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LET'S TALK ABOUT SEX HONESTLY: WHY FEDERAL  
ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION  
PROGRAMS DISCRIMINATE AGAINST GIRLS, ARE BAD  
PUBLIC POLICY, AND SHOULD BE OVERTURNED

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INTRODUCTION

In our current era, when teen pregnancy rates—while declining—are still the highest in the developed world,<sup>2</sup> and sexually transmitted infections (STIs) including the deadly HIV virus are either holding steady or increasing,<sup>3</sup> the United States government should be taking steps to combat these issues. Teaching comprehensive sex education to students that includes both contraception and abstinence as important components tackles these devastating social and health problems by educating young people about how to prevent unwanted pregnancies and STIs. However, a recent government-sanctioned trend promotes and funds abstinence-only-until-marriage programs (hereinafter abstinence-only programs) in elementary and secondary schools. These programs are ineffective and problematic on many levels.<sup>4</sup> They attempt to control the sexual behavior of students through shame, guilt, and fear by refusing to provide information about contraception except to discuss failure rates; by teaching students medically inaccurate information; and often by

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2. ALAN GUTTMACHER INST., *TEENAGERS' SEXUAL AND REPRODUCTIVE HEALTH: DEVELOPED COUNTRIES 1* (2002), available at [http://www.guttmacher.org/pubs/fb\\_teens.pdf](http://www.guttmacher.org/pubs/fb_teens.pdf).

3. CENTERS FOR DISEASE CONTROL & PREVENTION, *TRENDS IN REPORTABLE SEXUALLY TRANSMITTED DISEASES IN THE UNITED STATES, 2004: NATIONAL DATA ON CHLAMYDIA, GONORRHEA, AND SYPHILIS*, available at <http://www.cdc.gov/std/stats/04pdf/trends2004.pdf> (2004); HENRY J. KAISER FAMILY FOUND., *HIV/AIDS POLICY FACT SHEET: THE HIV/AIDS EPIDEMIC IN THE UNITED STATES* (2005), available at <http://www.kff.org/hivaids/upload/Fact-Sheet-The-HIV-AIDS-Epidemic-in-the-United-States-2005-Update.pdf>.

4. See MARTHA E. KEMPNER, *SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., TOWARD A SEXUALLY HEALTHY AMERICA: ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS THAT TRY TO KEEP OUR YOUTH "SCARED CHASTE"* (2001), available at [http://www.siecus.org/pubs/tsha\\_scaredchaste.pdf](http://www.siecus.org/pubs/tsha_scaredchaste.pdf).

using religious messages to prevent students from engaging in sex.<sup>5</sup> Abstinence-only programs do not stop the spread of STIs, have not been shown to be effective in reducing teen pregnancy, attempt to prohibit sex outside of marriage at *any* age, and marginalize gay and lesbian youth because they are not legally able to marry.<sup>6</sup> Many of these programs are run by or use materials from conservative religious organizations such as Focus on the Family.<sup>7</sup> Moreover, although Congress has appropriated almost \$1 *billion* for abstinence-only programs, it has not appropriated one single dollar for comprehensive sex education.<sup>8</sup> Over \$26 million of abstinence-only funds go to organizations with explicit antichoice missions.<sup>9</sup> In addition to being bad public policy, the abstinence-only programs also illegally discriminate against girls.<sup>10</sup> Furthermore, public opinion surveys show public support for comprehensive sex education over abstinence-only programs.<sup>11</sup> For all these reasons, opponents of abstinence-only programs should take legal actions—on the legislative, executive, and judicial levels—to overturn them.

This Comment argues that the federal abstinence-only programs are bad public policy and illegally discriminate against girls. Part I outlines the origins of existing federal abstinence-only programs and details how they are implemented.<sup>12</sup> Part II examines why abstinence-only programs are bad public policy, including the fact that they disproportionately impact girls, are ineffective, are not medically accurate, often are run by organizations that

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5. *See id.*

6. DOUGLAS KIRBY, THE NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY (2001), available at <http://www.teenpregnancy.org/resources/data/pdf/emersumsum.pdf>.

7. Focus on the Family is a conservative religious organization, founded by Dr. James Dobson. Focus on the Family, <http://www.focusonthefamily.com/press/focusvoices/A000000025.cfm>. Focus on the Family has an antichoice agenda, including opposing comprehensive sex education, “work[ing] against ‘special rights’ for homosexuals,” and sponsoring conferences that teach that homosexuality is preventable and treatable. People for the American Way, Right Wing Organizations: Focus on the Family, <http://www.pfaw.org/pfaw/general/default.aspx?oid=4257> (last visited Dec. 4, 2006).

8. Press Release, Sexuality Info. & Educ. Council of the U.S., 15% Boost for Ineffective Abstinence-Only-Until-Marriage Programs in President Bush's Proposed FY 2007 Budget (Feb. 7, 2006), <http://www.siecus.org/media/press/press0123.html>.

9. Sexuality Info. & Educ. Council of the U.S., Policy Update: SIECUS Releases Fiscal Year 2004 Edition of State Profiles (Mar. 2005), <http://www.siecus.org/policy/PUdates/pdate0164.html#headline>.

10. *See infra* Part II.

11. *See, e.g.*, Press Release, Othmer Inst. at Planned Parenthood of NYC, Even Anti-Choice Voters Support Sex Education that Includes Abstinence AND Contraception: Congress Prepared to Misperceive Nation's Youth, Defy Voter Demand for Medically Accurate Sex Education (May 15, 2002), available at <http://www.othmerinstitute.org/press/press5.html>.

12. A number of states either already have both abstinence-only and comprehensive sex education laws in place or are in the process of passing them; this Comment will only address the three federal programs.

misuse federal funds, and marginalize gay and lesbian youth. Part II also demonstrates that public opinion supports comprehensive sex education, not abstinence-only education. Part III discusses the legal actions that opponents of abstinence-only should take to overturn these programs in all three branches of government—the legislature, executive branch, and judiciary.<sup>13</sup> Finally, Part IV concludes that abstinence-only programs discriminate against girls and calls on interest groups, members of Congress, and the public to work together to overturn these dangerous programs with legal challenges in all three branches of government.

#### I. BACKGROUND INFORMATION ABOUT FEDERAL ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS

In order to understand why the abstinence-only programs are dangerous, one must first understand the context in which Congress passed each of them. This Section will outline the origin and content of all three programs to lay the foundation for why their opponents should overturn them.

Historically, the federal government has played a limited role in sex education in schools, in large part because four federal statutes prohibit it from prescribing state and local school curricula.<sup>14</sup> However, in the past two decades, conservative members of Congress have succeeded in passing laws to provide states with financial incentives if they teach abstinence-only curricula.<sup>15</sup> The number of schools teaching abstinence-only education has increased dramatically over the past several decades, due in large part to these new federal programs. “In 1988, only 2 percent (sic) of teachers responsible for sexuality education in public secondary schools reported teaching abstinence as the sole way to prevent pregnancy and STDs; by 1999, this figure had risen to 23 percent (sic) of secondary school sexuality education teachers.”<sup>16</sup>

Three federal programs have been established to teach only abstinence to elementary and secondary schoolchildren. They are the Adolescent Family

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13. Although these same steps could be taken on the state level, this Comment will focus on the federal government.

14. Advocates for Youth & Sexuality Info. & Educ. Council of the U.S., *Toward A Sexually Healthy America: Roadblocks Imposed by the Federal Government's Abstinence-Only-Until-Marriage Education Program* 6 (2001), available at <http://www.advocatesfor youth.org/publications/abstinenceonly.pdf>.

15. Rebekah Saul, *Whatever Happened to the Adolescent Family Life Act?*, THE GUTTMACHER REP. ON PUB. POL'Y, Apr. 19, 1998, at 5, 5, available at <http://www.guttmacher.org/pubs/tgr/01/2/gr010205.pdf>.

16. BARBARA DEVANEY ET AL., MATHEMATICA POLICY RESEARCH, INC., THE EVALUATION OF ABSTINENCE EDUCATION PROGRAMS FUNDED UNDER TITLE V SECTION 510: INTERIM REPORT 28 (2002) (citing Jacqueline Darroch et al., *Changing Emphases in Sexuality Education in U.S. Public Secondary Schools, 1988-1999*, 32 FAM. PLANNING PERSPECTIVES 204, 204 (2000)) available at <http://www.mathematica-mpr.com/publications/PDFs/evalabstinence.pdf>.

Life Act (AFLA),<sup>17</sup> welfare reform under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),<sup>18</sup> and the Department of Health and Human Services (HHS) Special Projects of Regional and National Significance (SPRANS).<sup>19</sup>

#### A. AFLA

The Adolescent Family Life Act was the first federally sanctioned and funded sex education legislation. AFLA provides formula grants to states to promote abstinence to teen mothers.<sup>20</sup> Congress included the AFLA provision as part of the 1981 Omnibus Budget Reconciliation Act (OBRA).<sup>21</sup> Since its inception, Congress has appropriated over \$100 million for AFLA.<sup>22</sup> Recently, President Bush requested \$13 million for AFLA in his Fiscal Year 2007 budget.<sup>23</sup> Not only has Congress provided a great deal of funding for this program, the funds also often go to organizations with conservative political agendas.

Community organizations, schools, and school districts are eligible for AFLA funding.<sup>24</sup> Current recipients of AFLA include community

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17. 42 U.S.C. § 300z (2000). Senators Jeremiah Denton and Orrin Hatch included the Adolescent Family Life Act (AFLA) in the 1981 Omnibus Budget Reconciliation Act (OBRA). Saul, *supra* note 15. See *infra* Part I.A. for a detailed explanation of the law's passage.

18. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.). PRWORA created the Temporary Assistance to Needy Families (TANF) program and added Title V, Section 510(b) of the Social Security Act, which established a new funding stream to provide grants to states for abstinence-only-until-marriage programs. See generally Sexuality Info. & Educ. Council of the U.S., A Brief History of Abstinence-Only-Until-Marriage Funding, <http://www.nonewmoney.org/history.html> (last visited Feb. 24, 2007).

19. H.R. 5006, 108th Cong. (2004). SPRANS abstinence funding was first included in the Fiscal Year 2001 budget, which provided \$30 million in forward funding for the program. H.R. Rep. No. 107-342, at 1710 (2001). However, SPRANS's abstinence program was not fully funded until the next year when it was included in the Fiscal Year 2002 Labor, Health and Human Services and Education Appropriations, in the amount of \$10 million. See *Teen Pregnancy Prevention: Hearing Before the Subcommittee on Human Resources, House Committee on Ways and Means*, 107th Cong. 107-48 (2001).

20. See 42 U.S.C. § 300z-2.

21. Saul, *supra* note 15, at 5.

22. Sexuality Info. & Educ. Council of the U.S., Federal Spending for Abstinence-Only-Until-Marriage Programs (1982-2006) (2006), <http://www.siecus.org/policy/states/2004/Federal%20Graph.pdf>.

