Disease Control and Prevention that revealed, at minimum, one in four teenage girls has an STI).

<sup>14</sup> See WAXMAN REPORT, *supra* note 6, at 8-11.

<sup>15</sup> As of May 2007, ten states either refused participation in Title V programs or vowed to decline participation in the next two fiscal years. SIECUS, SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES: AN OVERVIEW *in STATE*

Part II gives a brief history of the federal funding of sex education in the United States and follows the legislative path that has led to the current system. Part III focuses on the effects of these laws and questions whether they reflect proper governmental pursuits to protect public health and safety. It also explores these initiatives in comparison to other governmental interventions taken in the name of public health. In light of current research and states' refusals to accept federal funds, Part IV offers proposals for restructuring the purpose and parameters of federal abstinence education funding. Finally, Part V concludes legislators will soon feel pressure to reform current federal abstinence education policies, as neither abstinence-only, nor comprehensive sex education in their current forms have conclusively reduced rates of teenage pregnancy or STIs. A new approach is needed—one that builds on current notions of comprehensive and collaborative sex education and adds outcome-based financial incentives.

## II. FEDERAL INVOLVEMENT AND FUNDING OF ABSTINENCE-ONLY EDUCATION: BACKGROUND AND THE ROAD TO CHANGE

For over twenty years, the federal government has appropriated funds for state sex education programs.<sup>16</sup> Eligibility requirements and permissible uses of these allotments have changed over

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PROFILES: A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES 9 (2006)[hereinafter OVERVIEW]. Ten months later, this number had increased to seventeen. Daily Iowan Editorial Board, *Abstinence Only Consistently Fails: Iowa Right to Reject Title V Funds*, DAILY IOWAN, March 5, 2008 at Opinions, available at <http://media.www.dailyiowan.com/media/storage/paper559/news/2008/03/05/Opinions/AbstinenceOnly.Consistently.Fails.Iowa.Right.To.Reject.Title.V.Funds-3251545.shtml> (last visited May 7, 2008). By August 2008, twenty-five states had elected not to participate in Title V programs. SIECUS, WE'RE OUTTA HERE: 25 STATES WITHDRAW FROM CRUMBLING TITLE V ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAM 1 (2008), available at [http://www.siecus.org/\\_data/global/images/25%20states%20out%20final.pdf](http://www.siecus.org/_data/global/images/25%20states%20out%20final.pdf) [hereinafter OUTTA HERE]. These numbers reflect a near forty-percent decrease in state participation in Title V programs in the last two years. *Id.* States refusing participation are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Idaho, Iowa, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, Washington DC, Wisconsin, and Wyoming. *Id.*

<sup>16</sup> BRIEF HISTORY, *supra* note 3, at 1.

the years through a series of legislative acts and grants.<sup>17</sup> Progressively, funds have become constricted to abstinence-only-until-marriage ideology.<sup>18</sup> Aside from small, isolated earmarks,<sup>19</sup> three prominent avenues currently exist through which states can receive these specially designated federal funds.

The first is through the Adolescent Family Life Act (AFLA).<sup>20</sup> In the late 1970s and early 1980s, social concerns surrounding the human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS) were growing.<sup>21</sup> At the same time, there was concern that the legalization of birth control and abortions would encourage pre-marital sex among youth.<sup>22</sup> Thus, in 1981, without any Congressional hearings or floor votes, Congress passed AFLA.<sup>23</sup> AFLA was dual-purposed and sought to fund those programs that discouraged pre-marital sex, and those that provided support for pregnant and parenting teens.<sup>24</sup> AFLA received roughly eleven million dollars at its inception with appropriations fluctuating up and down until 1997 when funding began steadily to increase.<sup>25</sup> In 2008,

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<sup>17</sup> *Id.* at 1-3.

<sup>18</sup> See CARMEN SOLOMON-FEARS, REDUCING TEEN PREGNANCY: ADOLESCENT FAMILY LIFE AND ABSTINENCE EDUCATION PROGRAMS, C.R.S. REP. NO. RS20873 at 3 (2004), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-5749:1> (stating AFLA grantees have been limited to promoting programs compliant with the definition of abstinence education advanced in Title V, Section 510); see also WAXMAN REPORT, *supra* note 6, at 8 (stating Community-Based Abstinence Education grantees have been limited to promoting programs compliant with the Title V, Section 510 definition of abstinence education).

<sup>19</sup> BRIEF HISTORY, *supra* note 3, at 3. "Conservative organizations such as the Abstinence Clearinghouse and the Medical Institute . . . have also received funds specially earmarked by Congress." *Id.*

<sup>20</sup> 42 U.S.C. § 300z-2 (1981) (passed under the Reagan Administration as Title XX of the Public Health Service Act).

<sup>21</sup> Avert, History of AIDS up to 1986, [http://www.avert.org/his81\\_86.htm](http://www.avert.org/his81_86.htm).

<sup>22</sup> Naomi K. Seiler, *Abstinence-Only Education and Privacy*, 24 WOMEN'S RTS L. REP. 27, 29 (2002). "From the late 1950s through the 1970s, the 'sexual revolution' began to break down the assumption of premarital abstinence." *Id.*

<sup>23</sup> BRIEF HISTORY, *supra* note 3, at 1.

<sup>24</sup> See Solomon-Fears, *supra* note 18, at 2-3.

<sup>25</sup> *Id.* at 3.

Congress appropriated approximately \$29.8 million to AFLA.<sup>26</sup> While AFLA is still dual-natured in structure, in 1996 new legislation limited the breadth of sex education programs supported by AFLA, as focus shifted away from support services and toward abstinence-only education.<sup>27</sup>

In 1996, as part of a greater national welfare reform, Congress enacted Title V of the Social Security Act, linking the receipt of federal funds to the promotion of abstinence education through Section 510.<sup>28</sup> Like AFLA, Title V, Section 510 "was enacted quietly, without public or legislative debate."<sup>29</sup> The statute included an eight-point definition of programs qualifying as "abstinence education."<sup>30</sup> The stat-

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<sup>26</sup> U.S. Dep't of Health and Human Services, Office of Population Affairs, "Adolescent Family Life," available at <http://www.hhs.gov/opa/familylife/index.html>.

<sup>27</sup> BRIEF HISTORY, *supra* note 3, at 1.

<sup>28</sup> 42 U.S.C. § 710 (2003); "[s]ince 1997, all AFL[A] prevention projects that have been funded have been abstinence-only projects that were required to conform to the definition of abstinence education as defined in [Title V]." Solomon-Fears, *supra* note 18, at 3.

<sup>29</sup> BRIEF HISTORY, *supra* note 3, at 1.

<sup>30</sup> 42 U.S.C. § 710(b), which reads:

The purpose of an allotment . . . to a State is to enable the State to provide abstinence education, and . . . where appropriate, mentoring, counseling, and adult supervision to promote abstinence from sexual activity . . . .

For the purposes of this section, the term 'abstinence education' means an educational or motivational program which--

- (A) has its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
- (B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children;
- (C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
- (D) teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity;
- (E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;
- (F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society;
- (G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and

ute listed foremost those programs with the “exclusive purpose, [of] teaching the social, psychological, and health gains to be realized by abstaining from sexual activity,”<sup>31</sup> and those programs teaching abstinence as “the expected standard for all school age children.”<sup>32</sup> A state’s eligibility under Title V, Section 510 rests on meeting these definitional requirements, as well as matching three out of four federal dollars.<sup>33</sup> In 2007, legislators added an additional obligation, requiring that programs expand to target individuals between the ages of twelve and twenty-nine, instead of the original school-aged population.<sup>34</sup> Although the Department of Health and Human Services (HHS) oversees Title V, individual states retain discretion over how funds are used and dispersed among various intrastate organizations, agencies, and entities.<sup>35</sup> Originally, the statute allotted \$50 million dollars annually to the program, which was to be shared among states each year from 1998 to 2002.<sup>36</sup> However, since 2003, annual renewals have continued at the same rate, keeping Title V Section 510 programs afloat.<sup>37</sup>

In 2000, Congress passed a third key piece of legislation, Special Projects of Regional and National Significance (SPRNS), now commonly known as Community-Based Abstinence Education (CBAE).<sup>38</sup> This legislation allowed the Administration for Children and Families (ACF) to directly disperse federal money to state and local organizations supporting abstinence-only-until-marriage programs.<sup>39</sup> CBAE funding was originally set at twenty million dollars,

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(H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.

<sup>31</sup> *Id.* § 710(b)(2)(A).

<sup>32</sup> *Id.* § 710(b)(2)(B).

