

**“ABSTINENCE-PLUS” HEALTH SCIENCE
TEXTBOOKS AND CURRICULA
BEST SERVE TEXAS STUDENTS**

*“There is no greater sin than ignorance”
Rudyard Kipling*

A Position Paper

by the
**EARL CARL INSTITUTE
for Legal and Social Policy, Inc.**

Professor James Beard
President, Institute Board of Directors

Professor Marcia Johnson
Director, Institute

Lela Aderinboye
Arica Brandford
Jennifer Hahn
Ryan Leach
Leroy Mitchell
Vonetta Norman
Student Researchers

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Introduction

The Texas State Board of Education (SBOE) has voted on a matter that has far reaching and long term effect on the state's public school children.¹ The board's vote, adopting abstinence-only textbooks, ensures that Texas' children will be denied a complete health science education.

The Earl Carl Institute posits that abstinence must be a part of a health science education program. Therefore, the Institute believes the SBOE has violated its legal and moral duties by adopting the abstinence only health education textbooks. The textbooks restrict information from those most in need of education on prevention measures (in addition to abstinence) of pregnancy and sexually transmitted diseases. Moreover, the ruling comes even despite the fact that parents overwhelmingly favor comprehensive sexuality education.²

The United States Constitution mandates the separation of church and state. It prohibits the state from imposing religious moral principles to the exclusion of scientific educational principles.³ Furthermore, even minimal educational standards require a thorough examination of matters to be taught to meet the state's educational mandate.⁴ The state's failure to comply with its standards constitutes a breach of its duty and malfeasance of office.⁵

The State's Duty

The State Board of Education is authorized by the Texas Education Code to adopt, purchase, distribute, care, use and dispose of textbooks.⁶ More broadly, the Texas legislature delegated its general power over these matters to the SBOE *conditioned on the agency's compliance with the state's public education mission.*

“The mission of the public education system of this state is to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation.”⁷

Fulfilling the Mission

Fostering ignorance in public education clearly rejects the state's mission to educate public school students. Texas defines the purpose of education by relying essentially on “knowledge.” The Texas Education Code provides:

“It is the intent of the legislature that the essential knowledge and skills developed by the State Board of Education under this subchapter shall require all students to demonstrate the knowledge and skills necessary to read, write, compute, problem solve, think critically, apply technology, and communicate across all subject areas. The essential knowledge and skills shall also prepare and enable all students to continue to learn in postsecondary educational, training, or employment settings.”⁸

If a student has been misinformed, the child will not be armed with the education of a

quality that enables her to achieve her potential. Also, she will not be able to fully participate now, or in the future, in the social, economic or educational opportunities that Texas and the United States offer her.

Health Education in Texas

The abstinence-only textbooks fail public school children and the public generally on two essential levels. First, public school children are not being adequately educated on health science. Secondly, the public is being misinformed about the value and success of abstinence-only programs.

Texas Children

Health Science courses generally include sex education, which incorporates pregnancy, sexually transmitted diseases, and other associated health problems, into its curriculum.⁹ Part of the education requirement is the teaching of effective means to avoid the social, psychological and health problems associated with these conditions.¹⁰ Abstinence from sexual activity is one way, and probably, the most effective avoidance method. However, it is not the *only* effective measure, and teaching it to the exclusion of other methods constitutes a failure to adequately inform the students; and thus, a failure to educate.

The failure to provide students with the essential knowledge that enables them to problem solve and think critically in the area of health and sex education violates state law. Moreover, the dubious record of teaching abstinence-only wholly fails to support it as an appropriate method of education.

The Public

Sexuality education experts have shown that there is no credible research that proves the effectiveness of abstinence-only curricula in preventing or delaying sexual intercourse among teenagers.¹¹ In fact, in a report that reviewed at least 250 different studies on the issue, researchers found that the opposite is true.¹²

Abstinence-Plus Programs Work

Research shows that comprehensive sexual education programs as opposed to abstinence-only programs are more effective in reducing “risky” behavior in young people. A recent study concluded that programs that include information about abstinence as well as the use of contraceptives can successfully delay the onset of sex and increase the use of condoms among sexually active teens.¹³ These comprehensive programs can also decrease behavior that put young people at risk for HIV, STDs, and unplanned pregnancy.

On the other hand, abstinence-only programs have not been found to delay the onset of sexual activity in teens, nor have they been found to be effective in preventing risky sexual behavior.¹⁴ In fact, one expert has concluded that “abstinence-only programming runs the serious risk of leaving young people, especially those at elevated risk, uninformed and alienated.”¹⁵

One of the serious consequences of the abstinence-only program is that it sends mixed messages to teens. While it teaches that abstinence outside of marriage is the only acceptable way of eliminating unwanted pregnancy and sexually transmitted diseases, it also infers that there is no way to protect yourself if you do engage in sex. Students may believe that contraception and condoms cannot effectively prevent pregnancy or sexually-transmitted diseases. Sexually active teens exposed to this instruction might therefore avoid using contraception and condoms at a time when HIV transmission still remains a serious public health concern.