23. Telephone Interview with Rebecca Fox, State Policy Director, Sexuality Info. & Educ. Council of the U.S. in Wash. D.C. (Feb. 15, 2006).

24. See Sexuality Info. & Educ. Council of the U.S., STATE PROFILES (2005): A PORTRAIT OF SEXUALITY EDUCATION AND ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN THE STATES (2005), available at [www.siecus.org/policy/states/index.html](http://www.siecus.org/policy/states/index.html) (providing information about organizations in each state that received grants for abstinence-only education, including AFLA grants).

organizations such as Heritage Community Services in Georgia, whose CEO founded the group to work with the Lowcounty Crisis Pregnancy Center;<sup>25</sup> the Baptist Children's Home in Texas; and the Tri County Right to Life Educational Foundation in Ohio.<sup>26</sup> School-based groups receiving AFLA funding include the Dallas, Texas Independent School District; the Wheeler, Georgia County Board of Education; and the Winslow, Arizona Unified School District #1.<sup>27</sup> While not all program recipients have a conservative agenda that disproportionately impacts girls, many use religious messages, fear tactics, and false information to encourage abstinence.<sup>28</sup> In fact, these problems began with AFLA's inception. The history of AFLA is best summarized as follows:

In 1981, Sens. (sic) Jeremiah Denton (R-AL) and Orrin Hatch (R-UT), both staunch opponents of the Title X family planning program, which they believed undermined family values and promoted teen sexual activity and abortion, called for a new approach to teen pregnancy—one emphasizing morality and family involvement. Denton and Hatch sponsored AFLA and quietly shepherded it—without hearings or floor votes in either house of Congress—through committee and into the Omnibus Budget Reconciliation Act of 1981. AFLA's primary goal was to prevent premarital teen pregnancy by establishing "family-centered" programs "to promote chastity and self discipline." . . .

. . . .  
To win the support of Sen. Edward Kennedy (D-MA), the ranking Democrat on the labor and human resources subcommittee, the AFLA legislation also emphasized the provision of support services to pregnant and parenting adolescents. In fact, the statute provides that two-thirds of the services money go to "care" programs and one-third to prevention (although this ratio was reversed through the appropriations process in 1996).

Underlying AFLA was the conviction that the federal government had provided too much funding to Planned Parenthood and other family planning providers—thereby promoting a national

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25. Sexuality Info. & Educ. Council of the U.S., Policy Update April 2005: South Carolina-Based Heritage Community Services Expanding their Abstinence-Only-Until-Marriage Program Domestically and Internationally (2005), <http://www.siecus.org/policy/PUupdates/pdate0171.html#headline>. Crisis Pregnancy Centers typically advertise to pregnant women that they perform medical services, such as abortions, but instead use fear and shame to dissuade women from having an abortion. *Id.*

26. SIECUS, *supra* note 24.

27. *Id.*

28. See *infra* Part II. for examples of problems with abstinence-only programs.

“contraceptive mentality”—and that a new program was needed to counter this spending.<sup>29</sup>

As enacted, AFLA not only promoted abstinence but also allowed recipients to use religious messages, even in public schools.<sup>30</sup> As a result, the American Civil Liberties Union (ACLU) filed suit in federal court charging that AFLA unconstitutionally violated the separation of church and state.<sup>31</sup> In 1987, the district judge found the AFLA unconstitutional.<sup>32</sup> On appeal in 1988, the U.S. Supreme Court reversed that decision and remanded the case to a lower court.<sup>33</sup> An out-of-court settlement in 1993, however, required that programs supported by AFLA funds: “(1) not include religious references, (2) be medically accurate, (3) respect the ‘principle of self-determination’ regarding contraceptive referral for teenagers, and (4) not allow grantees to use church sanctuaries for their programs or to give presentations in parochial schools during school hours.”<sup>34</sup>

After the lawsuit, abstinence-only-until-marriage supporters realized the new watered-down AFLA was insufficient to meet their conservative goals and changed their focus to passing more repressive abstinence-only laws, including the Title V program in the welfare reform legislation and SPRANS funds.<sup>35</sup> However, AFLA grants continue to go to religious and conservative organizations that promote abstinence at the expense of comprehensive sex education.<sup>36</sup> Thus, AFLA programs are still dangerous, and opponents of abstinence-only education should continue to work to repeal them.

#### *B. Title V—Welfare Reform Under the PRWORA*

Because AFLA did not go far enough to promote their conservative goals, proponents of abstinence-only education began to try to pass other, more restrictive, programs.<sup>37</sup> In 1994, Republican Congressman John Doolittle from California attempted to amend the Elementary and Secondary Education Act reauthorization to “limit the content of HIV-prevention and sexuality education in school-based programs.”<sup>38</sup> Due to federal statutes preventing Congress from proscribing school curricula, his amendment failed.<sup>39</sup> Two years later,

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29. Saul, *supra* note 15, at 5.

30. See ADVOCATES FOR YOUTH & SIECUS, *supra* note 14, at 5.

31. Kendrick v. Bowen, 657 F. Supp. 1547 (D.D.C. 1987), *rev'd*, 487 U.S. 589 (1988).

32. *Id.*

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

34. ADVOCATES FOR YOUTH & SIECUS, *supra* note 14, at 5.

35. Telephone Interview with Bill Duncan, Legislative Director, Rep. Ernest Istook in Wash. D.C. (May, 2003).

36. SIECUS, *supra* note 18.

37. Telephone Interview with Bill Duncan, *supra* note 35.

38. ADVOCATES FOR YOUTH & SEICUS, *supra* note 14, at 5-6.

39. *Id.* at 6.

Congressmen Ernest Istook and Tom Coburn, both Republicans from Oklahoma, persuaded Speaker Newt Gingrich to include federal funds for an abstinence-only-until-marriage program in the 1996 welfare reform law; this new program was referred to as Title V.<sup>40</sup> The provision passed with no debate and no separate vote.<sup>41</sup> This program is more restrictive than AFLA<sup>42</sup> and also receives much more funding.<sup>43</sup>

Congress showed its support for the new Title V program by committing \$50 million per year to it for five years.<sup>44</sup> To receive these federal funds under Title V, states had to provide almost \$40 million in matching funds *and* agree not to simultaneously have a statewide curriculum mandating a more comprehensive approach to sex education.<sup>45</sup> The U.S. Department of Health and Human Services (HHS) provides these funds to state departments of health, which then disburse the money to community-based organizations, local school districts, local health departments, faith-based organizations, and universities, among others.<sup>46</sup> Since the program's inception, Congress has appropriated over \$450 million in federal funds for Title V.<sup>47</sup> Additionally, President Bush requested \$50 million for Title V in his Fiscal Year 2007 budget.<sup>48</sup>

A key provision in Title V makes the program much more restrictive, and therefore more dangerous, than AFLA. Title V established an eight-point definition to which participating programs must adhere.<sup>49</sup> Under this definition, programs receiving abstinence-only funding must teach: (A) the social, physiological, and health gains to be realized from abstinence; (B) that abstinence outside of marriage is the expected standard for all school-age children; (C) that abstinence is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems; (D) that a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity; (E) that sexual activity outside of marriage may have harmful psychological and physical effects; (F) that bearing children outside of wedlock is likely to have harmful

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40. Telephone Interview with Bill Duncan, *supra* note 35.

41. *Id.*

42. PRWORA, Pub. L. No. 104-193 § 912(b)(2), 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. § 710 (2000)).

43. SIECUS, *supra* note 22.

44. PRWORA, Pub. L. No. 104-193 § 912(d), 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. § 710 (2000)).

45. 20 U.S.C. § 7907(a) (2000). The federal government cannot mandate state curricula, so it cannot require states to teach comprehensive sex education. However, it can put conditions, such as not teaching comprehensive sex education, on the states if they accept the federal funding. See Sexuality Info. & Educ. Council of the U.S., Issues and Answers: Fact Sheet on Sexuality Education (2001), <http://www.siecus.org/pubs/fact/fact0007.html> (last visited Jan. 28, 2007).

46. DEVANEY ET AL., *supra* note 16, at 13.

47. SIECUS, *supra* note 22.

48. Telephone Interview with Rebecca Fox, *supra* note 23.

49. 42 U.S.C. § 710 (2000).

consequences for the child, the child's parents, and society; (G) how to resist sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and (H) the importance of attaining self-sufficiency before engaging in sexual activity.<sup>50</sup>

Schools participating in Title V must adhere to at least one of these points but cannot violate any of them.<sup>51</sup> Although the eight-point definition does not explicitly rule out the teaching of contraception, a report produced by HHS indicated that programs "do not promote use of contraception, on the premise that such information is inconsistent with program goals and sends a mixed message to youth."<sup>52</sup> Thus, HHS has interpreted Title V to prohibit the teaching of contraception, except to discuss failure rates.<sup>53</sup>

Like the AFLA program, both community organizations and schools can receive Title V funding. Current community-based recipients of the Title V funding include the Crisis Pregnancy Centers of Tucson, Arizona;<sup>54</sup> Rosalie Manor Community and Family Services in Wisconsin;<sup>55</sup> and the Shawnee, Illinois Crisis Pregnancy Center.<sup>56</sup> School-based Title V recipients include the Madison County, Alabama Public Schools;<sup>57</sup> the Crookston, Minnesota Independent School District # 593;<sup>58</sup> and the North Carolina Department of Public Instruction.<sup>59</sup> As with AFLA, some of these recipients attempt to teach abstinence in a morally-neutral manner, but they are more constrained by the eight-point definition.

### C. SPRANS

The third and final federal abstinence-only program is the Maternal and Child Health Block Grant's SPRANS program, which provides funding

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50. *Id.* § 710(b)(2).

51. *Id.*

52. DEVANEY ET AL., *supra* note 16, at 38.

53. The HHS guidance sent to grantees states, "[P]roviding instruction in, or promoting the use of birth control would be inconsistent with the A-H definition." U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE EVALUATION OF ABSTINENCE EDUCATION PROGRAMS FUNDED UNDER TITLE V, SECTION 510: INTERIM REPORT CHAPTER I, available at [http://aspe.dhhs.gov/hsp/abstinence\\_02/ch1.htm](http://aspe.dhhs.gov/hsp/abstinence_02/ch1.htm).

54. Sexuality Info. & Educ. Council of the U.S. Public Policy Office, State Profile: Arizona 6 (2005), <http://www.siecus.org/policy/states/2005/Arizona.pdf>.

55. Sexuality Info. & Educ. Council of the U.S. Public Policy Office, State Profile: Wisconsin 4,5,6 (2005), <http://www.siecus.org/policy/states/2005/Wisconsin.pdf>.