<sup>33</sup> *See* 42 U.S.C. §§ 702-03 (1989).

<sup>34</sup> BRIEF HISTORY, *supra* note 3, at 2.

<sup>35</sup> 42 U.S.C. § 705(a)(5)(A).

<sup>36</sup> 42 U.S.C. § 710(d).

<sup>37</sup> BRIEF HISTORY, *supra* note 3, at 1-2. States choosing to accept federal funds must still match three state dollars to every four federal dollars. *Id.*

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.* CBAE has not replaced Title V, Section 510 or AFLA programs, instead all three legislative acts co-exist as separate sources of funding. States may receive funding under all three

but by 2007 it had increased to \$113 million.<sup>40</sup> While individual recipients have discretion as to how funds are used, CBAE is the most restrictive of the federal grants in terms of what may be taught as part of abstinence-only education.<sup>41</sup> Specifically, the programs must meet all eight points of Title V, Section 510.<sup>42</sup>

Due to the substantial amount of federal funds dedicated to abstinence education, attention has turned to the effects and ramifications of these efforts.<sup>43</sup> Today, research shows abstinence-only programs are ineffective, and twenty-five states refuse to accept federal funding for abstinence education.<sup>44</sup> The critical question thus becomes: what changes, if any, would produce a more successful and effective federal sex education initiative?

### III. ABSTINENCE-ONLY EDUCATION: RAMIFICATIONS, PERMISSIBILITY, AND SHORTCOMINGS

#### A. Effects of Federal Financing

Although AFLA, Title V, and CBAE were enacted at different times, all three now use the definition of abstinence education set forth in Title V, Section 510.<sup>45</sup> While this statute contains an eight-

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legislative acts, as long as the respective eligibility criteria are met. See SIECUS, FEDERAL ABSTINENCE-ONLY-UNTIL-MARRIAGE FUNDING BY STATE *in* STATE PROFILES: PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES (FISCAL YEAR 2007 EDITION), available at <http://www.siecus.org/index.cfm?fuseaction=Page.viewPage&pageID=671&grandparentID=478&parentID=487>.

<sup>40</sup> *Id.* at 3.

<sup>41</sup> WAXMAN REPORT, *supra* note 6, at 8 (noting that “[A]bstinence-only education programs are not allowed to teach their participants any methods to reduce the risk of pregnancy other than abstaining until marriage. They are allowed to mention contraceptives only to describe their failing rates.”).

<sup>42</sup> BRIEF HISTORY, *supra* note 3, at 2.

<sup>43</sup> See Elizabeth Arndorfer, *Absent Abstinence Accountability*, 27 HASTINGS CONST. L.Q. 585, 590 (2000).

<sup>44</sup> See OUTTA HERE, *supra* note 15; see Part III, Subsection B, *infra* for full discussion of research studies into the effectiveness of abstinence education programs.

<sup>45</sup> See 42 U.S.C. § 710(b) (2003), *supra* note 30; see also BRIEF HISTORY, *supra* note 3, at 1-2.



point definition of eligible programs, the definition remains imprecise. Six of the eight points include the phrase “sexual activity,” however the statute contains no explanation of what this entails.<sup>46</sup> Without guidance as to a critical statutory phrase, state programs vary widely, with multiple interpretations as to the specific behaviors or acts constituting “sexual activity.”<sup>47</sup> This ambiguity and the wide discretion left to state and local entities in dispersing funds results in a variety of sex education programs throughout the country. This variety precludes continuity as to the information available to and accessible by youth.<sup>48</sup>

States are not required to accept federal funding for abstinence education. In the absence of mandatory national sex education, states can choose to codify state-specific sex education standards.<sup>49</sup> Yet, if states choose to accept federal funding, they must abide by Title V, Section 510 requirements.<sup>50</sup> The HHS oversees only the initial dispersal of funds, not the precise manner in which they are used.<sup>51</sup> States retain discretion to allocate funds to school districts, community organizations, state agencies, or other entities.<sup>52</sup> However, these same entities can choose to bypass state oversight by directly applying for AFLA or CBAE funding.<sup>53</sup> Regardless of which federal initiative finances an education program, the individual state or entity (often a local school board) has discretion to control the content of these fed-

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<sup>46</sup> *Id.*

<sup>47</sup> Sorgan, *supra* note 7, at 343. Questions arise as to whether the standard used to define the contours of ‘sexual activity’ are rooted in criminal law, medicine, pop-culture, or personal ideology. Differences in origination can reinforce the likelihood of varying interpretations of included behaviors.

<sup>48</sup> The lack of continuity is a problem, not just at the national level, but also at the intrastate level. The lack of a common or standard level of sex education available to students makes it difficult to assess which sex education programs are effective and which need improvement.

<sup>49</sup> See Sorgan, *supra* note 7, at 343.

<sup>50</sup> California has never accepted Title V funds. OVERVIEW, *supra* note 15, at 9.

<sup>51</sup> See BRIEF HISTORY, *supra* note 3, at 1.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2.

erally-supported programs.<sup>54</sup>

Consequently, different approaches in developing sex education programs and curricula have developed. States differ on the extent to which information about STIs, contraception, and abortion is permissible.<sup>55</sup> The circumstances in which these topics may or should be discussed vary, as does the emphasis placed on the issue and the depth of information provided.<sup>56</sup> For example, some states require discussions about contraception, whereas others permit such discussions if limited to the effectiveness, or lack thereof, of contraception.<sup>57</sup> A majority of states also provide statutory "opt-out" or "opt-in" provisions, giving parents a degree of control over their children's exposure to sex education.<sup>58</sup> "Opt-out provisions allow parents to remove their children from the classroom during sex education," while opt-in provisions require parental approval for allowing a child to receive sex education.<sup>59</sup> Policies in California, Vermont, and Texas reflect the diversity stimulated as a result of current federal financing.

### *1. A Closer Look: Three States, Three Approaches*

California is the only state to have never received Title V, Section 510 funding.<sup>60</sup> State legislators have purposefully avoided accepting

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<sup>54</sup> See 42 U.S.C. § 705(a)(5)(A); see also 42 U.S.C. § 300z et seq.; see also BRIEF HISTORY, *supra* note 3, at 3.

<sup>55</sup> Steib, *supra* note 13, at 451.

<sup>56</sup> See *id.* at 447-54.

Thirty-five states and the District of Columbia require that public schools include education about sexuality, disease prevention, or reproduction in their curricula. Seven states have statutes or codes that permit, but do not require, sex education or education about sexually transmitted diseases. Four other states have no specific requirements for sex education, but do require that schools teach health and hygiene.

*Id.* at 447-49.

<sup>57</sup> *Id.* at 453.

<sup>58</sup> *Id.* at 449-51. "Of the forty-two states and the District of Columbia that require or permit sex education, thirty-five of the state statutes or codes . . . contain opt-out or opt-in provisions."  
*Id.* at 450.

<sup>59</sup> *Id.* at 449-50.

<sup>60</sup> OVERVIEW, *supra* note 15, at 9.

these funds because of the restrictions on how they must be used.<sup>61</sup> Sex education is not mandatory in California public schools,<sup>62</sup> though schools are permitted to teach it from kindergarten through twelfth grade if certain statutory guidelines are met.<sup>63</sup> Specifically, the material must be age-appropriate, medically accurate, and objective.<sup>64</sup> No program may advance religious doctrine or promote bias, and all programs must “teach respect for marriage and committed relationships.”<sup>65</sup> California’s comprehensive approach includes teaching abstinence, but its ultimate purpose is more expansive than Title V, Section 510 standards.<sup>66</sup> The purpose of California’s comprehensive sexual education legislation is to give a student “the knowledge and skills necessary to protect his or her sexual reproductive health from unintended pregnancy and sexually transmitted disease . . . [and] to develop healthy attitudes.”<sup>67</sup> An emphasis is placed on fostering lines of communication between parents and students: parents may review the curriculum and any educational materials that will be used,<sup>68</sup> and may remove their children from the classroom without any adverse repercussions.<sup>69</sup> An emphasis is also placed on ensuring the accuracy and validity of health-related information, and so, partnerships with outside health agencies and consultants are encouraged.<sup>70</sup>

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<sup>61</sup> SIECUS, CALIFORNIA *in* STATE PROFILES: A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES 8 (2006) [hereinafter CALIFORNIA].

<sup>62</sup> *Id.* at 1.

<sup>63</sup> See California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act, CAL. EDUC. CODE § 51933 (West 2006).