Researchers have also been able to identify the characteristics of the most effective sex and HIV education programs.¹⁶ One of the most important characteristics that distinguish the effective from the ineffective programs is the delivery of consistent messages about abstaining from sexual activity and/or using condoms or other forms of contraception.¹⁷ Another compelling characteristic is to provide accurate information about the risks of teen sexual activity and about ways to avoid intercourse or use methods of protection against pregnancy and STDs.¹⁸

Abstinence-Only Programs Do Not Work

Abstinence-only programs are not new having been around for over twenty years.¹⁹ Since 1981, these programs have received federal funding.²⁰ The federal government currently provides over \$100 million annually to support these programs.²¹ The bulk of those funds come from the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.²² In all that time, there has been no peer-reviewed research that proves that it is effective in changing adolescents' behavior.²³ By the same token, program evaluations have found them to be "barely adequate" to "completely inadequate" in achieving their goals.²⁴

Texas has launched various abstinence-only programs including the McClellan County Collaborative Abstinence Project, the Scott & White Sex Education Program, the Medical Institute for Sexual Health, and "Mi Futuro/My Future".²⁵ While the programs vary in their method of instruction, neither has been cited to support the success of abstinence-only programming. On the other hand, numerous studies show the effectiveness of abstinence-plus curricula.²⁶

Furthermore, abstinence-only programs have been found to have an adverse affect on young people with an elevated risk of contracting STDs or HIV. These "high risk youths" include young people that are sexually experienced, have been sexually abused, that are homeless and runaways, and those that are gay and lesbian.²⁷

What the Studies Show

Curricula based programs are categorized into two main groups: abstinence-only education and abstinence-plus education (sometimes called sex or HIV education or comprehensive sex education).²⁸ Authentic abstinence programs promote abstinence from all sexual activity until marriage as the only way to prevent the risks of sexually transmitted diseases (STD) and HIV, and eliminate the risk of pregnancy. Some abstinence-only programs choose to

introduce the concept of contraception, but merely to speak of its failure to prevent certain diseases.²⁹ As distinguished from those programs, abstinence-plus programs promote abstinence as the safest option but also encourage the use of condoms and other contraception for sexually active teens.³⁰

A polarizing political debate rages on in America about which sex education program is most effective in reducing teen pregnancy and the risks of HIV and STDs. At this point in time, it is especially important to understand what works and what doesn't because under the Bush administration, federal support for "abstinence-only" education has rapidly expanded.³¹ According to the Waxman Report, the federal government will spend approximately \$170 million on abstinence-only education programs in fiscal year 2005, more than twice the amount spent in fiscal year 2001.³² Unfortunately, measuring the outcome of a public health intervention like abstinence can be difficult for political and methodological reasons. Although research supporting abstinence-only or abstinence-plus programs may each tout the other as biased and falling below the standards for good research, one thing is certain, when Texas updates its health textbooks, the stakes will be high. It has been noted that "Texas is the country's second-largest buyer of textbooks (after California), and publishing companies often market the books that Texas adopts to the other 49 states."³³ Therefore, it is very likely that these same textbooks will appear in classrooms around the country, making it even more crucial that Texas does not take a step backwards when updating the health textbooks.³⁴ These chilling statistics of Texas teens taken within the last ten years demonstrate the seriousness of the issue and are no doubt the most vital numbers to be considered:³⁵

- A 2001 Texas Department of State Health Services, Bureau of Vital Statistics report found that **every 10 minutes**, a teen in Texas gets pregnant.
- In a 2000 Center for Disease Control (CDC) survey, Texas ranked **46th out of 50 states** for the number of people living with **HIV/AIDS**.
- Under Governor Bush, Texas spent over \$10 million on abstinence-only-until-marriage education. Bush allocated nearly \$6 million in state funds, well over the \$3.7 million state match required by the federal allocation of \$4.9 million.
- In 1999, 220 Texan teen females aged 15 to 19 became pregnant *every single day*.
- Texas' **teen pregnancy** rate in 1999 was 113 per 1,000 teen females aged 15 to 19. Only Nevada, California, Arizona, and Florida had higher teen pregnancy rates.
- In a study from 1991-1998, Texas had the *second worst* **teen birth** rate among 15- to 19-year-old females, ranking 49th out of 50 states. Only Mississippi had a higher teen birth rate.
- Texas ranked *dead last* in the decline in teen birth rates among **15-to 17-year-olds**, ranking 50th out of 50. Between 1991 and 1998, the teen birth rate in this age group dropped by more than 21 percent in the United States as a whole; Texas' rate declined by only 10 percent.