56. Sexuality Info. & Educ. Council of the U.S. Public Policy Office, State Profile: Illinois 10 (2005), <http://www.siecus.org/policy/states/2005/Illinois.pdf>.

57. Sexuality Info. & Educ. Council of the U.S. Public Policy Office, State Profile: Alabama 6 (2005), <http://www.siecus.org/policy/states/2005/Alabama.pdf>.

58. Sexuality Info. & Educ. Council of the U.S. Public Policy Office, State Profile: Minnesota 6 (2005), <http://www.siecus.org/policy/states/2005/Minnesota.pdf>.

59. Sexuality Info. & Educ. Council of the U.S. Public Policy Office, State Profile: North Carolina 5-6 (2005), <http://www.siecus.org/policy/states/2005/North%20Carolina.pdf>.

through HHS for programs that overtly teach abstinence-only.<sup>60</sup> SPRANS provides grants to community organizations rather than schools; however, these groups can and do teach abstinence-only curriculum to students in school settings with the school's permission.<sup>61</sup> Current community-based recipients of SPRANS funding include the New Jersey Family Policy Council; Abstinence by Choice in Iowa; and Empowering the Vision in Florida.<sup>62</sup> Congress has appropriated over \$400 million to SPRANS since its inception.<sup>63</sup> Additionally, President Bush requested over \$140 million for SPRANS in his Fiscal Year 2007 budget.<sup>64</sup>

SPRANS is the strictest of all three abstinence-only programs. This is because SPRANS programs must be in compliance with *all* eight points of the definition.<sup>65</sup> Thus, conservative politicians, including President Bush, have promoted and funded these programs the most in the past five years.<sup>66</sup> As with the Title V program, SPRANS grantees are prohibited from teaching contraception.<sup>67</sup> Additionally, because these programs must follow all eight points, they are more restrictive than, for example, programs funded by Title V, because SPRANS recipients cannot pick and choose which points to promote.<sup>68</sup>

## II. ABSTINENCE-ONLY PROGRAMS DISPROPORTIONATELY IMPACT GIRLS, ARE BAD PUBLIC POLICY, AND CONTRADICT PUBLIC OPINION

As detailed in Part I, all three federal abstinence-only programs are dangerous because Congress provides their recipients, including conservative and religious organizations, hundreds of millions of dollars to teach restrictive messages regarding sex and sexuality.<sup>69</sup> Because of the strict eight-point definition, abstinence-only programs prevent instructors from teaching students about important subjects such as contraception, abortion, homosexuality, and

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60. See ADVOCATES FOR YOUTH & SIECUS, *supra* note 14, at 6.

61. *Id.*

62. SIECUS, *supra* note 24.

63. SIECUS, *supra* note 22.

64. Telephone Interview with Rebecca Fox, *supra* note 23.

65. *Id.*

66. *Id.*

67. COMM. ON GOV'T. REFORM—MINORITY STAFF, SPECIAL Investigation Div. U.S. House of Representatives, *The Content of Federally Funded Abstinence-Only Education Programs* 8 (2004), available at <http://reform.democrats.house.gov/Documents/20041201102153-50247.pdf> [hereinafter *Committee Report*].

68. For example, a Title V recipient could use those funds for a drug and alcohol awareness program, which would be considered a positive or at a least neutral goal and would meet Title V requirements. 42 U.S.C. § 710(b)(2)(G) (2000). However, a SPRANS recipient could not teach drug and alcohol awareness without also addressing the other seven points.

69. SIECUS, *supra* note 22.

AIDS.<sup>70</sup> The programs also require instructors to teach in a nonscientific and medically-inaccurate manner.<sup>71</sup> However, in the past several years, interest groups, members of Congress, and educators have taken positive steps to identify the many legal and ethical problems with the federal abstinence-only programs.

First, this Section will discuss how the programs negatively impact girls by failing to adequately address issues that disproportionately affect them, such as STIs and teen pregnancy, and by promoting harmful sex stereotypes. Second, this Section will argue that the programs are bad public policy because they are ineffective, medically inaccurate, promote religion in public schools, and marginalize gay and lesbian youth. Finally, this Section will show that the public supports comprehensive sex education over abstinence-only, another reason AFLA, Title V, and SPRANS should be repealed.

#### *A. Abstinence-Only Programs Negatively Impact Girls More Than Boys*

1. Abstinence-only programs do not adequately address issues that disproportionately impact girls, including STIs and unwanted teen pregnancy.

In most cases, girls have higher rates of sexually transmitted infections than boys.<sup>72</sup> Additionally, although teen pregnancy rates for girls in the United States are declining, they are among the highest in the industrialized world.<sup>73</sup> Because abstinence-only programs do not teach about contraception, they are doing a disservice to girls by withholding information that could, at the very least, ensure safer reproductive health for the girls and might even save their lives.

##### *a. Sexually Transmitted Infections*

Sexually transmitted infections harm both sexes, but girls often have higher infection rates than boys.<sup>74</sup> While incidences of HIV among women overall have decreased in the past two decades, among heterosexual women

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70. *Welfare Reform: A Review of Abstinence Education and Transitional Medical Assistance: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 107th Cong. 107-08 (2002) (statement of the ACLU), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107house\\_hearings&docid=f:79467.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107house_hearings&docid=f:79467.pdf) [hereinafter ACLU Statement].

71. *Id.*

72. Centers for Disease Control and Prevention, HIV/AIDS Among Women 3 (2006), available at <http://www.cdc.gov/hiv/topics/women/resources/factsheets/pdf/women.pdf> [hereinafter CDC, HIV/AIDS Among Women].

73. Heather Boonstra, Teen Pregnancy: Trends and Lessons Learned, in *The Guttmacher Report on Public Policy*, 7, 7 (2002), available at <http://www.guttmacher.org/pubs/tgr/05/1/gr050107.pdf>.

74. CDC, HIV/AIDS Among Women, *supra* note 72, at 3.

between the ages of fifteen and nineteen, the rates have more than doubled.<sup>75</sup> Girls also have higher rates of infection for other STIs. For example, Human Papilloma Virus (HPV) type sixteen, which accounts for about half of all cases of cervical cancers worldwide, was over twice as prevalent in U.S. women as in men.<sup>76</sup> Fifteen- to nineteen-year-old girls also have the highest rates of gonorrhea and chlamydia.<sup>77</sup> These disturbing facts demonstrate why girls need information to protect themselves from contracting these diseases. Abstinence-only programs do not provide this information, and this omission puts girls' health unnecessarily at risk.

Biological reasons explain why girls are at greater risk of contracting an STI than boys.<sup>78</sup>

Young women and female adolescents are more susceptible to STI, (sic) compared to their male counterparts, due to their anatomy. During adolescence and young adulthood, women's columnar epithelial cells—which are especially sensitive to invasion by sexually transmitted organisms, such as chlamydia and gonococcus—extend out over the vaginal surface of the cervix, where they are unprotected by cervical mucous, but recede to a more protected location as women age.

STIs are more likely to remain undetected in women than in men, resulting in delayed diagnosis and treatment, and untreated STIs are more likely to lead to complications in women, such as pelvic inflammatory disease and cervical cancer.<sup>79</sup>

Educators should provide girls information about contraception, especially condoms, which can prevent or at least reduce the risk of contracting most STIs.<sup>80</sup> This information is necessary to protect their health and even their lives.

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75. *Id.* (citing L.M. Lee & P.L. Fleming, Trends in Human Immunodeficiency Virus Diagnoses Among Women in the United States, 1994–1998, 56 *J. of the Am. Med. Women's Ass'n*, 94, 94–99 (2001)).

76. Sue Alford, *Advocates for Youth, Adolescents—At Risk for Sexually Transmitted Infections* (2003), available at <http://www.advocatesforyouth.org/publications/factsheet/fssti.pdf>. Eighteen percent of U.S. women and 8% of U.S. men were the applicable rates for HPV type sixteen. *Id.*

77. William Lafferty et al., Provision of Sexual Health Services to Adolescent Enrollees in Medicaid Managed Care Enrollees, 92 *Am. J. of Pub. Health* 1779, 1779 (2000).

78. Alford, *supra* note 76 (citing Inst. of Med., *The Hidden Epidemic: Confronting Sexually Transmitted Diseases* (Thomas R. Eng & William T. Butler eds., 1997)).

79. *Id.*

80. Centers for Disease Control and Prevention, *Male Latex Condoms and Sexually Transmitted Disease*, <http://www.cdc.gov/nchstp/od/condoms.pdf> (last visited Apr. 8, 2006).

*b. Unwanted Teen Pregnancies*

Girls are more negatively impacted by unwanted teen pregnancies than boys. According to the National Campaign to Prevent Teen Pregnancy, the United States has the highest rates of teen pregnancy and births in the developed world.<sup>81</sup> Moreover, teen pregnancy places a financial burden on the United States, costing at least \$9 billion annually.<sup>82</sup> Although teen pregnancy rates have decreased in the past fifteen years, unwanted pregnancies are still a serious problem for girls, emotionally and financially.<sup>83</sup> Therefore, teen pregnancy is a serious problem for both girls and the United States government. Abstinence-only programs do girls a disservice by not allowing funding recipients to teach contraception, thereby preventing girls from receiving important information they need to prevent unwanted pregnancies (and also, therefore, abortions).<sup>84</sup>

Teen mothers and their children suffer disproportionately from unintended pregnancies. For example:

- Teen mothers are less likely to complete high school (only one-third receive a high school diploma) and only 1.5% have a college degree by age 30.
- Teen mothers are more likely to end up on welfare (nearly 80% of unmarried teen mothers end up on welfare).
- The children of teenage mothers have lower birth weights, are more likely to perform poorly in school, and are at greater risk of abuse and neglect.
- The sons of teen mothers are 13 percent (sic) more likely to end up in prison while teen daughters are 22 percent (sic) more likely to become teen mothers themselves.<sup>85</sup>

Although unintended pregnancies can also affect teenage boys both financially and emotionally, they do not face the same impact as girls. This is because only a girl's physical health can be put at risk due to pregnancy and because this author believes a higher emotional toll results from carrying a baby than from being a sperm donor.

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81. Nat'l Campaign to Prevent Teen Pregnancy, General Facts and Stats <http://www.teenpregnancy.org/resources/data/genlfact.asp> (last visited Apr. 8, 2006) [hereinafter, NCPTP Facts and Stats].

82. *Id.* (citation omitted). The cost is partially due to the fact that unmarried teen parents of unplanned children are more likely than older or married women to rely on welfare; the sons of teen mothers are also more likely to become incarcerated, which results in additional government expense. *See id.* (citations omitted).

83. *See id.* (citations omitted).

84. Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2001-2002* 34 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 294, 302 (2002), available at <http://www.guttmacher.org/pubs/journals/3429402.pdf>.