<sup>64</sup> *Id.* at § 51933 (a)–(b) (requiring education be “appropriate for . . . all races, genders, sexual orientations, ethnic and cultural backgrounds, and pupils with disabilities.”)

<sup>65</sup> *Id.* at § 51933 (b)(7),(d).

<sup>66</sup> *Id.* at § 51933(b)(8); *but see* 42 U.S.C. § 710(b), *supra* note 30.

<sup>67</sup> CAL. EDUC. CODE § 51930 (West 2006).

<sup>68</sup> *Id.* at § 51938.

<sup>69</sup> *Id.* at §§ 51938, 51939.

<sup>70</sup> *Id.* at §§ 51935, 51936. Additional support for this notion is evident in the statutory definition of “medically accurate”:

verified or supported by research conducted in compliance with scientific methods and published in peer-review journals, where appropriate, and recognized as accurate and objective by professional organizations and agencies with expertise

Vermont, like California, adopts a broad-based approach.<sup>71</sup> Elementary and secondary schools are required to adopt “comprehensive health education,”<sup>72</sup> the purpose of which is “to provide a variety of learning experiences based upon knowledge of the human organism as it functions within its environment.”<sup>73</sup> HIV, STIs, contraception, pregnancy, childbirth, adoption, abortion, family and mental health, and human growth and development (including interpersonal relationships) are expressly identified as topics that must be addressed.<sup>74</sup> Parents are permitted to file for religious exemptions for their children.<sup>75</sup> As in California, the accuracy and legitimacy of disseminated information is emphasized.<sup>76</sup> Vermont specifically requires an eleven-member advisory council, comprised of at least three health professionals, to prepare and evaluate the content and effectiveness of the state’s comprehensive health program.<sup>77</sup>

Until 2008, Vermont was unique in that it accepted Title V, Section 510 funding, but refused to accept AFLA and CBAE grants.<sup>78</sup> For example, in 2006, Vermont received roughly \$66,600 federal dollars through Title V, Section 510.<sup>79</sup> These funds were dedicated to a state-wide media campaign seeking to improve communication between

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in the relevant field, such as the federal Centers for Disease Control and Prevention, the American Public Health Association, the American Academy of Pediatrics, and the American College of Obstetricians and Gynecologists.

*Id.* at § 51931.

<sup>71</sup> VT. STAT. ANN. tit. 16, § 131 (2004 & Supp. 2007).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at § 134.

<sup>76</sup> See CAL. EDUC. CODE §§ 51935, 51936, *supra* note 70 (highlighting California’s statutory requirements for disseminating medically accurate information).

<sup>77</sup> VT. STAT. ANN. tit. 16, §§ 132, 133 (2004).

<sup>78</sup> OUTTA HERE, *see supra* note 15 (noting Vermont has abandoned receipt of Title V funding); see SIECUS, *FEDERAL ABSTINENCE-ONLY-UNTIL-MARRIAGE FUNDING BY STATE IN STATE PROFILES: A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES 1* (2006)[hereinafter *BY STATE*](revealing that in 2006, of the states that accepted Title V, Section 510 funds, Vermont received the least).

<sup>79</sup> *BY STATE, supra* note 78.

parents and children, particularly in regard to drug and alcohol use.<sup>80</sup> Even in 2006, the decision to narrowly restrict the use of Title V, Section 510 funds suggested a strong legislative desire to avoid abstinence-only instruction, while still receiving the benefit of federal funding.

Although the purpose of the Texas public education system is “to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation,”<sup>81</sup> Texas, unlike Vermont and California, does not adopt a comprehensive approach to sex education.<sup>82</sup> Instead, sex education is optional, and even then, abstinence must be stressed.<sup>83</sup> A board of trustees for each school district, along with a local school health advisory council,<sup>84</sup> is entrusted to set an appropriate curriculum which, *inter alia*, “must: (1) present abstinence from sexual activity as the preferred choice of behavior . . . (2) devote more attention to

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<sup>80</sup> SIECUS, *VERMONT*, in STATE PROFILES: A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES 2 (2006)[hereinafter *VERMONT*](This campaign emphasizes subsection G of 42 U.S.C. § 710(b)(2) which defines an abstinence education program as one that “teach[es] young people how to reject sexual advances and how alcohol and drug use increase vulnerability to sexual advances.” See 42 U.S.C. § 710(b)(2)(G) (2008), *supra* note 30. At the time this comment was originally drafted, Vermont still accepted Title V, Section 510 funding; then, it was this author’s opinion that the decision to narrowly restrict the use of Title V, Section 510 suggested a move toward total refusal of federal funding, which has proven to be the case.)

<sup>81</sup> TEX. EDUC. CODE ANN. § 4.001(a)(Vernon 2006).

<sup>82</sup> SIECUS, *TEXAS*, in STATE PROFILES: A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES 11-12 (2006)[hereinafter *TEXAS*]; see *VERMONT supra* note 80, at 1; see *CALIFORNIA supra* note 69, at 1.

<sup>83</sup> *TEXAS, supra* note 82, at 11-12. In Texas, contraception may be discussed, but if programs choose to address contraception and condom use, they must address actual rates of error associated with use and misuse. TEX. EDUC. CODE ANN. § 28.004(e)(5)(Vernon 2006). Information about the effectiveness of condoms may not be limited to perfect-use and theoretical conditions. *Id.*

<sup>84</sup> TEX. EDUC. CODE § 28.004(d). This council consists mostly of parents whose children are enrolled in the particular district, and at the Board of Trustee’s discretion, public school teachers, administrators, students, health care professionals, the business community, law enforcement, senior citizens, clergy, and nonprofit health organizations. See *id.* There is no set number of individuals who may or must be a part of the council. It is the responsibility of the Board of Trustees to appoint members to the council, but it is within the Board’s discretion as to which particular individuals, among these named groups, are selected. *Id.*

abstinence from sexual activity than to any other behavior.”<sup>85</sup> The purpose of this joint committee is to “ensur[e] that local community values are reflected in the district’s health education instruction.”<sup>86</sup> Fostering communication between parents and students is encouraged and sought through provisions allowing for parental notification, review of education materials, and opt-out provisions.<sup>87</sup> In 2006, Texas received over \$4.77 million dollars in Title V, Section 510 funding; which was split between faith-based organizations, school districts, hospital-based public health centers, community-based agencies, and education service centers.<sup>88</sup>

The approaches adopted in California, Vermont, and Texas are just three examples of the range of instruction Title V, Section 510, in its current form, yields.<sup>89</sup>

## 2. What Research Reveals About Sex Education Today

Another effect of federal financing of abstinence education is an onslaught of research into the efficacy of such programs. Seeking to determine whether federal dollars are wisely appropriated, this research focuses on the possible interplay between abstinence education and rates of teenage pregnancy and STIs, as well as general social awareness of reproductive health.<sup>90</sup> Research studies vary in terms of the specific sex education programs studied, the federal initiative financing the programs, and the curriculum’s focus—namely, whether abstinence-only education is examined or abstinence-only education is juxtaposed with comprehensive sex education.<sup>91</sup> This diversity, as well as the difficulty of adequately accounting for factors

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<sup>85</sup> *Id.* at § 28.004(e).

<sup>86</sup> *Id.* at § 28.004(a). It is also within the province of the local school health advisory council to recommend the age and grade-level at which students should receive sex education. *Id.* at § 28.004(c)(3).

<sup>87</sup> *Id.* at § 28.004(i-j).

<sup>88</sup> TEXAS, *supra* note 82, at 11.

<sup>89</sup> For additional information on how these and other states use Title V funding, see FISCAL YEAR 2007 EDITION, *supra* note 39.

<sup>90</sup> Varley, *supra* note 10, at 539-40.

<sup>91</sup> *Id.*

like opt-out provisions and personal/local/religious values that may impact efficacy, plague research results with uncertainty.<sup>92</sup> Thus, concretely assessing program efficacy becomes difficult, as does identifying target areas for improvement.

Still, numerous studies criticize abstinence-only education. A 2007 study of Title V, Section 510 abstinence education programs performed on behalf of HHS by the Mathematica Policy Research, Inc. revealed abstinence education “improved identification of STDs [sexually transmitted diseases] but had no overall impact on knowledge of unprotected sex risks and the consequences of STDs.”<sup>93</sup> The study further revealed that regardless of exposure to abstinence education programs, youth were equally likely to abstain from sex,<sup>94</sup> have unprotected sex at first intercourse or in the twelve months preceding the survey,<sup>95</sup> engage in first intercourse at the same mean age (14.9 years),<sup>96</sup> have the same number of sexual partners,<sup>97</sup> and have the same rates of pregnancy, births, or STIs.<sup>98</sup> Despite these findings, researchers did not concede a systemic failure with abstinence education.<sup>99</sup> Instead, they proposed changes to the scheduling and timing of these programs, namely that instruction should continue through the high school years because high school is the period when most youth become sexually active and peer support dissolves.<sup>100</sup>

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<sup>92</sup> Steib, *supra* note 13, at 456.