- Texas ranked *second to last* for the decline in the teen birth rate among **15-to 19-year-olds** during the same time period, ranking 49th out of 50.
- In the same study, while Texas ranked 15th out of 39 states in the decline in the birth rate among **15-to 19-year-old African American teens** (30.4 percent), Texas' decline in the birth rate for **Caucasian teens aged 15 to 19** was the sixth smallest recorded in any state (12.5 percent). Texas' birth rate declined by only 3.5 percent among **Hispanic teens aged 15 to 19** compared to 12.3 percent nationwide.
- A 1999 CDC survey found that Texas had an extremely high number of reported STD cases — accounting for about 10 percent of all reported cases of chlamydia and gonorrhea in the country.
- In the same CDC study, Texas' chlamydia rate was 319 per 100,000 population, ranking 44th out of 50. Texas' gonorrhea rate was 167 per 100,000 population, ranking the state 40th out of 50.

The Texas strategy to combat the teen pregnancy issue and the risks of STDs and HIV with abstinence-only education has not produced the desired results, so it does not seem prudent to continue on the same fruitless path. Instead, what Texas needs to do is implement responsible curricula which will embrace this reality and equip teens with the necessary tools they need to be safe and aware, whether or not they decide to have sex.

The top medical organizations in the country; the American Medical Association, the American Academy of Pediatrics, the American Public Health Association, and the American College of Obstetricians and Gynecologists, all support abstinence-plus education as the program best suited to fit the needs of America's teens.³⁶ It is most likely that the support stems from the fact that the published research on sex and HIV education programs is far more conclusive and encouraging than the limited results for abstinence-only education programs.³⁷ Since 1991, rates of teen pregnancy and birth have declined significantly in the United States, and abstinence-only proponents claim that this is due to their strong message of abstinence until marriage.³⁸ To rebut this claim, abstinence-plus advocates point to an analysis of the decline in teen pregnancy in the 1990s, published by the Alan Guttmacher Institute, which shows that approximately 25% of the decrease was to a lower proportion of teenagers who were sexually experienced, while 75% of the decrease can be attributed to lowered pregnancy rates among young women who were sexually experienced.³⁹ Furthermore, numerous studies found that comprehensive sex education which both encourages abstinence and teaches about effective contraceptives has been shown to delay sex, reduce the frequency of sex, and increase the use of condoms and other contraceptives.⁴⁰

To date, there have been few rigorous studies of abstinence-only curricula that have been shown to have an overall effect on sexual behavior or contraceptive use.⁴¹ In fact, in 2004, Representative Henry Waxman (D-CA) requested an investigation of the abstinence-only curricula, which produced troubling results.⁴² The report found that in 2003, over 80% of

the abstinence-only curricula used by over two-thirds of the largest federal abstinence initiative grantees of SPRANS (Special Programs of Regional and National Significance Community-Based Abstinence Education), contained false, misleading, or distorted information about reproductive health.⁴³ The report found numerous errors but the most significant were: false information about contraceptives, false information about the risks of abortion, scientific errors, and blatant blurring of religion and science.⁴⁴

Another indication of the weak position which abstinence-only proponents hold is that Columbia University researchers found that while virginity “pledge” programs helped some participants to delay sex, 88% still had premarital sex, and their rates of sexually transmitted diseases showed no statistically significant difference from those nonpledgers.⁴⁵ Additionally, virginity pledgers were also less likely to use contraception when they did have sex and were less likely to seek STD testing despite comparable infection rates.⁴⁶ The rational conclusion to be drawn from these findings is that if adolescents perceive obstacles to obtaining contraception and condoms, they are more likely to have negative outcomes to sexual activity.⁴⁷

The chief argument that advocates of abstinence-only programs have against abstinence-plus programs is that the program is contradictory and ultimately undermines its message by promoting both abstinence and encouraging protected sex. To the contrary, according to a 2001 report by Surgeon General David Satcher, which reviewed comprehensive sex education, found that “evidence gives strong support to the conclusion that providing information about contraception does not increase adolescent sexual activity...[and that] some of these evaluated programs increased condom use or contraceptive use more generally for adolescents who are sexually active.”⁴⁸ Therefore, no contradiction exists in the abstinence-plus message because teens are not encouraged to engage in sexual intercourse simply because information about contraceptives is made available. Abstinence is still promoted as the safest method of preventing teen pregnancy.

A compelling 1999 CDC survey found that the percentage of high school-aged youth reporting they had sexual intercourse was 50%, and 51% of seniors reported to be sexually active.⁴⁹ The harsh reality is that 50% of teens make the choice to have sex before they graduate from high school, so teens that are approached with a “sex only after marriage” concept will feel alienated because they no longer have that choice. It is unlikely that a sex education program or any curricula for that matter will successfully translate to teens if half of them feel alienated because of the type of message involved. The American Academy of Pediatrics suggest that because adolescent pregnancy and sexually transmitted diseases is a multifaceted problem, the most successful programs should include various approaches to the problem, such as abstinence promotion, contraception availability and sexuality education.⁵⁰ Abstinence-plus programs provide the necessary information that is lacking in abstinence-only programs by recognizing that although the primary prevention method is abstinence, there is a secondary prevention method in the form of contraceptives for teens that are at high risk (i.e. teens that are already sexually active and homosexuals).