85. NCPTP Facts and Stats, *supra* note 81 (citations omitted).

*c. Abstinence-only programs promote harmful sex stereotypes*

Abstinence-only programs also enforce and promote harmful stereotypes about male and female sexuality and particularly outdated and insulting stereotypes about girls. This type of biased education is unethical and even illegal.<sup>86</sup> Federally-funded abstinence-only programs use curriculum that contains the language such as: “Because they generally become aroused less easily, females are in a good position to help young men learn balance in relationships by keeping intimacy in perspective.”<sup>87</sup> Another example is: “A woman is stimulated more by touch and romantic words. She is far more attracted by a man’s personality while a man is stimulated by sight. A man is usually less discriminating about those to whom he is physically attracted.”<sup>88</sup> Also, “Watch what you wear, if you don’t aim to please, don’t aim to tease.”<sup>89</sup> Finally, “The liberation movement has produced some aggressive girls today, and one of the tough challenges for guys who say no will be the questioning of their manliness.”<sup>90</sup> A radio advertisement by Nevada’s abstinence-only coordinator even stated that “girls would feel ‘dirty and cheap’ when they ‘lose’ their boyfriends after having [premarital] sex.”<sup>91</sup> Other such programs diminish girls’ professional and academic accomplishments, stereotype girls as weak and in need of protection, and reinforce male sexual aggressiveness.<sup>92</sup>

The above information is further proof of the importance of preventing teen pregnancies. Abstinence-only programs not only do a disservice to girls by putting their unique health needs at risk (denying them information on STIs and pregnancy prevention), but also create greater risks to them than they create for boys. By denying girls information on contraception, abstinence-only programs harm girls’ physical and emotional health more so than boys’. Abstinence-only programs also disproportionately negatively impact girls and perpetuate outdated stereotypes. Therefore, opponents of abstinence-only programs should repeal them in favor of comprehensive sex education programs that teach both abstinence *and* contraception as important components.

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86. See *infra*, Part III.C for the argument that abstinence-only programs are illegal because they violate Title IX, the federal anti-discrimination education law.

87. Sexuality Info. & Educ. Council of the U.S., *How the \$ is Spent*, <http://www.nonewmoney.org/main2.htm> (citing Coleen Kelly Mast, *Sex Respect: The Option of True Sexual Freedom*, Student Workbook 6 (1997)) (last visited Apr. 8, 2006).

88. *Id.* (citing TOM KLAUS, *WAIT TRAINING, WORKSHOP MANUAL* 40 (1997)).

89. *Id.* (citing MAST at 82).

90. *Id.* (citing MAST at 85).

91. Sexuality Info. & Educ. Council of the U.S. Public Policy Office, *The Five Most Egregious Uses of Welfare’s Title V Abstinence-Only-Until-Marriage Funds*, [http://www.siecus.org/policy/egregious\\_uses.pdf](http://www.siecus.org/policy/egregious_uses.pdf) (last visited Apr. 8, 2006).

92. COMMITTEE REPORT, *supra* note 67, at 16-18.

*B. Abstinence-Only Programs Are Bad Public Policy*

In addition to disproportionately negatively impacting girls, abstinence-only programs are also an example of bad public policy. They are ineffective, medically inaccurate, misuse federal funds by promoting religion in public schools, and marginalize gay and lesbian teens. For all these reasons, they should be overturned.

1. Abstinence-only programs are ineffective

Research indicates that abstinence-only programs are ineffective.<sup>93</sup> According to a study by the nonpartisan Alan Guttmacher Institute (AGI), among others, contraception—rather than abstinence-only curricula—is most responsible for the decline in teen pregnancy in the 1990s.<sup>94</sup> Since the vast majority of the federally funded abstinence-only programs were not in place until the late 1990s, they could not have affected the teen birth rate in any significant manner until after that decade ended.<sup>95</sup>

Other organizations have also shown the ineffectiveness of abstinence-only programs. For example, Advocates for Youth, an advocacy group for young people's reproductive and sexual health, evaluated abstinence-only programs in five states and found that they "show little evidence of sustained, long-term impact on adolescents' attitudes favoring abstinence or on teens' intentions to abstain."<sup>96</sup> This report also found that no state saw any long-term success in delaying sexual behavior among students.<sup>97</sup> Another study found that although middle-school students participating in an Ohio abstinence-only program showed modest short-term changes in attitudes about abstinence and an intent to remain abstinent, they showed no change in subsequent sexual initiation and were less likely to use condoms during sexual intercourse than

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93. Debra Hauser, Advocates for Youth, Five Years of Abstinence-Only-Until-Marriage Education: Assessing the Impact 2, available at <http://www.advocatesforyouth.org/publications/stateevaluations.pdf>; Kirby, *supra* note 6, at 8. See also Inst. of Med., No Time To Lose: Getting More From HIV Prevention 3 (2000), available at <http://www.iom.edu/Object.File/Master/4/131/HIV8pager.pdf>. See generally Sexuality Info. & Educ. Council of the U.S., SIECUS Curricula Reviews, [http://www.communityactionkit.org/curricula\\_reviews.html](http://www.communityactionkit.org/curricula_reviews.html) (last visited Apr. 8, 2006).

94. Boonstra, *supra* note 73, at 8; Nat'l Fam. Planning and Reproductive Health Assoc., Oppose Funding for Dangerous, Factually Incorrect Abstinence-Unless-Married Education Programs 3, 6 (2004), <http://www.nfprha.org/atf/cf/{C342E09A-9DD8-4743-8E8C-EBDC304DF4B8}/AbstinenceMarch2006FINAL.pdf>.

95. See Ammie N. Feijoo, Advocates for Youth, Trends in Sexual Risk Behaviors Among High School Students—United States, 1991 to 1997 and 1999 to 2003 (2004), available at <http://www.advocatesforyouth.org/publications/factsheet/fstrends.pdf>.

96. Hauser, *supra* note 93, at 2.

97. *Id.*

students who did not participate in the program.<sup>98</sup> All of this data combine to show the failure of abstinence-only programs. The data also raise a question about why the federal government wastes millions of taxpayer dollars on ineffective programs.

In contrast to the numerous studies showing the failure of abstinence-only programs, proponents of these programs have only one report that attempts to show their effectiveness.<sup>99</sup> This document, released by HHS in 2002, evaluates the Title V program specifically and shows that there are flaws nonetheless.<sup>100</sup> Despite claims by the Bush Administration and some members of Congress that the abstinence-only programs are beneficial, the HHS report shows numerous problems with them.<sup>101</sup> First and foremost, the report acknowledges there is no proof that abstinence-only programs are effective, noting that methodological problems in most studies showing the success of abstinence-only programs prevent a reliable measure of the programs' actual success.<sup>102</sup> Second, the report also notes problems engaging parents and establishing partnerships with schools.<sup>103</sup> Despite the report's findings, conservative members of Congress and the Bush Administration continue to advocate for the programs' expansion.

## 2. Abstinence-only programs are medically inaccurate

Abstinence-only programs also teach medically inaccurate information. A congressional study found that 80% of abstinence-only programs use factually

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98. Jon Platner, Planned Parenthood of N. New Eng., Challenging Abstinence-Only Sex Education (Sept. 13, 2005), [http://www.ppnne.org/site/News2?JServSessionIdr012=ecicegjt1k1.app5b&page=NewsArticle&id=8394&security=1&news\\_iv\\_ctrl=1021](http://www.ppnne.org/site/News2?JServSessionIdr012=ecicegjt1k1.app5b&page=NewsArticle&id=8394&security=1&news_iv_ctrl=1021).

99. DEVANEY ET AL., *supra* note 16. Robert E. Rector, a policy analyst at the conservative Heritage Foundation, also wrote a report claiming the success of abstinence-only programs; however, he relies on a sample too small to be statistically significant. See ROBERT E. RECTOR, HERITAGE FOUND., THE EFFECTIVENESS OF ABSTINENCE EDUCATION PROGRAMS IN REDUCING SEXUAL ACTIVITY AMONG YOUTH (2002), <http://www.heritage.org/Research/Family/BG1533.cfm>.

100. Devaney et al., *supra* note 16. This report was rushed to press in an attempt to provide abstinence-only supporting members of Congress with some government document purporting to show the programs' effectiveness at the scheduled House Commerce Committee reauthorization of the programs. Press Release, Advocates for Youth, HHS "Non-Report" on Abstinence-Only Programs Challenged by Advocates for Comprehensive Sex Education (Apr. 23, 2002).

101. Welfare Reform: A Review of Abstinence Education and Transitional Medical Assistance: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce, 107th Cong. 2-4 (2002) (statements of Rep. Brown), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_house\\_hearings&docid=f:79467.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:79467.pdf); Press Release, HHS, Interim Report Says Abstinence Programs Are "Changing The Local Landscape" in Teen Pregnancy Prevention Efforts: Programs Offer More Than a Single Message of Abstinence, Evaluation Finds (Apr. 23, 2002), available at <http://www.hhs.gov/news/press/2002pres/20020423.html>.

102. DEVANEY ET AL., *supra* note 16, at 12, 20.

103. *Id.*

incorrect curriculum or teach distorted information about reproductive health.<sup>104</sup> Specifically, abstinence-only programs present medically inaccurate information about condoms and other forms of contraception, abortion, and STIs.<sup>105</sup> Regarding condoms, the study concluded that abstinence-only programs often either overstate their failure rate or fail to provide accurate information about condoms' effectiveness in preventing STIs such as HIV.<sup>106</sup> Some abstinence-only programs also wrongly teach that between 5% and 10% of women who have abortions will become sterile and that women who have abortions are more likely to later give birth to mentally-retarded children.<sup>107</sup> One curriculum includes false information that sweat and tears cause HIV, and another incorrectly states the number of chromosomes a child inherits from each parent.<sup>108</sup>

Providing this misinformation to our children is a disservice to them. It also helps explain why abstinence-only programs have been ineffective in reducing unwanted pregnancies and STI rates and why many teens who pledge to remain abstinent are at greater risk when they later decide to have sex.<sup>109</sup> It is unconscionable that the federal government funds programs that mislead our youth and put their health and lives at risk. Therefore, the fact that abstinence-only programs teach medically inaccurate information is yet another reason they should be overturned in favor of federal funding for comprehensive sex education.

### 3. Abstinence-only program recipients misuse federal funds by promoting religion in public schools

Additionally, abstinence-only programs misuse federal funds by promoting religion. In fact, some states that receive federal abstinence-only funds have used the funding to actively advocate religious teachings in public schools.<sup>110</sup> Moreover, faith-based groups manage hundreds of the federally-funded, community-based abstinence-only programs.<sup>111</sup> Some of these programs explicitly cite God or Christianity in promoting abstinence-only education, while others blur the line between science and religion.<sup>112</sup> Although the programs allow religious organizations to receive federal funds to teach

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104. COMMITTEE REPORT, *supra* note 67, at i.