<sup>93</sup> IMPACTS, *supra* note 12, at xviii. This study examined four abstinence-only education programs funded by Title V, Section 510: (1) My Choice, My Future! in Powhatan, Virginia, (2) ReCapturing the Vision in Miami, Florida, (3) Families United to Prevent Teen Pregnancy in Milwaukee, Wisconsin, and (4) Teens in Control in Clarksdale, Mississippi. *Id.* at 1. School-age youth were divided into two groups: those in the program group were exposed to Title V, Section 510 abstinence education programs, whereas those in the control groups were not. *Id.* at 2. Aside from access to abstinence education program services, the youth in both groups were similar, thus allowing differences in outcomes to be attributable to abstinence education. *See id.* at 1.

<sup>94</sup> *Id.* at 29.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at xviii, 31.

<sup>97</sup> *Id.*

<sup>98</sup> IMPACTS, *supra* note 12, at 35.

<sup>99</sup> *Id.* at xxiii-xxiv.

<sup>100</sup> *Id.*

In the absence of definitive proof linking abstinence-only education with a decrease in teenage pregnancy or STI rates, comprehensive sex education has been offered as a better alternative.<sup>101</sup> Comprehensive programs, because they incorporate abstinence in their instruction of effective contraceptive use,<sup>102</sup> may “better delay the age of first sexual activity, reduce the number of sexual partners, and reduce sexually transmitted disease and unplanned pregnancy rates.”<sup>103</sup> The American Medical Association (AMA) supports the adoption of comprehensive sex education programs in schools.<sup>104</sup> The AMA urges schools to create comprehensive programs that use information from peer-reviewed studies to address issues of pregnancy, HIV, and STIs; and to encourage participation from health care professionals and parents.<sup>105</sup> Abstinence, the AMA feels, should be addressed in the context of other contraceptive choices and safer sex.<sup>106</sup> The American Academy of Family Physicians (AAFP) and the American Academy of Pediatrics (AAP) also endorse similar initiatives.<sup>107</sup> These groups argue against programs that “do not show evi-

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<sup>101</sup> WAXMAN REPORT, *supra* note 6, at 3-4, citing DOUGLAS KIRBY, THE NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY (SUMMARY) 18 (2001), *available at* [http://catalystforchildren.org/pdf/Emerging\\_Answers.pdf](http://catalystforchildren.org/pdf/Emerging_Answers.pdf) [hereinafter SUMMARY].

<sup>102</sup> WAXMAN REPORT, *supra* note 6, at 4, citing DOUGLAS KIRBY, DO ABSTINENCE-ONLY PROGRAMS DELAY THE INITIATION OF SEX AMONG YOUNG PEOPLE AND REDUCE TEEN PREGNANCY? 6 (Oct. 2002), *available at* [http://www.thenationalcampaign.org/resources/pdf/pubs/abstinence\\_only.pdf](http://www.thenationalcampaign.org/resources/pdf/pubs/abstinence_only.pdf) [hereinafter DELAY INITIATION].

<sup>103</sup> Steib, *supra* note 13, at 455, citing INSTITUTE OF MEDICINE (IOM), NO TIME TO LOSE: GETTING MORE FROM HIV PREVENTION (2000), *available at* <http://www.iom.edu/Object.File/Master/4/131/HIV8pager.pdf> and citing SUMMARY, *supra* note 101; *see* IMPACTS, *supra* note 12, citing DELAY INITIATION, *supra* note 102, at 6.

<sup>104</sup> American Medical Association (AMA), H-170.968 Sexuality Education, Abstinence, and Distribution of Condoms in Schools (2004), *available at* [http://www.ama-assn.org/apps/pf\\_new/pf\\_online?f\\_n=browse&doc=policyfiles/HnE/H-170.968.HTM](http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-170.968.HTM) (last visited May 7, 2008)(stating the AMA “opposes the sole use of abstinence-only education, as defined [by Title V, Section 510], within school systems”).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> AMA, Medical Student Section, Ad Hoc Comm. on Public Health, Adolescent Sexual Health Education, *available at* [http://www.ama-assn.org/ama1/pub/upload/mm/15/ph\\_sexual\\_health\\_ed.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/15/ph_sexual_health_ed.pdf).



denance-based benefits,” alluding to abstinence-based programs.<sup>108</sup> Still, research has quashed suspicions that causal connections exist between decreased teenage pregnancy rates and mandatory contraception education; at the same time, research has also overturned hypotheses of causal connections between mandatory STI prevention education and decreased infection rates within states.<sup>109</sup>

Several studies scrutinizing the content of abstinence-only education programs, including a 2004 report prepared for U.S. Representative Henry A. Waxman, have revealed significant misrepresentations in abstinence-only curricula.<sup>110</sup> The Waxman Report reviewed the curricula used in the most popular federally funded abstinence-only education programs among CBAE grantees.<sup>111</sup> Aside from requiring a table of contents or brief curriculum summary, the federal government does not review the content of abstinence-only programs.<sup>112</sup> According to the Waxman Report, of the thirteen prominent programs examined, eleven had inaccuracies.<sup>113</sup> Thus, over eighty percent of abstinence-only curricula used by federal grantees contained “false, misleading, or distorted information about reproductive health.”<sup>114</sup>

Specifically, the Waxman Report identified five critical areas of concern with abstinence-only programs.<sup>115</sup> These programs (1) “contain false information about the effectiveness of contraceptives,”<sup>116</sup> (2)

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<sup>108</sup> See AMA, *supra* note 104.

<sup>109</sup> Steib, *supra* note 13, at 455.

<sup>110</sup> WAXMAN REPORT, *supra* note 6.

<sup>111</sup> *Id.* at 5. These are Choosing the Best Life; Choosing the Best Path; A.C. Green’s Game Plan; WAIT Training; Choosing the Best Way; Sexual Health Today; Me, My World, My Future; Friends First/STARS; Why kNOw; Navigator; FACTS; Managing Pressures Before Marriage; and Sex Can Wait. *Id.* at 6.

<sup>112</sup> *Id.* at 4-5.

<sup>113</sup> *Id.* at 7.

<sup>114</sup> *Id.* at i.

<sup>115</sup> *Id.* at i-ii.

<sup>116</sup> WAXMAN REPORT, *supra* note 6, at i. The report identified failures in educating youth on selecting birth control and in using contraceptive methods properly. *Id.* at 11. The report also highlighted misrepresentations promulgated by some curricula as to the efficacy of condoms in preventing pregnancy and the transmission of HIV. *Id.* at 8, 11. These curricula “rely on the false idea that HIV and other pathogens can ‘pass through’ condoms” despite the Centers for Disease Control and Prevention’s findings that condoms, when used properly,

“contain false information about the risks associated with abortions,”<sup>117</sup> (3) blur the line between religion and science,<sup>118</sup> (4) “treat stereotypes about girls and boys as scientific fact,”<sup>119</sup> and (5) contain scientific errors.<sup>120</sup> The report surmises that the “[s]erious and pervasive problems with the accuracy of abstinence-only curricula may help explain why these programs have not been shown to protect adolescents from sexually transmitted diseases and why youth who pledge abstinence are significantly less likely to make informed choices about precautions when they do have sex.”<sup>121</sup>

### **B. Abstinence-Only Education: An Improper Federal Government Pursuit?**

In this nation’s history, the federal government has occasionally intruded into the private lives of citizens in the name of public health.<sup>122</sup> “Although the Supreme Court has been loath to find af-

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are ‘highly effective in preventing the transmission of HIV.’” *Id.* at 8, citing CDC, FACT SHEET FOR PUBLIC HEALTH PERSONNEL: MALE LATEX CONDOMS AND SEXUALLY TRANSMITTED DISEASES (Jan. 2003), available at <http://www.cdc.gov/nchstp/od/condoms.pdf>. In terms of preventing pregnancy, some curricula misconstrue figures released by the World Health Organization (WHO), and suggest a consistent fifteen percent failure rate associated with condom use. *Id.* at 12, citing WHO, EFFECTIVENESS OF MALE LATEX CONDOMS IN PROTECTING AGAINST PREGNANCY AND SEXUALLY TRANSMITTED INFECTIONS (June 2000), available at [www.who.int/mediacentre/factsheets/fs234/en/](http://www.who.int/mediacentre/factsheets/fs234/en/) (reporting that condoms when used correctly and consistently have a two to three percent failure rate, as opposed to a fifteen percent failure rate when typically used, meaning incorrectly and not at each sexual interaction).