There is no conclusive evidence regarding the effectiveness of abstinence-only programs, but there are conclusive and numerous published studies that show that abstinence-plus programs delay the onset of sexual behavior and reduce the risks of sexually transmitted diseases and HIV. The proponents of abstinence-only programs are correct when they

conclude that abstinence is the safest method in preventing pregnancy and sexually transmitted diseases. But one cannot stop there. The chilling Texas statistics will not allow us to do so. It is impossible to predict when adolescents will remain abstinent. Thus, responsible curricula will promote contraceptive use and relevant and accurate information about sexually transmitted diseases for those teens that choose to have sexual intercourse. As a service to Texas teens, we must choose the most effective programs that have shown the best evidence of success.⁵¹

The Cost of Censorship

The public health impact and the societal and individual costs of adolescent pregnancy are well known.⁵² Each child born to a teenager has attached to it significant costs. Since Texas has the nation's highest rate of teenage pregnancy, other options should be explored besides abstinence-only teaching. Furthermore, public school students are increasingly minorities and many are economically disadvantaged. Statistics show that these populations are at a higher risk for pregnancy and STDs; and thus, the group least able to bear the burden of restricted or limited education on the subject of sexuality and protection.

Constitutional Implications of Abstinence-Only programs

Religious Freedom

A. Historical Perspective

The First Amendment of the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.⁵³

The United States Supreme Court has interpreted this language as prohibiting the state's endorsement of one or more religions over any other. The abstinence-only program endorses the principles of Christian fundamentalism over other religions and over principles of atheism. By this action, the state is merging with the church in violation of the United States Constitution.

Those in support of the proposed abstinence-only curriculum would argue that America was founded upon Judeo-Christian principles and morality. That "Christian values" have found their way into many of our current laws. They would also argue that there is a commingling of state and religion that rejects any contention that they must or even are separate.

In rebuttal, it is important to note the historical significance our founders placed in the separation of these two "powers." The use of the word "power" to describe the church is deliberate. History has shown the political and social influence of the church. The Church of England was the establishment in 17th century England. The early English immigrants to this country were seeking religious freedom to worship without fear of persecution. English settlers found that freedom in the early colonies. In the Carolinas, Virginia, and Maryland the Church of England was recognized by law as the State Church. In Maryland, which had

passed through Catholic and Puritan hands, this church was supported by general taxation – public funds.⁵⁴

The Established Church had little footing in the North, outside of New York, where it was rapidly gaining. Pennsylvania and Rhode Island alone were all religions free. In New England, except Rhode Island, the Puritan or Congregational Church was practically the State Church. In fact, in several regions the church was attaining the type of political power that the Church of England possessed in England.⁵⁵

Thus the question is why did the founding fathers create this barrier between church and state? The answer is simple. The founding fathers recognized the danger in allowing the church to obtain controlling authority over values and policy, which would potentially lead to the same type of persecution and suppression that motivated them to leave mother England in the first place. As a result, the writers of the Constitution believed it essential to create an unquestionable separation between both “powers.” As articulated by Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”⁵⁶

B. Supreme Court Decisions

1. School Prayer

In the Supreme Court case of *Abington v. Schempp*, the Court held that the Establishment Clause prohibits state laws and practices requiring students at the opening of the school day to read verses from the Bible and recite the Lord’s Prayer.⁵⁷ The Court upheld the Establishment Clause of the First Amendment due to what they saw as “religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.”⁵⁸ The court stated in dicta,

The First Amendment requires the state to be a **neutral** in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.
(*emphasis added*)

It is this neutrality aspect that has been the centerpiece of modern Establishment Clause jurisprudence and which must be our focus. The concept was first promulgated in *Everson v. Board of Education*.⁵⁹ The Court stated that the “amendment require[d] the state to be a neutral in its relations with groups of religious believers and non-believers” alike. The state is “no more to be used so as to handicap religions than it is to favor them.”

It’s important to note that the *Abington* Court developed a two-prong test in these matters. The test was stated as follows: “What [is] the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.” In other words, to withstand the constitutional test, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.⁶⁰ In this respect, the abstinence-only program fails in both respects.

2. State Aid to Nonpublic Schools

The *Abington* test was further developed in the seminal case of *Lemon v. Kurtzman*.⁶¹ As a point of clarity, the Establishment Clause does not prohibit all forms of intermingling between church and state. In *Lemon*, the Court makes that point clear:

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.