105. *Id.*

106. ACLU Statement, *supra* note 70, at 108; COMMITTEE REPORT, *supra* note 67.

107. COMMITTEE REPORT, *supra* note 67, at i.

108. *Id.* at ii.

109. *Id.*

110. SIECUS, *supra* note 91. The Louisiana example is particularly illustrative.

111. Mary Jo McConahay, *A Neighborhood Named Desire: Louisiana Demonstrates What's Wrong, and Right, with the Bush Administration's Favorite Form of Sex Education*, SIERRA, Jan.-Feb. 2004, at 24, available at <http://www.sierraclub.org/sierra/200401/abstinence.asp>.

112. COMMITTEE REPORT, *supra* note 67, at i-ii.

abstinence education in public schools, using Christianity as part of a public school curriculum violates the separation of church and state.<sup>113</sup>

One example of the explicit use of religion in abstinence programs comes from Louisiana:

The Louisiana American Civil Liberties Union found that government abstinence-only funds had paid a minister to train other ministers to spread the message, and that thousands of dollars went to programs that included prayers as well as continuous references to God, Jesus Christ, and the spiritual repercussions of sex before marriage. One film shown in a federally funded program said God covers us “like an umbrella when it rains,” but that sex before marriage puts us outside the umbrella where God can’t help us. A statewide caucus in Baton Rouge that instructed high schoolers about the legislative process (and how to use it to fight abortion, for instance) was told “abstinence is the cornerstone of Judeo-Christian belief,” and that it was “time to restore the Judeo-Christian heritage in America.”<sup>114</sup>

Similarly, another curriculum’s newsletter states that “as a result of societal change, ‘No longer were we valued as spiritual beings made by a loving Creator.’”<sup>115</sup> These programs explicitly promote Judeo-Christian messages that both leave out students who do not share these religious beliefs and unconstitutionally promote religion.<sup>116</sup>

Other programs use less explicit but equally disturbing and inaccurate religious themes to discuss reproduction. For example, one curriculum teaches that life begins when the egg and sperm unite.<sup>117</sup> Others describe fetuses as “babies.”<sup>118</sup> These programs are not only medically inaccurate but also unconstitutionally insert religious messages into public school curricula.<sup>119</sup>

The religious misuse by some abstinence-only funding recipients recently led Rhode Island’s Department of Education to instruct schools to stop using

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113. See KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 160-61 (6th ed. 2005) (“The First Amendment has two religious clauses that protect the individual’s religious liberty: the Establishment Clause and the Free Exercise Clause. These two clauses prevent the use of public schools to proselytize, and correspondingly, forbid the expenditure of public tax funds to support religion.”).

114. McConahay, *supra* note 111.

115. COMMITTEE REPORT, *supra* note 67, at 15.

116. ALEXANDER & ALEXANDER, *supra* note 113 at 160-61. See also *Bowen v. Kendrick*, 487 U.S. 589 (1988), in which the U.S. Supreme Court directed a lower court to ensure that AFLA did not unconstitutionally violate the Free Exercise Clause of the U.S. Constitution.

117. COMMITTEE REPORT, *supra* note 67, at 15.

118. *Id.*

119. ALEXANDER & ALEXANDER, *supra* note 113 at 160-61.

this curriculum.<sup>120</sup> The program, run by the conservative group Heritage of Rhode Island, included a video in which the host described that abstinence helped him to “honor [his] relationship with Jesus.”<sup>121</sup> Rhode Island’s decision is a positive one and should be followed by other states. However, rather than advocating a piecemeal approach to repealing abstinence-only programs in one state at a time, opponents of the programs should work to overturn them on the federal level.

Promotion of religion is common in abstinence-only programs. While Congress has authorized religious organizations to teach abstinence-only education, religious messages should not be used to educate students about reproduction because religious lessons in public schools violate the separation of church and state by unconstitutionally promoting religion.<sup>122</sup> In addition to wrongly promoting religion in public schools, many of these religious groups also teach messages that either leave out or humiliate gay and lesbian teens.

#### 4. Abstinence-only programs marginalize gay and lesbian teens

The marginalization of gay and lesbian youth is yet another problem with the federally-funded abstinence-only education programs.<sup>123</sup> Several of the eight points in Title V and SPRANS state that sex outside of marriage is harmful.<sup>124</sup> Since gay and lesbians do not have legal access to marriage in forty-nine of the fifty states in the United States,<sup>125</sup> abstinence-only programs give the message to gay and lesbian students that their sexual activity is inherently harmful. Further, the programs “assume that all students are straight,” creating a “climate of intolerance,” and even provide medically inaccurate information intended to scare gay students.<sup>126</sup> For example, one abstinence-only curriculum taught in public school through the “Sex Respect” program states: “Homosexual activity involves an especially high risk for

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120. Press Release, ACLU, ACLU Hails Rhode Island Department of Education Efforts to Stop the Use of Harmful "Abstinence-Only-Until-Marriage" Curriculum in Public Schools (Mar. 22, 2006), available at <http://www.aclu.org/reproductiverights/sexed/24721prs20060322.html>. For a copy of Rhode Island’s advisory, see [http://www.riaclu.org/documents/DOEHeritage\\_advisory.pdf](http://www.riaclu.org/documents/DOEHeritage_advisory.pdf) (last visited Apr. 8, 2006).

121. Press Release, ACLU, *supra* note 120.

122. ALEXANDER & ALEXANDER, *supra* note 113 at 160-61.

123. Sexuality Info. & Educ. Council of the U.S., Fact Sheet, Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Youth 3, [http://www.siecus.org/policy/LGBTQ\\_FS.pdf](http://www.siecus.org/policy/LGBTQ_FS.pdf) (last visited Apr. 9, 2006). According to SIECUS, 3% of high school students report being gay, lesbian, or bisexual; 5% report being gay, lesbian, bisexual, or having sexual experiences with individuals of the same sex. *Id.* at 1 (citing MASS. DEP’T. OF EDUC., 2001 MASSACHUSETTS YOUTH RISK BEHAVIOR SURVEY 69, 77 (2002)).

124. 42 U.S.C. § 710(b)(2) (2000).

125. Massachusetts is the only state in the U.S. that legally recognizes gay marriage. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

126. Lambda Legal Defense and Education Fund, Tackling Homophobia in Abstinence-only Education, (Nov. 25, 2002), <http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=1173>.

AIDS infection [because] body openings are used in ways for which they are not designed. During such unnatural behaviors, additional damage is done to blood vessels and other body parts.”<sup>127</sup> These programs marginalize gay and lesbian youth, and this unethical “education” should not be tolerated.

Since numerous reports have shown abstinence-only programs are ineffective, teach dangerous medically inaccurate information, illegally promote religion, and discriminate against gay and lesbian teens, they should be abandoned in favor of the more popular and publicly-supported comprehensive sex education programs.

### *C. Public Opinion Clearly Favors Comprehensive Sex Education Over Abstinence-Only Programs*

Another factor that advances comprehensive sex education over abstinence-only education is public support. Polling and other public opinion data show that Americans overwhelmingly support comprehensive sex education programs and oppose abstinence-only programs.<sup>128</sup> This opinion is consistent among respondents of different genders, religions, and ideologies.<sup>129</sup> For example, the Religious Coalition for Reproductive Choice (RCRC) states that Americans of all religions favor comprehensive sexuality education—with abstinence as one component—in schools.<sup>130</sup> This includes 59% of those who oppose abortion rights, 74% of Catholics, 57% of Baptists, and 67% of fundamentalists and evangelicals.<sup>131</sup> Similarly, general public opinion polls shows that 93% of Americans support teaching comprehensive sex education in high schools, and 84% of Americans support sex education being taught in middle/junior high schools.<sup>132</sup> This data show the public does not support abstinence-only education programs.

A more recent study conducted by Harris Interactive also found little public support for abstinence-only education.<sup>133</sup> In fact, 65% of respondents

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127. *Id.* (quoting program materials).

128. Marcela Howell & Ammie N. Feijoo, *Advocates for Youth, Science or Politics?: George W. Bush and the Future of Sexuality Education in the United States* 1-2, 4 n.6 (2001), available at <http://www.advocatesforyouth.org/publications/factsheet/fsbush.pdf>; Press Release, Othmer Inst., *supra* note 11; Platner, *supra* note 98.

129. Press Release, Othmer Inst., *supra* note 11.

130. Religious Coalition for Reproductive Choice, *Quick Facts: Sexuality Education* (citing LAKE, SNELL, PERRY & ASSOC., *RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE NAT'L SURVEY ON RELIGION AND CHOICE* (2000)), <http://www.rcrc.org/issues/quickfacts.cfm> (last visited Apr. 9, 2006).

131. *Id.*

132. Sexuality Info. & Educ. Council of the U.S., *Frequently Asked Questions: What is the current research and information that supports sexuality education?*, <http://www.siecus.org/library/faqs/faqs0001.html> (last visited Jan. 28, 2007).

133. Harris Interactive, *Harris Poll #2, Majorities of U.S. Adults Do Not Believe Abstinence Programs Are Effective in Preventing or Reducing HIV/AIDS, Unwanted*

thought abstinence programs have been ineffective in preventing or reducing unwanted pregnancies, and 58% thought the programs failed to reduce or prevent HIV and AIDS.<sup>134</sup> Seventy-eight percent thought the programs did not reduce extramarital sex.<sup>135</sup> The poll measured differences based on respondents' party affiliation and found that although Republicans were more likely than Democrats to view the programs as effective, a majority of respondents from both political parties believed the programs did not reduce or prevent extra-marital sex or unwanted pregnancies.<sup>136</sup> A majority of Democrats and Independents thought the programs failed to prevent or reduce the prevalence of HIV and AIDS, while Republicans were equally divided on this issue.<sup>137</sup> The Harris poll shows that the public, regardless of partisan affiliation, largely views abstinence-only programs as a failure.<sup>138</sup>

While public opinion alone should not dictate policy, the strong public support for comprehensive sex education, along with the proven ineffectiveness and medically inaccurate nature of abstinence-only education, is yet another reason opponents of the programs should repeal AFLA, Title V, and SPRANS.

### III. OPPONENTS OF ABSTINENCE-ONLY PROGRAMS CAN AND SHOULD TAKE LEGAL ACTIONS TO OVERTURN THESE DANGEROUS PROGRAMS

This Article has highlighted numerous problems with federal abstinence-only programs. They disproportionately negatively impact girls by denying them information on contraception that could prevent unwanted pregnancies and STIs. They are bad public policy because they are ineffective, medically inaccurate, promote religious messages in public schools, and marginalize gay and lesbian youth. They also contravene public opinion, which both supports comprehensive sex education and believes the abstinence-only programs are ineffective. For all these reasons, opponents of abstinence-only programs—including members of Congress, interest groups, and the public—should challenge and attempt to overturn them. Our federal government allows policies to be challenged through multiple access points—in this case, Congress, the executive branch, and the federal court system. Abstinence-only opponents should take advantage of opportunities in all three institutions to replace these dangerous programs with comprehensive sex education.