<sup>117</sup> WAXMAN REPORT, *supra* note 6, at i, 13 (noting some curricula “give misleading information about the physical and psychological effects of abortions ... rel[ying] on numerous outdated sources to present a distorted and exaggerated view of the dangers of legal abortion”).

<sup>118</sup> *Id.* at i, 15 (reporting curricula advance as scientific fact religious interpretations of when fetuses become living beings).

<sup>119</sup> *Id.* at ii, 16-18 (finding studies “describe girls as helpless or dependent upon men” and teach “girls care less about achievement and their future than do boys,” “men are sexually aggressive and lack deep emotions,” “[w]hile a man needs little or no preparation for sex, a woman needs hours of emotional and mental preparation”).

<sup>120</sup> *Id.* at ii, 12, 18 (reporting, for example, that some curricula state pregnancy can result from touching another person’s genitals, and suggest abstinence as a remedy to all psychological problems).

<sup>121</sup> WAXMAN REPORT, *supra* note 6, at ii.

<sup>122</sup> “Public health interventions are designed to prevent injury and disease among popula-

firmative constitutional obligations to protect individuals and the public, it certainly has upheld a wide range of public health powers."<sup>123</sup> The constitutionality of an intrusion is determined by balancing the interests involved. Depending on the type of interests implicated, one of three levels of scrutiny (strict, intermediate, or rational) is triggered.<sup>124</sup> Once compared, if state interests outweigh personal interests, the government is permitted to proceed with its intervention or program. And so, in the context of abstinence-education, the question becomes whether this governmental intervention, through the allotment of federal resources, is truly in the name of public health, or rather, for some other purpose.

In the absence of floor votes and Congressional hearings surrounding the initial approval of Title V, Section 510, traditional canons of statutory construction are implicated to help determine legisla-

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tions." PUBLIC HEALTH LAW AND ETHICS: A READER 47 (Lawrence O. Gostin ed., Univ. of Cal. Press 2002). Examples of governmental interventions include reduction of smoking in public places, seat belt legislation, smallpox vaccinations, and clean air and water regulations. IOM, THE FUTURE OF PUBLIC HEALTH 39-46 (Nat'l Acad. Press 1988). Others include civil confinements, isolation, and quarantines of certain individuals infected or suspected of infection with communicable diseases. Gostin, *supra* note 122, at 415-16. *See also* Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905) ("[L]iberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.") *Id.* at 26.

<sup>123</sup> Gostin, *supra* note 122, at 174. Included in these powers are: the ability to tax and spend for the general welfare, to regulate interstate commerce, to raise revenue for public health services, to regulate private activities endangering the public's health, to enforce civil rights amendments, and to employ all means reasonably appropriate to achieve the objectives of enumerated national powers. *Id.* at 174-75.

<sup>124</sup> A law will be upheld if it is rationally related to a legitimate governmental purpose. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Any conceivable purpose will suffice, regardless of whether it is in fact the intended purpose of the legislation. *Id.* In some situations, like discrimination based on gender or parentage, a more stringent level of scrutiny is triggered. *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973). A law under intermediate scrutiny will be upheld if it is substantially related to an important governmental purpose. *Id.* The legislation must be narrowly tailored to achieve the intended goal. The strictest level of scrutiny is implicated in cases of discrimination based on race, national origin, or fundamental rights, including the right to vote, travel, procreate, privacy, and to exercise freedom of speech or religion. *Korematsu v. U.S.*, 323 U.S. 214 (1944). Under strict scrutiny, a law will be upheld if it is necessary to achieve a compelling government purpose. *Id.* The means used by the legislation must not only be narrowly tailored to achieve the end goal, but must also be the least restrictive alternative. *Id.*

tive purpose.<sup>125</sup> The purpose of the Title V, Section 510 federal grant is “to enable the State to provide abstinence education, and at the option of the State, where appropriate, mentoring, counseling, and adult supervision to promote abstinence from sexual activity, with a focus on those groups which are most likely to bear children out-of-wedlock.”<sup>126</sup> Abstinence education has as “its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity.”<sup>127</sup> While the statute discusses risks associated with participation in sexual activity (including, *inter alia*, pregnancy, STIs, psychological effects), it fails to explicitly identify as its purpose the reduction of these outcomes.

Phrases, such as, “out-of-wedlock” and “a mutually faithful relationship in the context of marriage is the expected standard of human activity,” have stirred concern that desires to promote religious or politically-rooted morality, and not public health, drive the federal initiative.<sup>128</sup> Looking at the results exposed in the Waxman Report about blurred lines between science and medicine,<sup>129</sup> as well as the high proportion of faith-based entities receiving CBAE funding,<sup>130</sup> these concerns are reasonable. Still, courts uphold laws if any possible legitimate legislative purpose is conceivable, regardless of whether this is in fact the true underlying purpose.<sup>131</sup> In *Williamson v. Lee Optical of Oklahoma*, the Supreme Court upheld an Oklahoma law requiring opticians to have a prescription from an optometrist or ophthalmologist before making a pair of glasses.<sup>132</sup> In support of its decision, the Court essentially proposed its own theories regarding possible le-

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<sup>125</sup> BRIEF HISTORY, *supra* note 3, at 1.

<sup>126</sup> 42 U.S.C. § 710(a)(b)(1).

<sup>127</sup> 42 U.S.C. § 710(a)(b)(2)(A).

<sup>128</sup> 42 U.S.C. § 710(a)(b)(2)(D); *see* OVERVIEW, *supra* note 15, at 8 (arguing federal government is attempting to promote marriage “under the guise of a public health strategy”).

<sup>129</sup> *See* WAXMAN REPORT, *supra* note 118.

<sup>130</sup> OVERVIEW, *supra* note 15.

<sup>131</sup> In *McGowen v. Maryland*, the Supreme Court declared that under rational basis review the actual purpose of a law is irrelevant and the law must be upheld “if any state of facts reasonably may be conceived to justify it.” *McGowen*, 366 U.S. at 426.

<sup>132</sup> *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

gitimate purposes of this undeniably optometrist-friendly law.<sup>133</sup> Further, courts have upheld legislation aimed at maintaining public morality. For example, in *McGowen v. Maryland*, the Supreme Court upheld a law allowing the exemption of certain businesses from Maryland Sunday closing laws against allegations of equal protection violations.<sup>134</sup> In doing so, the Court allowed the sale of certain products like milk, bread, fruits, medicines, and newspapers, but banned alcohol sales.<sup>135</sup>

While maintaining traditional notions of propriety and sexual conservatism may play a role in federal support of abstinence education,<sup>136</sup> it is not inconceivable that reducing rates of teenage pregnancy and STIs, though not explicitly stated, are also legislative purposes. Even if the purpose of federal abstinence education legislation were to promote the institution of marriage, these acts would survive rational basis review.<sup>137</sup> Thus, regardless of its actual or conceivable purpose, Title V, Section 510 abstinence education passes the rational basis review required of all permissible legislation. Yet, in light of current research revealing rising rates of teenage pregnancy and STIs in girls,<sup>138</sup> the concern moves away from legitimacy and focuses on whether this legislation is a needed or worthwhile venture. Because the efficacy of abstinence education programs is often uncertain and immeasurable, legislators are faced with costly interventions that arguably fall short of their public health goal.

Further, although rational legislative basis can be satisfied, additional constitutional concerns may arise when states infuse federal funding into supporting public school-based curricula. The Supreme Court in *West Virginia State Board of Education v. Barnette* held that the states' public schools are meant to hold to the "ideal of secular in-

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<sup>133</sup> *Id.* at 86-88, 91.

<sup>134</sup> *McGowen*, 366 U.S. 420.

<sup>135</sup> *Id.* at 454-55, 457.

<sup>136</sup> WAXMAN REPORT, *supra* note 6, at 15 ("By their nature, abstinence-only curricula teach moral judgments alongside scientific facts.")

<sup>137</sup> See *Lawrence v. Texas*, 539 U.S. 558, 585 (2003)(implying that the preservation of the traditional institution of marriage serves a legitimate state interest).

<sup>138</sup> See *Tanner*, *supra* note 13.

struction."<sup>139</sup> According to the American Psychological Association, the goal of an educational system should be "to provide youths with the information and the opportunity to develop analytic tools and social skills by which to make independent and careful decisions about their immediate and future lives."<sup>140</sup> Abstinence-only education has been criticized as an impermissible conduit of advocating political agendas.