The state may enact legislation which, for example, would provide aid to both public and parochial schools. However, engagements between religious organizations and the state will be scrutinized under the *Lemon* test. This test requires that the statute 1) have a secular legislative purpose, 2) its principal or primary effect must be one that neither advances nor inhibits religion, and 3) must not foster an excessive government entanglement with religion. In Chief Justice Burger's opinion, the Court held two states statutes unconstitutional under the religion clauses of the First Amendment, though promoting secular legislative purposes, since both involved excessive entanglement of state with church.⁶²

3. School Curriculum

Most pertinently, the Supreme Court has addressed the issue of the intrusion of religious principles in the curriculum of public education. In *Epperson v. Arkansas*, the Supreme Court held that Arkansas statutes forbidding the teaching of evolution in public schools and in colleges and universities supported in whole or in part by public funds are contrary to the freedom of religion mandate of the First Amendment and in violation of the Fourteenth Amendment.⁶³ The Court found the law to be in conflict with the establishment clause mandate of "neutrality." Acknowledging the broad academic freedom the state possesses in determining the breadth of public school curriculum, the Court determined that the narrower terms of the First Amendment provisions precluded the elimination of the teachings of evolution. In dicta, the court stated:

The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit...the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.

The Court delved into the controversial arena of sex education and family planning in the case of *Bowen v. Kendrick*.⁶⁴ *Bowen* paved the path to state-supported sex education programs, which prescribed for the exclusive teachings of abstinence-only-until-marriage over comprehensive sex education. In this case, a number of plaintiffs, including members of religious institutions, sought to have the Adolescent Family Life Act (AFLA) invalidated as an unconstitutional establishment of religion.⁶⁵

The District Court held the AFLA unconstitutional both on its face and as applied. In applying *Lemon's* three-prong test, Chief Justice Rehnquist delivered the opinion of the U.S. Supreme Court that Congress had a legitimate secular purpose in reducing or eliminating the social problems caused by teenage pregnancy.⁶⁶ The Supreme Court found the second *Lemon* prong more difficult to resolve, but ultimately found that the Act did not have the primary effect of advancing religion. They reasoned that there was no requirement that grantees be affiliated with any religious organization, and the services provided under the Act were not religious in character.⁶⁷ As to the third *Lemon* prong, the Supreme Court held that the Act did not create an excessive entanglement of church and state. Their rational was

that there was no reason to assume that religious organizations who receive AFLA grants are “pervasively sectarian” in the same sense as parochial schools have been held to be in previous cases before the Court.⁶⁸

Although the AFLA was found to be constitutional “on its face”, the Supreme Court remanded the case to the District Court to make a determination whether the Act “as applied” violates the Establishment Clause. They could not ignore the District Court’s findings that AFLA aid was given to “pervasively sectarian” religious organizations and that some AFLA grantees impermissibly used AFLA funds.⁶⁹ In this sense, the Supreme Court recognized that even those measures adopted by the state as legitimate governmental interests may nonetheless cross the line of permissible church-state activity, if the challenged statute or program “as applied” impermissibly advances religion.

C. Premise of a Constitutional Challenge

1. “Science” or Fiction

A recent study of abstinence-only sex education programs in Texas revealed that the programs have had little impact on changing Texas teenagers’ behavior.⁷⁰ Of the more than 29 junior and high schools surveyed, the study found that 23% of ninth-grade girls reported having had sexual intercourse before they received abstinence education. However, the study showed that 28% of those same girls reported having sexual intercourse after receiving abstinence education.⁷¹ Additionally, the study showed that the percentage of ninth-grade boys having sexual intercourse remained unchanged before and after abstinence education.⁷² These findings come on the cusp of the Bush Administration’s plans to boost federal funding for abstinence-only sex education programs by an additional \$30 million to \$135 million in 2005.⁷³ Even proponents of abstinence-only programs acknowledge the problems with their effectiveness.⁷⁴

Representative Henry Waxman (D-Calif.) conducted a study which found that out of the 13 most commonly used abstinence-only sex education curricula, 11 contained unproven claims, subjective conclusions or outright falsehoods regarding reproductive health, gender traits and when life begins.⁷⁵ House researchers limited their study to programs funded by Special Programs of Regional and National Significance (SPRANS), which received the bulk of the \$138 million in federal monies budgeted for grants to abstinence-only programs for fiscal year 2004. SPRANS programs received \$75 million of the available grants in 2004 for federally-funded abstinence education. To qualify for a SPRANS grant, the curriculum cannot teach any method other than abstinence to reduce the risk of pregnancy and can only mention contraceptives in order to explain their rates of failure.

These curricula were used in 25 states by state health departments, school districts, hospitals, and community-based organizations. The misrepresentations and errors ranged from inaccurate statistics about abortion-related hazards to misstatements of scientific fact. Some of the claims made by the programs include: that a fetus at 43 days gestation is a “thinking person,” that a boy or man can impregnate a woman or girl by touching her genitals, that women who undergo abortion are “more prone to suicide,” that 10% of women who undergo abortion become sterile, that 50% of gay male teenagers are HIV-positive, that HIV can be spread through sweat and tears and that condoms fail to prevent sexually transmitted diseases 31% of the time when used during heterosexual intercourse.⁷⁶ Therefore, not only

is there evidence that the programs are ineffective or have “little impact,”--at best--they also perpetuate the promulgation of misinformation among children.