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Pregnancies, or Extramarital Sex (2006), [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=629](http://www.harrisinteractive.com/harris_poll/index.asp?PID=629) (last visited Feb. 25, 2007).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Despite the overwhelming public support for comprehensive sex education and opposition to abstinence-only programs, two primary reasons likely explain why the abstinence-only programs have not been overturned. First, until recently, these majorities have been latent and likely did not vote for candidates exclusively on this issue. Second, conservative majorities that support abstinence-only education have until recently controlled Congress and the White House.

*A. Legislative Actions*

Members of Congress play an important role in serving the public interest by advancing sexual education policies that the public supports. Since public opinion overwhelmingly favors comprehensive sex education over abstinence-only programs,<sup>139</sup> and since Congress created the abstinence-only programs, this is a key institution in which opponents should attempt to repeal them.

A bipartisan group of members of Congress has already introduced several bills to counter the abstinence-only programs by adding federal funding for comprehensive sex education. In 2001, Democratic Congresswoman Barbara Lee from California and Republican Congressman Jim Greenwood from Pennsylvania introduced the Family Life Education Act (FLEA).<sup>140</sup> FLEA would have provided \$100 million per year for five years to fund comprehensive sex education including contraception and comprehensive HIV and AIDS education.<sup>141</sup> In 2005, Congresswoman Lee and Democratic Senator Frank Lautenberg from New Jersey introduced the Responsible Education About Life Act (REAL), which was almost identical to the FLEA.<sup>142</sup> Both bills died in committee at the end of the 109th Congress, and neither has been re-introduced in the 110th Congress. While the new Democratic majorities in the House and Senate make it more likely that action may occur on similar bills, if introduced, it is also likely that President Bush would veto them due to his strong support for abstinence-only programs.

Although no action has yet been taken on the REAL Act or the FLEA, members of Congress who favor comprehensive sex education have recently taken other actions to amend the abstinence-only programs and make them more palatable. For example, in 2002, members of the House Commerce Committee offered an amendment to the welfare reform reauthorization legislation that would have prevented federal funding for abstinence-only programs until they were shown to be medically accurate and effective; however, the amendments failed.<sup>143</sup>

Despite the lack of success in committee, one Representative—Democrat Henry Waxman from California—has continued to pursue other avenues to promote comprehensive sex education while pointing out the failures of abstinence-only programs. In 2004, Congressman Waxman issued a report

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139. HARRIS INTERACTIVE, *supra* note 133; Press Release, Othmer Inst., *supra* note 11.

140. H.R. 3469, 107th Cong. (2001); H.R. 4182, 108th Cong. (2004); H.R. 768, 109th Cong. (2005) (Congressman Greenwood was no longer serving in the 109th Congress and ceased to be a lead sponsor).

141. *See, e.g.*, The Family Life Education Act, H.R. 3469, 107th Cong. § 3 (2001).

142. H.R. 2553, 109th Cong. (2005); S. 368, 109th Cong. (2005). REAL would have funded comprehensive sex education programs at \$206 million per year for five years. H.R. 2553 § 7; S. 368 § 7.

143. Kaiser Family Foundation, Daily HIV/AIDS Report, House Committee Approves Renewal of Abstinence-Only Funding Contained in Welfare Reform Bill (Apr. 26, 2002), [http://www.kaisernetwork.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=10829](http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=10829).

showing the dangers of the abstinence-only programs.<sup>144</sup> In 2005, Congressman Waxman wrote two separate letters to the Government Accounting Office requesting an investigation into a specific grant and a review of HHS's process for evaluating potential grantees for accuracy and effectiveness in their curricula.<sup>145</sup> These efforts are a step in the right direction to demonstrate the dangers abstinence-only programs perpetuate on our youth.

More recently, Democratic Congressmen Luis Gutierrez from Illinois and Democrat Jim Moran from Virginia introduced the Guarantee of Medical Accuracy in Sex Education Act.<sup>146</sup> If passed, House Bill 5598 would ban federal funding for entities that teach medically inaccurate sex education.<sup>147</sup> Congressmen Gutierrez and Moran introduced this legislation after over 100 members of Congress wrote to a key congressional committee asking for this ban.<sup>148</sup> The Senate included a similar provision in an appropriations bill in 2006, but conservative members removed it during the conference committee.<sup>149</sup> The Guarantee of Medical Accuracy in Sex Education Act has not yet been re-introduced in the 110th Congress.

The efforts of these members of Congress are admirable, and unlike the past several years when the House and Senate were controlled by conservatives, it is more likely that efforts to weaken or overturn abstinence-only programs are more likely to succeed in the new Democratically-controlled Congress. However, President Bush's opposition to these efforts makes them subject to a veto. Therefore, opponents of abstinence-only education should also pursue executive and judicial actions to overturn them.

### *B. Executive Actions*

Several of the interest groups that work with members of Congress who are opposed to abstinence-only education have also taken action in the executive branch to challenge the programs. In 2005, two groups whose missions include promoting comprehensive sex education—The Sexuality Information and Education Council of the United States (SIECUS) and Advocates for Youth—filed an administrative complaint against HHS alleging that federally-funded abstinence-only sex education programs provide false, incomplete, and inaccurate information to school-age children in violation of a

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144. COMMITTEE REPORT, *supra* note 67.

145. Platner, *supra* note 98.

146. H.R. 5598, 109th Cong. (2006).

147. *Id.* § 3.

148. Press Release, Sexuality Info. & Educ. Council of the U.S., Medical Accuracy Bill Seeks to Remedy Deliberate Misinformation in Federally Funded Abstinence-Only-Until-Marriage Programs (June 13, 2006), available at <http://www.siecus.org/media/press/press0127.html>.

149. *Id.*

little-known federal law, the Data Quality Act.<sup>150</sup> The groups have not received a response to their complaint.<sup>151</sup> However, their actions brought positive publicity to the issue. Additionally, the groups may be successful in their complaint.

The president, as head of the executive branch, has the authority to make some changes to the abstinence-only programs. For example, President Bill Clinton directed the HHS to interpret the eight-point definition in Title V to mean recipients must follow only one of the points, rather than all eight, against Congress's wishes.<sup>152</sup> The president could also suggest de-funding abstinence-only programs but since President Bush supports these programs, this is very unlikely until after the 2008 election.

While the actions taken by interest groups and legislators in the executive and legislative branches are admirable, it is unlikely they will succeed in the near future, since President Bush supports abstinence-only education and would likely veto any changes to the programs although both houses of Congress are now controlled by majorities that support comprehensive sex education. Therefore, opponents of abstinence-only programs should also take legal action in the courts.

### *C. Judicial Actions*

A court-based strategy may be the most effective means at this time to overturn dangerous abstinence-only programs. This Section of the Article will first provide background on Title IX, which prohibits sex discrimination in education. It will next put forth several legal theories with which opponents of abstinence-only programs can use Title IX to challenge them, including the deliberate indifference theory, the pregnancy discrimination theory, and the disparate impact theory. This Section is not intended to be a comprehensive legal blueprint for overturning the abstinence-only programs. Other laws and legal theories may be used. Instead, the goal is simply to suggest legal theories that may be used by practitioners who wish to challenge abstinence-only programs. Finally, this Section will argue that opponents of abstinence-only programs can use these theories to overturn the dangerous programs by demonstrating that they violate Title IX because they constitute sex-based discrimination against female students.

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150. Press Release, Advocates for Youth, Groups File Legal Complaint against Government for Spreading False and Misleading Sex Education (Sept. 13, 2005), available at <http://www.advocatesforyouth.org/NEWS/PRESS/2005/091305.htm>.

151. Sexuality Info. & Educ. Council of the U.S., Policy Update, Groups File Formal Complaint Against Abstinence-Only-Until-Marriage Programs (Sept., 2005), <http://www.siecus.org/policy/PUupdates/pdate0204.html>.

152. Telephone Interview with Rebecca Fox, State Policy Director, Sexuality Info. & Educ. Council of the U.S. Wash. D.C. (May 2003). Members of Congress who were supportive of a more restrictive interpretation of the abstinence-only programs countered by passing SPRANS and making it explicit that recipients must follow all eight points of the definition. *Id.*

### 1. Background on Title IX

The most logical law with which to challenge the abstinence-only laws is Title IX which prevents discrimination in education.<sup>153</sup> Congress passed Title IX to prevent discrimination in education as part of the Education Amendments of 1972.<sup>154</sup> The law specifically states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."<sup>155</sup> Title IX applies broadly to any program that receives federal funding:

Under Title IX, the receipt of any amount of federal financial assistance is sufficient to trigger the broad nondiscrimination obligation embodied in the statute. This nondiscrimination obligation extends institution-wide to *all* education programs or activities operated by the recipient of the federal funds, even if some of the education programs or activities themselves are not funded with federal dollars.<sup>156</sup>

Thus, Title IX applies to many private schools as well as institutions of public education.

The impetus for Congress to pass Title IX began in the 1960s and continued in the 1970s when Oregon Congresswoman Edith Green introduced legislation containing language calling for gender equity in education.<sup>157</sup> After hearings on the issue, the Senate passed amendments banning sex discrimination in educational institutions that received federal funding.<sup>158</sup> President Nixon signed the bill into law in 1972.<sup>159</sup>

The law bans sex discrimination broadly in the educational setting. During debate on the bill, Senator Bayh noted, "[w]e are dealing with

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153. Although opponents of abstinence-only programs may be able to bring other claims, such as violations of equal protection or due process under the Fourteenth Amendment or a claim under the Pregnancy Discrimination Act to challenge the programs, this Article focuses solely on Title IX as a vehicle for overturning the programs.

154. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-903, 86 Stat. 373, 373-74 (1972) (codified as amended at 20 U.S.C. § 1681 (2000)).

155. 20 U.S.C. § 1681(a).

156. JODY FEDER, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, TITLE IX, SEX DISCRIMINATION AND INTERCOLLEGIATE ATHLETICS: A LEGAL OVERVIEW 3 (2005) (citing CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE, TITLE IX LEGAL MANUAL 51 (2001), available at [http://www.house.gov/case/crs\\_reports/TitleIX.pdf](http://www.house.gov/case/crs_reports/TitleIX.pdf)). See also Civil Rights Restoration Act of 1987, 20 U.S.C. 1687 (2000).

157. U.S. Dept. of Ed., Title IX: A Sea Change in Gender Education, <http://www.ed.gov/pubs/TitleIX/part3.html> (last visited Mar. 19, 2007).

158. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE IX: 25 YEARS OF PROGRESS 7 (1997), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2/contentstorage\\_01/0000000b/80/26/ea/9a.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2/contentstorage_01/0000000b/80/26/ea/9a.pdf).