Particularly within the gay, lesbian, and transgender communities, concerns have arisen that promotion of abstinence-until-marriage disproportionately affects homosexual students,<sup>141</sup> thus possibly violating the Equal Protection Clause of the Fourteenth Amendment.<sup>142</sup> The argument is that homosexual students, who currently have no federally recognized right to marry, are marginalized in classrooms because of the focus federal funding places on interpersonal relationships and sexual activity in the context of marriage.<sup>143</sup> Homosexual students are targeted in greater proportion and alienated because of federal guidelines propagating the message "that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects."<sup>144</sup> The exact ramifications on homosexual students, however, is uncertain, and no success-

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<sup>139</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

<sup>140</sup> Roger J.R. Levesque, *Sexuality Education: What Adolescents' Educational Rights Require*, 6 PSYCHOL. PUB. POL'Y & L. 953, 973 (2000).

<sup>141</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>142</sup> Danielle LeClair, *Let's Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, And Should Be Overridden*, 21 WIS. WOMEN'S L.J. 291 (discussing disproportionate impacts of abstinence-only-until-marriage initiatives on gay students and the responses from national organizations and legislators to address these concerns); Lambda Legal Defense and Education Fund, *New Toolkit Tackles Homophobia in 'Abstinence-Only' Education, Equips Communities to Fight for Real Sex Ed*, (Sept. 9, 2002), available at <http://www.lambdalegal.org/news/pr/sex-education-homophobia.html> (quoting staff attorney Jonathan Givner that abstinence-only programs "render our youth invisible").

<sup>143</sup> See 42 U.S.C. § 710(b)(2)(B) (requiring programs urge "abstinence from sexual activity outside of marriage as the expected standard for all school age children"); 42 U.S.C. § 710(b)(2)(D) (requiring programs teach that "a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity"); see LeClair, *supra* note 142, at 292.

<sup>144</sup> 42 U.S.C. § 710(b)(2)(E).

ful challenge has been asserted to date. Justice O'Connor's concurrence in *Lawrence v. Texas*,<sup>145</sup> has, some legal scholars argue, left the door open for a possible means to overturn abstinence-only education programs based on an equal protection argument.<sup>146</sup> Justice O'Connor recognized that all laws must have a rational basis, and may not disproportionately affect a particular group.<sup>147</sup> She noted the Court has "never held that moral disapproval [of a group], without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of people."<sup>148</sup> Although state interests in abstinence education have been asserted, the failure to account for the rights of homosexual students may prove to be an outweighing interest. Forceful and persuasive arguments that societal, political, or moral animus steers federal abstinence-only education, and that states have failed to demonstrate interests sufficient to meet the constitutional demands of stricter scrutiny,<sup>149</sup> remain to be advocated on behalf of homosexual students. Whether this argument will be successful, however, is another question.

### C. Government Interventions in the Name of Public Health

"In general, Americans are skeptical about the role of government."<sup>150</sup> Concerns about unnecessary intrusion into personal rights, liberty, and privacy have led to criticism of several governmental interventions.<sup>151</sup> Distrust of officials, fear of the potential inefficacy of a

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<sup>145</sup> *Lawrence*, 539 U.S. at 579-85 (invalidating a Texas law criminalizing homosexual sodomy based on substantive due process violations of the Fourteenth Amendment).

<sup>146</sup> David Rigsby, *Sex Education in Schools*, 8 GEO. J. GENDER & L. 895, 905 (2006); Steib, *supra* note 13, at 462-63.

<sup>147</sup> *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we [the Court] have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.")

<sup>148</sup> *Id.* at 582.

<sup>149</sup> The Court in *U.S. v. Carolene Prod. Co.* suggests a stricter level of judicial scrutiny will be necessary under the Fourteenth Amendment in the context of "prejudice against discrete and insular minorities." *U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938).

<sup>150</sup> Gostin, *supra* note 122, at 39.

<sup>151</sup> *Id.* at 383 (discussing compulsory immunization as one such instance).

given treatment or intervention, and religious or moral objections form the crux of such criticism.<sup>152</sup> Further, when interventions involve children or education, parental rights and interests are also triggered and become an area of concern.<sup>153</sup>

In this nation's legal history, parents' rights to control their children's education are well entrenched.<sup>154</sup> In 1923, the Supreme Court in *Meyer v. Nebraska* found that parents had a right to "establish a home and bring up children,"<sup>155</sup> including therein a right to control their children's education.<sup>156</sup> The Court found a state law prohibiting the instruction of classes in any language other than English an impermissible interference with parental rights.<sup>157</sup> Two years later in *Pierce v. Society of Sisters*, the Court reaffirmed the parents' power to control their child's education, but recognized state interests in providing education.<sup>158</sup> States have the power to reasonably "regulate all schooling" and to require "certain studies plainly essential to good citizenship . . . be taught, and nothing be taught which is essentially inimical to the public welfare."<sup>159</sup> Since *Pierce*, the Court has consistently upheld parental rights to make child-rearing decisions<sup>160</sup> while maintaining the necessity of state intervention in some instances.<sup>161</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> See PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 183-84 (Lawrence O. Gostin ed., Univ. of Cal. Press 2000) [hereinafter PUBLIC HEALTH LAW]; (discussing the history of anti-vaccinationists, including fear and mistrust among parents about the risks of submitting children to vaccination).

<sup>154</sup> Levesque, *supra* note 140, at 974-75.

<sup>155</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding a Nebraska law prohibiting teaching foreign languages in school violated the Due Process clause of the Fourteenth Amendment).

<sup>156</sup> *Id.* at 399.

<sup>157</sup> *Id.* at 401.

<sup>158</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

<sup>159</sup> *Id.* at 534.

<sup>160</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (upholding the general right of parents to direct their children's educational upbringing and referring to *Pierce v. Soc'y of Sisters* as "a charter of the rights of parents to direct the religious upbringing of their children"); see also *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>161</sup> See *Troxel*, 530 U.S. at 86 (Stevens, J. dissenting) (arguing a parent's liberty interests do not form a "rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.")



One context in which the government has intruded on parental rights is in the area of immunizations. For example, states have promulgated a series of age and circumstance-based criteria, as well as immunization schedules.<sup>162</sup> Although vaccination is an actual bodily invasion, many of the same complaints and concerns arise in the context of compulsory vaccination and abstinence education.<sup>163</sup> Both interventions were initiated at times when the social climate was one of concern for the health and safety of the nation's youth, and both are premised on the theory that without these interventions, rates of communicable infections would increase.<sup>164</sup> Additionally, the decisions to introduce immunization and abstinence education fall within the state's power to enact legislation protecting public health and safety.<sup>165</sup>

In both cases, state legislators have a final objective, but the "mode or manner in which those results are to be accomplished"<sup>166</sup> is within their discretion, "subject, of course . . . only to the condition that no rule prescribed by a State, nor any regulation adopted by a

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<sup>162</sup> For more information and a state-by-state look at immunization laws and recommendations, see Immunization Action Coalition, State Information (2008), <http://www.immunize.org/states>; see also The Association of State and Territorial Health Officials (ASTHO) 2008 State Immunization Legislation (2008), available at <http://www.astho.org/pubs/2008ImmunizationLegislationFinal.pdf> (highlighting 2008 immunization legislation enacted, withdrawn, and passed but awaiting approval as related to, *inter alia*, school and child healthcare, exemptions, and information systems). Also, the CDC has issued specialized schedules of recommended immunizations for all individuals based on age and health status. CDC, Recommended Immunizations - United States 2008 (2008), <http://www.vaccinesafety.edu/2008-schedule.htm>.

<sup>163</sup> "All States, as a condition of school entry, require proof of vaccinations against a number of diseases." Gostin, *supra* note 122, at 379. For examples of compulsory immunization by states, see TEX. EDUC. CODE ANN. § 38.001 (Vernon 2006) (mandating that students be immunized against diphtheria, rubeola, rubella, mumps, tetanus, and poliomyelitis in order to enroll in Texas public schools unless parents claim a religious objection or provide a sworn statement from a physician that immunization would endanger the child's health); see also CAL. EDUC. CODE § 120335 (West 2006) (conditioning admission into California public schools on immunization against diphtheria, haemophilus influenza type b, measles, mumps, whooping cough, rubella, tetanus, poliomyelitis, Hepatitis B, and chicken pox).

<sup>164</sup> See *infra* discussion of AFLA in PART II; see also *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 23-24 (1905) (discussing the need for mandatory smallpox vaccinations given an increasing prevalence in the community).