To further emphasize this point, *The Houston Chronicle* reported last year that one abstinence-only program in Texas was teaching middle school students that a teenage girl’s cervix is more vulnerable to certain STD’s than the cervix of an adult woman and that there is little evidence to support the theory that condoms protect against any STD other than HIV.⁷⁷ Too many Texas abstinence educators have taken the stance that kids should be limited in their options, which comes at the expense of valuable information to make responsible decisions. Unfortunately, these programs do not prepare those students who will invariably search for answers in a manner which will pose a substantial risk to their health and safety; simply as a result of not receiving the essential information to acting not only appropriately, but safely.

2. Bowen Revisited

The plain unequivocal fact is that there has been no scientific evidence proving that abstinence-only sex education either reduces sexual activity among teens or reduces the rate of teenage pregnancies and STD transmissions.⁷⁸ On the contrary, there is ample evidence that comprehensive sex education curriculum are notably successive.⁷⁹ Given these new and existing studies indicating the ineffectiveness of abstinence-only programs, the question which begs to ask is, “If the support for abstinence-only programs is based on reducing the social and economic consequences of adolescent sexual activity, but studies prove these programs minimally effective at best, what is the rationale for their continued existence?” The reason for continued adherence to these programs is purely sectarian. It provides a method by which religious organizations may advance their ideology, sponsored in whole by the state.

The second prong of the *Lemon* test asks if the primary effect is the advancement of religion. The *Bowen* Court noted that the services provided under the AFLA were not religious in character, although it did coincide with the religious dogma.⁸⁰ The Court reasoned that the Act allowed both religious and nonreligious organizations to participate in the program, and therefore maintained a “course of neutrality among religions, and between religion and non-religion.”⁸¹ However, Justice O’Connor recognized that “using religious organizations to advance the secular goals of the AFLA, without thereby permitting religious indoctrination is inevitably more difficult than in other projects.”⁸² The risk of creating a “symbolic link”⁸³ between government and state can become more pervasive and severe if not properly monitored.

As the abstinence-only programs stand today, they 1) impermissibly advance religion in violation of the Establishment Clause and are 2) unconstitutionally applied in violation of the Establishment Clause. The overwhelming breadth of evidence conveys two points. First, comprehensive sex education programs are effective. Second, abstinence-only programs are ineffective for their stated goal. The federal government spends an unconscionable amount of taxpayer dollars on a program that has consistently proven to be nothing more than wishful thinking. Once it’s shown that the secular purposes are nonexistent or ineffective, only the sectarian purposes remain; in clear contradiction to the Establishment Clause.

Moreover, even if the programs still survive the *Lemon* test as they did in *Bowen*; they have been unconstitutionally applied in violation of the First Amendment. Public funds are being used to promote religious doctrines. Several studies performed by private organizations and the government illustrates the misinformation given to students in abstinence-only programs. Reliable and important information is replaced with religious teachings at an extraordinary degree. To continue state funding of these programs is analogous to the deletion of the First Amendment from our Constitution. The imposition of an abstinence-only program does not pass the *Abington* test. It widens the permissible use of coincidental religious philosophy in an educational context to broaden a child's overall understanding of the world to an impermissible state imposition of religious values. And an abstinence-only program would constitute just that, state endorsement of Christianity. Its purpose is not to protect, but rather to restrict based on the religious beliefs of those who participate in one particular faith – Christianity. In effect, impermissible state-authored religious principles are being cloaked or disguised as an exercise in permissible state discretion in implementing public school curriculum.

Taking a retrospective look at Supreme Court cases upholding religion in whatever form in the public school forum, one concept is dominant among all – neutrality. In order to achieve the government's stated goal of reducing adolescent pregnancy and exposure to sexually transmitted diseases--and pass constitutional muster--abstinence must be taught in concert with all other proven protection measures. The current applications of the programs fail to adhere to the neutrality theme consistent among court decisions.

There is a fine line between the distinction of separation of church and state. The abstinence-only health curriculum leaps over that line by allowing the government, through its agent the SBOE, to use its power to advance the religious goals which may be well-founded ideologically, but are ineffective practically and impermissible constitutionally.

Conclusion

The Texas Legislature should not approve abstinence-only health textbooks nor abstinence-only education programs. To do so, disregards available scientific data that shows abstinence-plus programs to be effective and abstinence-only programs to be ineffective. Texas is obligated to adopt health science education textbooks and programs that fully inform the student about abstinence as well as other preventive measures against unwanted pregnancy and sexually transmitted diseases.