159. *Id.* at 8.

discrimination . . . of available services or studies within an institution once students are admitted.”<sup>160</sup> Any educational institution that receives federal funds is subject to Title IX’s enforcement and regulation provisions.<sup>161</sup> Title IX itself does not explicitly provide for a private cause of action; instead, the remedy for a Title IX claim is a loss of federal funding.<sup>162</sup> This penalty is a steep one, as intended by Congress,<sup>163</sup> and therefore educational institutions should be careful not to violate Title IX, or they will risk losing needed funds.

Despite Congress’ intent that Title IX apply broadly, advocates of gender and sex equality have most commonly used Title IX in two ways: to fight for parity in athletics and to protect girls from sexual harassment.<sup>164</sup> While these are important achievements, Title IX can and should be applied to other areas of sex discrimination in education.

Precedent exists for a broader use of Title IX in the courts. Proponents of sex equity in education have, for example, argued that Title IX protects girls from sex-based discrimination based on their unique ability to become pregnant.<sup>165</sup> According to the U.S. Department of Education, “the law prohibits schools from suspending, expelling, or discriminating against them in educational programs and activities due to their status as mothers.”<sup>166</sup> Although this provision has often been interpreted literally to apply to pregnant girls and those who have already given birth, the law itself is broader and can and should be used to protect girls based on their sex-specific ability or potential to become pregnant.<sup>167</sup>

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160. 118 CONG. REC. 5812 (1972).

161. Gabrielle Morgan, Recent Development, “Character Standard” or Sex Discrimination? Students’ Exclusion from National Honor Society Called a Violation of Title IX, 14 BERKELEY WOMEN’S L.J. 116, 121 (1999).

162. 20 U.S.C. § 1682 (2000). See also David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination under Title IX*, 39 WAKE FOREST L. REV. 311, 321-22 (2004).

163. Cohen, *supra* note 162 at 321-22 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689-709 (1979)).

164. Examples applying Title IX in the context of athletic parity include *Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Neal v. Bd. Of Trs. of Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999); and *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1st Cir. 1996). For cases on sexual harassment, see *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

165. See *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975 (E.D. Ky. 1998).

166. OFFICE FOR CIVIL RIGHTS, *supra* note 158, at 9.

167. For example, the U.S. Supreme Court has noted that, “Concern for a woman’s existing or potential offspring historically has been the excuse for denying women equal employment opportunities.” *Int’l Union v. Johnson Controls Inc.*, 499 U.S. 187, 211 (1991) (citing as example *Muller v. Oregon*, 208 U.S. 412 (1908)) (emphasis added). “Congress in the PDA prohibited discrimination on the basis of a woman’s ability to become pregnant. We do no more than hold that the PDA means what it says.” *Id.* (emphasis added). See also *Pacourek v. Inland Steel Co.*, 858 F.Supp. 1393, 1401 (N.D.Ill. 1994) (holding that treating a woman differently for attempting to become pregnant discriminated against her based on her

The *Chipman* case was a good start to expanding Title IX case law, since it resulted in a holding that schools cannot discriminate based on a girl's ability to become pregnant.<sup>168</sup> Therefore, according to Congress and subsequent Title IX case law,<sup>169</sup> educational institutions that treat girls differently based on actual or potential pregnancy risk losing their federal funding since disparate treatment constitutes illegal sex-based discrimination under Title IX.

Applying a broad interpretation of sex discrimination to abstinence-only programs under Title IX is consistent with Congress' goals when it passed the law.<sup>170</sup> It is also consistent with case law in the area of Title IX that goes beyond sex disparities in athletics and sexual harassment.<sup>171</sup> Therefore, Title IX is the appropriate law to use to argue that the abstinence-only programs constitute sex-based discrimination against female students and should be struck down.

## 2. Why opponents of abstinence-only programs should use Title IX to challenge abstinence-only programs

Since abstinence-only programs are taught in schools that receive federal funding, these schools must adhere to the law's antidiscrimination provisions or risk sanctions for violating Title IX.<sup>172</sup> Abstinence-only programs violate Title IX because they discriminate against girls by treating them differently than boys. The programs do this by failing to adequately address issues that disproportionately affect girls, including STIs and unwanted teen pregnancies, and by actively promoting harmful sex stereotypes. Therefore, opponents of abstinence-only laws can argue that schools using federal funds to teach only abstinence are violating Title IX because the programs treat girls differently than boys, which constitutes illegal discrimination. A number of cases have shown this type of sex distinction in the educational setting is prohibited under Title IX.<sup>173</sup>

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sex-specific ability to become pregnant). These antidiscrimination arguments in the employment context can be applied to Title IX and the education context as well.

168. *Chipman*, 30 F. Supp. 2d at 979. See also Cohen, *supra* note 162, at 313-14. See *infra*, Part III(C)(3)(b) for a discussion about the Pregnancy Discrimination Theory.

169. See *Pederson*, 213 F.3d 858; *Davis*, 526 U.S. 629; *Neal*, 198 F.3d 763; *Gebser*, 524 U.S. 274; *Chipman*, 30 F. Supp. 2d 975; *Cohen*, 101 F.3d 155.

170. See Cohen, *supra* note 162, at 319.

171. See, e.g., *Chipman*, 30 F. Supp. 2d 975.

172. Education Amendments of 1972, Pub. L. No. 92-318, § 901-903, 86 Stat. 373, 373-74 (1972) (codified as amended at 20 U.S.C. § 1681 (2000)).

173. See, e.g., *Pederson*, 213 F.3d at 879; *Davis*, 526 U.S. 629; *Neal*, 198 F.3d at 770; *Gebser*, 524 U.S. 274; 118 S. Ct. 1989; *Chipman*, 30 F. Supp. 2d 975; *Cohen*, 101 F.3d at 170.

### 3. Prior Title IX cases provide a useful precedent for challenging abstinence-only programs

The legal arguments put forth in these Title IX cases can and should be used to overturn the abstinence-only programs. While a number of Title IX cases provide beneficial examples of successful legal strategies, those relating to sexual harassment and pregnancy discrimination in schools may be the most useful.

First, this Section will discuss the deliberate indifference theory, which opponents of abstinence-only programs can use to argue school districts should be liable when they are aware of education discrimination against girls yet fail to take steps to prevent or end the discrimination. Second, this Section will discuss the pregnancy discrimination theory, which may be used to argue school districts discriminate against female students based on their unique ability to become pregnant by using abstinence-only programs. The pregnancy discrimination theory can be expanded to protect girls from discrimination outside the educational setting as well. Third, this Section will discuss the disparate impact theory, which could be used to show abstinence-only education has caused a significant adverse effect on a protected group—girls.

#### *a. The Deliberate Indifference Theory*

One method of proving a violation of Title IX involves a showing that a covered entity has engaged in “deliberate indifference.” Under this theory, school officials in institutions that receive federal funding may be held liable for discrimination if they are aware of the discrimination but do not take steps to prevent or end it.<sup>174</sup> This argument has been successful in Title IX sexual harassment cases and can be used to challenge the abstinence-only programs in schools as well. Title IX cases in which the plaintiff successfully demonstrated sex discrimination occurred in education because of sexual harassment include *Doe v. University of Illinois*,<sup>175</sup> *Gebser v. Lago Vista*,<sup>176</sup> and *Davis v. Monroe County*.<sup>177</sup> These three cases provide the basis for the deliberate indifference theory, which can be used to challenge the federal abstinence-only programs.

Title IX precedents have established that when a school district knows of actions at a school that harm girls but takes no action to prevent the harm, the school’s sovereign immunity defense is invalid.<sup>178</sup> In the case of abstinence-only education, school officials who are aware of the harm caused to girls by

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174. See, e.g., *Doe v. Univ. of Ill.*, 138 F.3d 653 (7th Cir. 1998); *vacated sub nom.*, Bd. of Trs. of Univ. of Ill. v. Doe, 526 U.S. 1142 (1999), *reinstated in part sub nom.*, *Doe ex rel. Doe v. Univ. of Ill.*, 200 F.3d 499 (7th Cir. 1999); *Gebser*, 524 U.S. 274.

175. 138 F.3d at 677 (holding the school district liable for not intervening to stop sexual harassment discrimination after being notified about it).

176. 524 U.S. 274.

177. 526 U.S. at 641.

178. *Id.*

the programs may be held liable under the deliberate indifference theory.<sup>179</sup> Schools that teach abstinence-only education but know about girls becoming pregnant or getting STIs at higher rates than boys after they take the course are on notice that the programs are disproportionately harming girls. This puts schools at risk of being liable for discrimination under Title IX. This is because courts have rejected schools' sovereign immunity claims in Title IX cases when the schools were deliberately indifferent to harms caused to one sex at the school even if the harm was not necessarily caused by the school.<sup>180</sup>

Title IX prohibits sex-based discrimination in schools, and courts have ruled that deliberate indifference by school officials constitutes a violation of Title IX.<sup>181</sup> Therefore, opponents of abstinence-only programs should argue that teaching abstinence-only education, after being aware that these programs discriminate against girls,<sup>182</sup> makes school officials liable under the deliberate indifference theory. This form of unequal treatment toward girls is a violation of Title IX and another reason the abstinence-only programs should be overturned.

*b. The Pregnancy Discrimination Theory*

In addition to protecting female students' rights by holding school officials liable for deliberate indifference, courts have also held that girls cannot be discriminated against on the basis of sex with regard to pregnancy. While the pregnancy discrimination theory is more often used in an employment rather than educational settings,<sup>183</sup> the legal arguments can be applied in the educational setting to protect female students from pregnancy-based discrimination.<sup>184</sup>

The *Chipman* court noted that discrimination against girls in an educational setting based on their pregnancies constituted a violation of Title IX<sup>185</sup>—thus the pregnancy discrimination theory was born. Federal regulations

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179. This is another reason schools should refuse to accept federal abstinence-only funding.

180. *See Doe*, 138 F.3d at 658.

181. *Id.* at 677; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

182. Because they disproportionately negatively impact them by denying life-saving information on contraception, which could prevent unwanted pregnancies and STIs.

183. Sex-discrimination in employment cases include: *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (holding employers that offer prescription drug coverage to employees but refuse to offer contraception is a violation of the Pregnancy Discrimination Act); *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that an employer's policy that excluded women who were pregnant or capable of bearing children from being placed in jobs involving lead exposure was a violation of Title VII); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (holding that providing pregnancy coverage unequally to female employees and the wives of male employees was a violation of Title VII and the Pregnancy Discrimination Act).

184. *See, e.g., Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975 (1998).