<sup>165</sup> See *Jacobson*, 197 U.S. at 11.

<sup>166</sup> *Id.* at 27.

local governmental agency . . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument.”<sup>167</sup> To respect this provision, both interventions generally allow circumstances for exclusion. Statutory exemptions based on medical contraindications to immunization, religious exemptions, and philosophical convictions exist based on the particular state.<sup>168</sup> For example, in the context of sex-related education, most states provide opt-in or opt-out provisions.<sup>169</sup>

Ultimately, government efforts in these areas are similar in that states are charged with making decisions which affect the lives of their youth. These interventions demonstrate instances in which state interests in protecting health and safety can outweigh parental rights to control child rearing and education.

#### IV. RESTRUCTURING SEX EDUCATION FUNDING

“The public is likely to bristle at government efforts to prescribe social orthodoxies, particularly if officials deceive them.”<sup>170</sup> In a social climate that currently urges personal responsibility, the restriction of access to comprehensive sex education seems nonsensical. Adolescents are expected to actively engage in society but lack the resources to make informed decisions or to best protect themselves if the need arises.<sup>171</sup>

Some studies propose that abstinence-only education is not fundamentally flawed; instead, problems lie in the temporal execution of

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<sup>167</sup> *Id.* at 27.

<sup>168</sup> Gostin, *supra* note 122, at 379; *see* TEX. EDUC. CODE ANN. § 38.001, *supra* note 163 (allowing exemptions in Texas for religious convictions and in circumstances where a physician has provided a signed and sworn statement that immunization will endanger the student’s life); *see also* CAL. EDUC. CODE § 120365 (West 2006) (permitting exemptions in California if immunization is against one’s beliefs).

<sup>169</sup> Gostin, *supra* note 122, at 379.

<sup>170</sup> *Id.* at 337.

<sup>171</sup> *Cf.* TEX. EDUC. CODE ANN. § 4.001(a)(2003) (stating the purpose of the Texas public education system as seeking “to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation”).

these programs and the failure to adequately follow up.<sup>172</sup> While some believe that the commencement of education at a young age is strategically advantageous, the 2007 Mathematica report urges “targeting youth solely at young ages may not be sufficient.”<sup>173</sup> The study finds high school to be the time when the average adolescent becomes sexually active.<sup>174</sup> It is also around this same time that peer support “erodes sharply”<sup>175</sup> and adolescents become more prone to social influences and pressures. Thus, a possible solution appears to be the consistent promotion of both the core values of abstinence-only education throughout high school, and the assurance that adolescents will have adequate mentoring services available. Yet, without conclusive evidence that these proposals will be effective, and given the recent trend of states refusing to accept federal funds to promote abstinence education,<sup>176</sup> the issue becomes whether federal initiatives are worth the hefty investment. This issue prompts the question: should federal financing requirements be amended to regain the interest of states, and if so, how?

The foundation of abstinence education funding must be redefined by revising Title V, Section 510. This route would have the most immediate impact on the current system, as the majority of federal funding today is tied to the definition of abstinence education programs in this particular statute.<sup>177</sup> Redefinition would involve changes in statutory language, legislative purpose, scope of instruction, and requirements for receipt of federal funds.<sup>178</sup>

But first, I submit beginning from the premise that all aspects of the current system are no longer intact. While instincts may prompt the question, ‘is no sex education better than abstinence-only education?’ the core question I propose, rather, is whether youth will still have access to any sex education at all. The answer is yes.

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<sup>172</sup> IMPACTS, *supra* note 12, at xxiii.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 29, 31.

<sup>175</sup> *Id.* at xxiii.

<sup>176</sup> See OVERVIEW, *supra* note 15, at 9.

<sup>177</sup> BRIEF HISTORY, *supra* note 3, at 1-2.

<sup>178</sup> See Part IV, Subsection A, *infra* for full discussion.

Education in the context of the home and family will still exist, as will information gleaned from books, the Internet, media outlets, medical professionals, and social contacts. Moreover, the basic educational curriculum is set at the state-level and is subject to state discretion.<sup>179</sup> As such, states are within their authority to design any sex education program they deem appropriate, including the path of no sex education at all. While the “[Supreme] Court leaves determination[s] of the content of educational rights to the states, with the fundamental reservation that educational efforts must respect and promote democratic values,”<sup>180</sup> it has been urged that democratic values should “require that programs use comprehensive and explicit educational materials and present divergent sexual beliefs and materials.”<sup>181</sup> The risk involved in having a system free of federally-funded abstinence education is the great variance that would likely arise in curricula between states. Yet, these discrepancies are probably no different from those that currently exist. And so, what would be the effective difference in a system free of federal financing?

Parental dissatisfaction and criticisms of the pursuit of improper governmental purposes would likely still exist, depending on a particular state’s decisions.<sup>182</sup> One critical difference, however, would be a reduction in available resources for grassroots and community-based programs. These entities would most likely cease to exist, or at the least, operate at much lower capacities. As a result, a greater burden would lie on school systems or parents themselves to teach sex education. As it stands, many parents do not discuss sex at home,

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<sup>179</sup> Sorgan, *supra* note 7, at 343.

<sup>180</sup> Levesque, *supra* note 140, at 971.

<sup>181</sup> *Id.* at 973.

<sup>182</sup> In states that currently do not accept any federal funding for abstinence-only education, incidents of parental dissatisfaction with the school board in regards to sex education-related materials still occur. See SIECUS, MONTANA in STATE PROFILES: A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES (Fiscal Year 2007 ed.) (2007), available at <http://www.siecus.org/index.cfm?fuseaction=Page.viewPage&parentID=487&grandparentID=478&pageId=845>; see also SIECUS, VERMONT in STATE PROFILES: A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES (Fiscal Year 2007 ed.) (2007), available at <http://www.siecus.org/index.cfm?fuseaction=Page.viewPage&parentID=487&grandparentID=478&pageId=862>.

and adolescents mostly learn about sex from their friends.<sup>183</sup> As such, there is a distrust about the accuracy of this information, and the overall impact on rates of teenage pregnancy and STDs in a system free of federally financed sex education is, at best, uncertain. If the ultimate purpose of restructuring abstinence education is the improvement of public health and safety, then undertaking a venture that would likely keep the status quo is ill-advised.

On the opposite end of the spectrum from abandoning federal funding is the alternative of establishing a national sex education curriculum. While doing so would require substantial resources and interdisciplinary involvement to develop age-appropriate and medically accurate information, a national curriculum carries several advantages. First, all students (in public schools) would learn the same material, and all teachers would be required to teach from a standard guide, regardless of personal or regional attitudes. Second, such a system may also help mitigate current ideological tensions between teachers, parents, and the community.<sup>184</sup> Tightly restricted opt-out provisions could still be permissible, but should not be frequently used, as the program's goal would be to provide neutral and accurate information. Federal funds could still be provided to community-based groups through CBAE-like grants, although these entities would now be charged with the duty of reinforcing the content of the national curriculum. While the Supreme Court has recognized congressional power to offer incentives for states to enact federally-sponsored legislation, the federal government cannot force states to do so.<sup>185</sup> Requiring the adoption of a national curriculum may thus

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<sup>183</sup> Jesse R. Merriam, *Why Don't More Public Schools Teach Sex Education? A Constitutional Explanation and Critique*, 13 WM. & MARY J. WOMEN & L. 539, 554-55 (2007).

<sup>184</sup> Surveys of teachers have revealed "pressures from parents, comm150

unity, and school administrators remain the most challenging problems they face in providing sexuality education, which leads them to omit topics potentially subject to ideological disputes." Levesque, *supra* note 140, at 969.

<sup>185</sup> See *N.Y. v. United States*, 505 U.S. 144 (1992) (finding the Low-Level Waste Policy Amendments Act of 1985 unconstitutional because it forced states to take title of radioactive waste produced intrastate if that particular state was non-compliant with federal disposal requirements); see also *Printz v. United States*, 521 U.S. 898 (1997) (finding portions of the Brady Bill that force local and state law enforcement officers to conduct background checks on prospective handgun purchasers unconstitutional).

face harsh criticism as an unlawful intrusion into the sphere of state powers.<sup>186</sup>

Between these two extremes is a middle ground, an alternative that builds on components already in place but also incorporates some fundamental changes.