Due to the growing high risk Texas public school population, by adopting abstinence-only education curricula and texts, Texas will place the greatest burden from lack of information on the people least able to carry it. The cost of ignorance is too high for the State and its children to bear.⁸⁴

¹ Kimberly Reeves, *No Sex, Please, We're Texas*, AUSTIN CHRON. July 9, 2004, available at http://www.austinchronicle.com/issues/dispatch/2004-07-09/pols_naked4.html.

² See Kristen S. Rufo, *Public Policy vs. Parent Policy: States battle over whether public schools can provide condoms to minors without parental consent*, 13 N.Y.L. Sch. J. Hum. Rts. 589 (Spg. 1997).

³ U.S. CONST. amend. I.

⁴ For a discussion of theories of recovery including misrepresentation, *see* Thomas G. Eschweiler, *Educational Malpractice in Sex Education*, 49 SMU L. Rev. 101, (1995).

⁵ *Id.*

⁶ TEX. EDUC. CODE § 31.003 (2004).

⁷ TEX. EDUC. CODE § 4.001 (2004).

⁸ TEX. EDUC. CODE § 28.001 (2004).

⁹ *See* Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. Cal. Rev. L. & Women's Stud. 265 (Spring 2000).

¹⁰ Ann M. Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 Mich. J. Gender & L. 121 (2002).

¹¹ *Id.* at 121. Also *see* www.webpan.com/disinclair/education.html citing the National Institute of Child Health and Human Development, as reported on Salon, *Abstinence Education*, stating that to the degree it works at all, it works by encouraging a sort of virginity chic-- students abstain not due to any great philosophical conversion or health-based pragmatism, but because they have been introduced to the notion, reinforced by peer pressure, that it is "cool" to do so. This superficial commitment delays incidence of first intercourse on the average of eighteen months. While this may initially seem a somewhat impressive figure, the benefits of this extra year and a half of virginity pale next to the fact that, due to the active encouragement of ignorance on the subjects of contraception and practical sexual hygiene in abstinence-only programs, incidents of first intercourse for the programs' alumni are dramatically more likely to be incidents of unprotected, unsafe sex. Furthermore, abstinence programs tend to encourage the old-fashioned notion of "in virgo intacta," defining virginity as abstention from vaginal sex-- there is much anecdotal evidence supporting the notion that some teens in Abstinence Education programs displace vaginal intercourse with oral or anal sex, neither of which is necessarily safe from a disease prevention standpoint.

¹² Douglas Kirby, The National Campaign, *Emerging Answers: Research Findings on Programs to Reduce Teen Pregnancy*, 5, (May 2001) available at <http://www.teenpregnancy.org/resources/data/pdf/emersum.pdf>.

¹³ *Id.* at 8.

¹⁴ Chris Collins et al, AIDS Policy Research Ctr. & Ctr. for AIDS Prevention Studies, *Abstinence-only vs. Comprehensive Sex Education* (March 2002) available at <http://ari.ucsf.edu/pdf/abstinence.pdf>.

¹⁵ Julie Jones, *Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075, 1076 (2002).

¹⁶ Kirby, *supra* note 11, at 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ No New Money, *Brief History of Abstinence-Only-Until-Marriage Education*, at <http://www.nonewmoney.org/history.htm>.

²⁰ *Id.*, stating that the U.S. Office of Population Affairs began administering a chastity program in 1981.

²¹ Rebecca Schleifer et al, Human Rights Watch, *Ignorance Only: HIV/AIDS, Human Rights and Federally Funded Abstinence-Only Programs in the United States; Texas: A Case Study* (Sept. 2002) available at <http://www.hrw.org/reports/2002/usa0902/USA0902.pdf>. *See also* NARAL Foundation, *Federal Abstinence-only Education: Funding Misinformation*, at http://www.naral.org/facts/abstinence_only_federal.cfm.

²² *Id.*

²³ *Id.*

²⁴ *Id.* *See also* Sex & Censorship Committee, National Coalition Against Censorship, *Abstinence-Only Education: Why First Amendment Supporters Should Oppose It*, at www.vakkur.com/psy/sex_abstinence_only.htm "Every

reputable sexuality education organization in the U.S., as well as prominent health organizations including the American Medical Association, have denounced abstinence-only sexuality education. And a 1997 consensus statement from the National Institutes of Health concluded that legislation discouraging condom use on the ground that condoms are ineffective "places policy in direct conflict with science because it ignores overwhelming evidence...Abstinence-only programs cannot be justified in the face of effective programs and given the fact that we face an international emergency in the AIDS epidemic."

²⁵ *Id.*

²⁶ See Douglas Kirby, National Campaign to Prevent Teen Pregnancy, *Do Abstinence-only Programs Delay the Initiation of Sex Among Young People and Reduce Teen Pregnancy?* (2002) citing 9 out of 10 abstinence-only programs as being wholly unsuccessful with the remaining one being substantially unsuccessful even though all ten have been described as successful. See also Kirby, *supra*, note 11, identifying numerous successful abstinence-plus programs including "Reducing the Risk", "Safer Choices", "Becoming A Responsible Teen" and at least four others.