185. *Id.* at 977-79.

promulgated pursuant to Title IX apply its prohibition against sex discrimination to pregnancy. The regulations state, “[A] recipient [of federal funds] shall not apply any rule concerning a student’s actual or *potential* parental, familial, or marital status which treats students differently on the basis of sex.”<sup>186</sup> The *Chipman* court, applying these regulations, decided the exclusion of two pregnant students from the National Honor Society (NHS) was an exclusion “based on pregnancy.”<sup>187</sup> The court looked to three similar NHS cases<sup>188</sup> and agreed with two of them that the school’s exclusion of the girls from the NHS on the basis of pregnancy was in fact illegal sex-based discrimination under Title IX.<sup>189</sup>

*Chipman* also noted two important points that are useful in using the pregnancy discrimination theory to challenge abstinence-only programs under Title IX. First, the *Chipman* court noted that the federal law prevents sex-based discrimination based on actual or *potential* parental status.<sup>190</sup> Second, the *Chipman* court acknowledged that although it is an employment-based rather than an educational law, precedents under the Pregnancy Discrimination Act could be applied in Title IX cases.<sup>191</sup> Therefore, opponents of abstinence-only programs, using the *Chipman* precedent, may challenge them using the pregnancy discrimination theory.

Opponents of abstinence-only programs should argue that the programs discriminate against girls based on their sex-specific ability to become pregnant. As stated in *Chipman*, Title IX regulations prohibit discrimination on the basis of “actual or potential” parental status that “treats students differently based on sex.”<sup>192</sup> Abstinence-only programs do treat students differently based on sex. It is true that a boy’s actual or potential parental status might change if he impregnates his female partner because he received misleading or no information about contraception in an abstinence-only program. By withholding or providing misleading information about contraception, both boys and girls are similarly harmed because they may suffer the emotional and financial harm of an unwanted pregnancy. This is a sex-similar change to both

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186. 34 C.F.R. § 106.40(a) (2006) (emphasis added).

187. *Chipman*, 30 F.Supp. 2d at 978.

188. *Id.* (citing *Cazares v. Barber*, No. CIV-90-0128-TUC-ACM (D. Ariz. May 31, 1990) (holding that excluding a pregnant student from the NHS while allowing a male student who fathered a child to join the NHS was gender discrimination under Title IX and the Fifth Amendment); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3rd Cir. 1990) (holding that as long as both sexes were treated similarly with regard to premarital sex, the pregnant female student could be dismissed from the NHS); and *Wort v. Vierling*, No. 82-3169, slip op. (C.D. Ill. Sept. 4, 1984), *aff’d on other grounds*, 778 F.2d 1233 (7th Cir. 1985) (holding that because only women can become pregnant, dismissal of a student based on pregnancy rather than premarital sex constituted unequal treatment based on gender—an equal protection violation)).

189. *Id.*

190. *Id.* at 977 (citing 34 C.F.R. § 106.40(a)).

191. *Id.* at 977-79.

192. *Id.*

sexes' actual or potential parental status. However, only girls face the unique harm of becoming pregnant, a different and sex-specific change to their actual or potential parental status. Therefore, girls face a different harm than boys in abstinence-only programs. Since differential treatment based on sex is prohibited under Title IX and abstinence-only programs treat boys and girls differently by imposing a unique sex-specific risk and harm on girls, opponents of the programs should argue they constitute illegal sex discrimination under Title IX.

Along with pregnancy discrimination and deliberate indifference, the disparate impact theory is another useful way to demonstrate how withholding information or providing misleading information about contraception constitutes sex discrimination—a violation of Title IX.

*c. The Disparate Impact Theory*

Antidiscrimination laws protect members of the protected class against both disparate treatment and disparate impact.<sup>193</sup> First, plaintiffs in a disparate impact case must prove that “a particular practice has caused a significant adverse effect on a protected group.”<sup>194</sup> Second, the burden shifts to the defendant to show that the practice or policy being challenged is necessary.<sup>195</sup> It is not necessary to prove intentional discrimination in a disparate impact case.<sup>196</sup> The court in *Chipman* held that the disparate impact of denying admission to pregnant girls to the NHS was “apparent” and that the girls had a high probability of succeeding in their Title IX claim.<sup>197</sup>

In challenging abstinence-only programs, plaintiffs must first prove that the programs have a significant adverse and disparate impact on girls because they provide no information or misleading information about contraception and promote harmful sex stereotypes, which leads to unwanted teen pregnancies and increased STI rates. Schools taking part in the federal abstinence-only programs are prohibited from teaching about contraception, except to discuss failure rates.<sup>198</sup> This denial of information puts girls at greater risk for contracting STIs than boys and also puts them at risk of becoming pregnant. Girls have higher infection rates than boys for most STIs<sup>199</sup> as well as the unique ability to become pregnant. Both of these factors show that the harmful abstinence-only programs have a significant adverse and disparate impact on girls.

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193. *United States v. City of Warren, Mich.*, 138 F.3d 1083, 1091 (6th Cir. 1998).

194. *Id.* at 1091-92.

195. *Id.*

196. *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1997).

197. *Chipman*, 30 F. Supp. 2d at 979.

198. 42 U.S.C. § 300z-2 (2000); 42 U.S.C. § 710 (2000); COMMITTEE REPORT, *supra* note 67 at 8.

199. CDC, HIV/AIDS AMONG WOMEN, *supra* note 72.

Abstinence-only programs also promote harmful sex stereotypes that have a disparate impact on girls.<sup>200</sup> By diminishing girls' professional and academic accomplishments, stereotyping girls as weak and in need of protection, and reinforcing male sexual aggressiveness,<sup>201</sup> abstinence-only programs harm girls by threatening their autonomy.<sup>202</sup> The programs also harm girls by causing low self-esteem, making it harder for them to refuse male sexual advances and dissuading them from entering male-dominated professions.<sup>203</sup> Although abstinence-only programs also promote sex stereotypes about boys, girls experience a significantly adverse impact because of their traditionally inferior role in society.

After proving the significant and adverse impact, the burden shifts to the school district, which must show programs are a "reasonable necessity." The district will have difficulty meeting this burden because the programs are neither reasonable nor necessary. Abstinence-only programs are not reasonable because they are ineffective, promote harmful sex stereotypes, and teach medically inaccurate information. They are not necessary because there is an alternative—comprehensive sex education.

Abstinence-only programs are not reasonable for several reasons. First, the programs are unreasonable because they do not effectively prevent teen pregnancy and disease. Approximately 50% of girls report having sex before graduating from high school, and eighty-four out of every 1,000 girls becomes pregnant before graduating from high school.<sup>204</sup> Second, the programs promote harmful sex stereotypes about girls, which is also unreasonable.<sup>205</sup> Finally, the programs teach medically inaccurate information.<sup>206</sup> Many major medical groups find that teaching medically inaccurate information about sex to students is unreasonable, including the Society for Adolescent Medicine, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the American Public Health Association, and the American

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200. *See supra* Section II.A.1.c.

201. COMMITTEE REPORT, *supra* note 67 at 16-18.

202. LEGAL MOMENTUM, SEX, LIES AND STEREOTYPES: PROFILES OF FEDERALLY FUNDED ABSTINENCE-ONLY GRANT RECIPIENTS 2 (2006), *available at* <http://legalmomentum.org/legalmomentum/files/abstinenceonlyprofiles.pdf>.

203. *See generally* PEGGY ORENSTEIN, SCHOOL GIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE CONFIDENCE GAP (2000) (discussing the low self-esteem many young females experience due to their gender); United Nations, Platform for Action, Fourth World Conference on Women, Platform for Action, <http://www.un.org/womenwatch/daw/beijing/platform/girl.htm#object4> (last visited Jan. 28, 2007).

204. The National Campaign to Prevent Teen Pregnancy, Teen Sexual Activity in the United States, <http://www.teenpregnancy.org/resources/data/pdf/TeenSexActivityOnePagerJune06.pdf> (last visited Mar. 19, 2007).

205. *See supra* Section II.A.1.c.

206. *See supra* Section II.B.2.

Medical Association.<sup>207</sup> Thus, proponents of abstinence-only education programs will have a difficult time showing the programs are reasonable.

Additionally, abstinence-only programs are not necessary because there are alternatives—specifically comprehensive sex education programs.<sup>208</sup> In fact, polls show a vast majority of the public supports comprehensive sex education rather than abstinence-only programs.<sup>209</sup> Further, no federal law mandates the curriculum of sex education—either comprehensive or abstinence-only—they simply provide optional funds to states for the programs. Therefore, opponents of abstinence-only programs can argue they are unnecessary. Supporters of abstinence-only programs may argue the programs are necessary due to high rates of teen pregnancy and STIs. However, because the programs are medically inaccurate<sup>210</sup> and have proven ineffective,<sup>211</sup> they have not been shown to reduce either teen pregnancies or STIs. Thus, in addition to having a disparate impact on girls, abstinence-only programs are unnecessary. Opponents of abstinence-only programs can use these arguments to challenge the programs as in violation of Title IX because they constitute sex-based discrimination against girls under the disparate impact theory.

#### *d. Summary*

Opponents of the federal abstinence-only-until-marriage education programs can and should challenge them using antidiscrimination arguments from Title IX case law such as the deliberate indifference theory, the pregnancy discrimination theory, and the disparate impact theory. This discussion should not be considered to be exclusive regarding the legal theories that may be used to overturn the programs; the author's intent was to demonstrate how some Title IX legal theories might be useful to practitioners toward this goal. In the current political environment, a Title IX court-based challenge is likely the most effective way to overturn the dangerous abstinence-only programs.

### CONCLUSION

Abstinence-only-until-marriage programs disproportionately negatively affect girls. They are bad public policy because they are ineffective, medically inaccurate, often religious in content, and marginalize gay and lesbian youth.

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207. See the findings section of the Guarantee of Medical Accuracy in Sex Education Act, H.R. 5598, 109th Cong. (2006).

208. Although the federal government makes AFLA, Title V, and SPRANS funds available to the states, states do not have to accept the funds. Advocates for Youth, Abstinence-Only-Until-Marriage Programs: History of Government Funding, <http://www.advocatesforyouth.org/rrr/history.htm#2> (last visited Jan. 28, 2007). Although states may have statutes governing the curriculum of sex education, the federal government cannot mandate curriculum. *Id.*

209. Press Release, Othmer Inst., *supra* note 11.

210. See *supra* Section II.B.2.

211. See *supra* Section II.B.1.

Further, the programs are contrary to public opinion. Some members of Congress and interest groups recognize the problems with the programs and have begun to take action to overturn them. While abstinence-only-until-marriage opponents should challenge these dangerous programs in all three branches of government, a Title IX judicial challenge is likely the most effective and expedient way to strike down these dangerous, discriminatory programs. Girls need the facts about contraception as part of a comprehensive, medically accurate sex education curriculum rather than the misleading, inaccurate, stereotypical information they are currently receiving from abstinence-only programs. It is time to put an end to the misguided abstinence-only programs and talk to girls about sex *honestly*.