### A. A New Solution

This new alternative redefines the foundation of federally-financed abstinence education. In doing so, it seeks to ensure that all school-age adolescents receive medically-accurate and age-appropriate sex education in a forum free from political, religious, or moral influences. The goal is to incorporate school administrators, parents, and health care professionals in both curriculum design and delivery. Changes will focus on amending current statutory language, increasing the parameters of sex education curricula, and restructuring the purpose and protocols of federal financing, including adding outcome-based incentives for state participation.

Specifically, reforms would target the statutory language of Title V, Section 510, as this has become the basis for most federal funding.<sup>187</sup> First, the words 'sexual activity' would be defined in the statute to reduce variance and to provide guidance to program coordinators on topics that should be addressed by the new curriculum. Next, removal of words such as "marriage" and "wedlock,"<sup>188</sup> and by implication the approval of only heterosexual relationships, would lessen the semblance of using federal funds to maintain notions of religiously or politically-rooted propriety and morality. Instead, the proper scope of sexual activity would be discussed in the context of 'any dedicated, monogamous relationship.' Such changes would reduce the likelihood of offending or discriminating against homosex-

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<sup>186</sup> It is by no means this author's position that a nationwide curriculum be mandated by the federal government. In fact, current case law implies that such a mandate would be unconstitutional. See *United States v. Lopez*, 514 U.S. 549, 566 (1995) (holding that while Congress may regulate many commercial activities that substantially affect interstate commerce and the educational process under the authority of the Commerce Clause, this authority does not allow Congress to regulate all aspects of local schools).

<sup>187</sup> See BRIEF HISTORY, *supra* note 3, at 3.

<sup>188</sup> 42 U.S.C. § 710(b), *supra* note 30.

ual students.

The next series of statutory changes would focus on the parameters of sex education curricula. Similar to the proposals of the AMA, abstinence would be discussed as one method of contraception and lifestyle but would not be the sole focus of legislation or any education program.<sup>189</sup> Thus, statutory provisions requiring abstinence-only education would be replaced with those taking a more sexually-comprehensive approach. The goal would be to equip youth with a broad base of knowledge and practical skills, so as to enable them to act wisely when confronted with a sex-related situation. Giving youth the ability to make reasoned decisions is rooted in providing them with accurate, appropriate, and adequate information.

While some argue that exposure alone to more comprehensive education will increase curiosity and encourage experimentation among youth, inconsistent research results suggest that these contentions are merely unfounded speculations.<sup>190</sup> Several states, such as California and Vermont, have already taken steps to incorporate these types of comprehensive-oriented changes into their education codes.<sup>191</sup> The implication of seeking to make curricula as objective and neutral as possible<sup>192</sup> is that state legislatures recognize the growing need to address sexual health and to ensure the maximum number of students receive this instruction.

Another aspect of change would be the redefinition of Title V's legislative purpose. Abstinence promotion would no longer be the central emphasis. Instead, a more public health-based, preventative goal would be recognized. The express focus would be to reduce rates of teenage pregnancies and STIs. A two-fold approach would be used to help achieve this goal.

First, outcome-based financial incentives would be instituted. States demonstrating successful reductions in teenage pregnancy and

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<sup>189</sup> See AMA, *supra* note 104.

<sup>190</sup> See IMPACTS, *supra* note 12 (studies showed similarities in rate of sexual abstinence, age of first intercourse, and number of sexual partners between groups receiving abstinence-only education and groups that are not).

<sup>191</sup> California Comprehensive Sexual Health and HIV/AIDS Prevention Education Act, CAL. EDUC. CODE § 51933 (West 2006).; VT. STAT. ANN. tit. 16, § 131 (2004 & Supp. 2007).

<sup>192</sup> See CAL. EDUC. CODE § 51933.

STI rates would be eligible for more federal funding. By creating a scheme whereby states compete with each other, state legislatures will likely have greater incentives to make bigger, more serious strides towards achieving results.<sup>193</sup>

Second, programs would teach medically and scientifically accurate information about STIs, risky lifestyle choices, and contraception (including abstinence). A strong core curriculum would be instituted with a multidisciplinary approach to discussing premarital sex, including the physiological, emotional, psychological, and financial consequences. Further, strengthening the lines of communication between parents and students, as well as building partnerships with health care professionals in local communities, would facilitate positive reinforcement and a support structure.<sup>194</sup>

Researchers in the fields of risk perception and communication insist that uncertainty breeds fear.<sup>195</sup> The key to effective communication, they argue, is to understand fear and use this understanding to empower a target audience to seek change.<sup>196</sup> Applying these principles would be critical to securing parental involvement in programs directed toward more comprehensive school-based sex education. Local communities and school districts would need to facilitate opportunities for parents, school administrators, and health care professionals to meet and discuss sex-related risks and realities in their communities. Parents often idealize the behaviors and attitudes of their own children, or they are unaware of early onset sexual activity and the associated social and medical statistics. By personalizing these risks, and explaining the realistic goal of more comprehensive sex education, parents would likely feel less threatened by a movement away from abstinence-only programs. Further, allowing par-

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<sup>193</sup> Applying a reverse notion of the 'race to the bottom' theory, and incorporating Justice Brandeis's proposition of states as the 'laboratories of democracy.' See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

<sup>194</sup> See American Medical Association (AMA), H-170.977 Comprehensive Health Education (2004), available at [http://www.ama-assn.org/ama1/pub/upload/mm/388/alcohol\\_education.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/388/alcohol_education.pdf). (encouraging involvement from parents, health professionals, and community members).

<sup>195</sup> George Gray & David Ropeik, *Dealing With the Dangers of Fear: The Role of Risk Communication*, 21 HEALTH AFF. 106, 109 (2002).

<sup>196</sup> *Id.* at 108.



ents to review proposed curriculum and to share their opinions and concerns would likely alleviate parental apprehension about school-based sex education.

Physicians can play a role in helping to effectuate change by easing parental fears, helping structure curricula, and serving as a resource for adolescents in need of information or advice. Organizations such as the AAP recognize the role physicians can play in educating youth about sex-related risks, and such organizations encourage physicians to increase their involvement in this area.<sup>197</sup> Currently, several states incorporate these notions into their education codes by calling for the organization of advisory health committees that consist of parents and health care professionals.<sup>198</sup> However, the door is open for states to experiment and to create innovative avenues to encourage participation among physicians. Perhaps certain types of tax-based incentives, or amendments in licensing or accreditation standards that call for community involvement, would help increase physician participation.

Ultimately, federally-financed abstinence education as it now exists in the United States fails to provide concrete public health protections. Hefty statutory and structural changes are required to redefine its foundation and its scope.

## V. CONCLUSION

Although the federal government has played a role in sex education for over twenty years, in the last decade it has severely limited how its appropriations may be used. With the three most prominent streams of federal funding now tied to a singular definition of abstinence education, more states find themselves overly constricted. As new research reveals rising rates of pregnancy and STIs among ado-

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<sup>197</sup> Comm. on Psychosocial Aspects of Child and Family Health and Comm. on Adolescence, American Academy of Pediatrics (AAP), *Sexuality Education for Children and Adolescents*, 108 (2) PEDIATRICS 498, 499 (2001) ("Pediatricians are in an ideal position to provide longitudinal sexuality education to children and adolescents as part of preventative health care, and many tools are available to guide their efforts. Additionally, pediatricians' efforts may be useful in complementing school or community-based programs.").

<sup>198</sup> See TEX. EDUC. CODE ANN. § 28.004 (Vernon 2006); VT. STAT. ANN. tit. 16, § 132, *supra* note 77.

lescents, scientific and medical inaccuracies in abstinence-only programs, and misguidance on contraception, increasingly states are forgoing federal dollars in the name of broadening the scope of their sex education programs.<sup>199</sup> As they currently stand, federally-financed abstinence-only initiatives are inconsistent with community and public health demands.

Problems plaguing the current system will not resolve themselves. As more states refuse funding, legislators will soon face a decision regarding what to do about federally-financed abstinence-only initiatives. The allotment of federal money to support sex education serves a great public health interest, but only if the parameters for the receipt of such funds are restructured. The very foundation on which federal financing for sex education is currently based would need to be redefined.

While critics of abstinence-only education often advocate for comprehensive sex education, researchers have identified shortcomings in both of these avenues and proposed a new alternative. This new path builds on the framework of comprehensive sex education that several states have already adopted, but also adds outcome-based financial incentives to attract state participation. It would call for changes in statutory language and program curricula, as well as the creation of new partnerships between parents, local health care professionals, and school administrators. These changes would likely result in increases in the breadth, reliability, and accessibility of critical preventative sexual health information. Most importantly, these changes would further the public health goals that first initiated legislation for federally-financed sex education programs.

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<sup>199</sup> OVERVIEW, *supra* note 15.