²⁷ See Smith, *supra* note 9.

²⁸ Kirby, *supra* note 11, at 7.

²⁹ *Id.* at 7.

³⁰ *Id.* at 7.

³¹ U.S. H.R. COMM. ON GOV. REFORM, Minority Staff Special Investigations Div., *The Content of Federally Funded Abstinence-Only Education Programs* 1 (Comm. Print Dec. 2004) [hereinafter *Hearings*].

³² *Id.*

³³ Melissa Pardue, National Review Online, *Abstinence 101*, at <http://www.nationalreview.com/comment/pardue200410190842.asp> (Oct. 19, 2004).

³⁴ Sex & Censorship Comm., Nat'l Coalition Against Censorship, Planned Parenthood, *Abstinence-Only "Sex" Education*, at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/teensexualhealth/fact-abstinence-education.xml> (Current as of Jan. 2005).

³⁵ See Advocates for Youth, *Science or Politics? George W. Bush and the Future of Sexuality Education in the United States*, available at http://www.advocatesforyouth.org/publications/transitions1203_6.htm.

³⁶ Collins, *supra* note 13, at 4.

³⁷ *Id.* at 9.

³⁸ *Id.* at 12.

³⁹ Simson & Sussman, *supra* note 9 and see Kirby, *supra* note 12.

⁴⁰ Eschweiler, *supra* note , at 4.

⁴¹ Hearings, *supra* note 31.

⁴² *Id.* at i (Executive Summary).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 4.

⁴⁶ Hannah Bruckner and Peter Bearman, *Virginity Pledgers More Likely to Engage in Risky Sexual Behavior*, *Journal of Adolescent Health*, March 18, 2005 and at www.medicalnewstoday.com/medicalnews.php?, but see Robert Rector and Kirk Johnson, *Virginity Pledgers Have Lower STD Rates and Engage in Fewer Risky Sexual Behaviors*, www.heritage.org, June 14, 2005.

⁴⁷ *Welfare Reform: A Review of Abstinence Education and Transitional Medical Assistance. Hearing Before the Subcomm. on Health of the House Comm. on Energy & Commerce*, 107th Cong. 2 (2002) (statement by Am. Acad. of Pediatrics).

⁴⁸ U.S. Surgeon General David Satcher, *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior*, Rockville, MD office of the Surgeon General, 2001, available at www.sureongeneral.gov/library/sexualhealth/default.htm, last visited July 7, 2005.

⁴⁹ See Virginia Noland et al., *Sex Education, Access to Contraception and Rates of Teen Pregnancy: A Comparison of the Federal Republic of Germany and the United States*, *The International Electronic Journal of Health Education*, available at [www.aahperd.org/icjhe/template.cfm?temp\[late=current/jan120](http://www.aahperd.org/icjhe/template.cfm?temp[late=current/jan120), last visited July 7, 2005.

⁵⁰ Hearing, *supra* note 47.

⁵¹ See Joanne Csete, *Abstinence and Ignorance: Dismissing Science in the Fight Against AIDS*, 31 Fall Hum. Rts. 7 (2004).

⁵² Michael J. Fucci, *Educating Our Future: An Analysis of Sex Education in the Classroom*, 2000 B.Y.U. Educ. & L.J. 91 (2000); and see Sex & Censorship Committee, National Coalition Against Censorship *supra* note 3, stating that "the U.S. has the highest rate of teen pregnancy in the developed world, and American adolescents are contracting HIV faster than almost any other demographic group. The teen pregnancy rate in the U.S. is at least twice that in Canada, England, France, and Sweden, and 10 times that in the Netherlands. Experts cite restrictions on teens' access to comprehensive sexuality education, contraception, and condoms in the U.S., along with the widespread American attitude that a healthy adolescence should exclude sex. By contrast, the "European approach to teenage sexual activity, expressed in the form of widespread provision of confidential and accessible contraceptive services to adolescents, is . . . a central factor in explaining the more rapid declines in teenage childbearing in northern and western European countries."

⁵³ U.S. CONST. art. I.

⁵⁴ Henry W. Elson, *History of the United States of America*, (Herman V. Ames, ed., The MacMillan Company 1904).

⁵⁵ *Id.*

⁵⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

⁵⁷ *Abington v. Schempp*, 374 U.S. 203 (1963).

⁵⁸ *Id.* at 225.

⁵⁹ *Everson*, 330 U.S. at 1.

⁶⁰ *Abington*, 374 U.S. at 222.

⁶¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁶² *Id.* The Rhode Island program consisted of salary supplements paid to teachers of secular subjects in nonpublic schools. The Court held that the statute operated to the benefit of parochial schools constituting an integral part of the religious mission of the church and that the recipient teachers were under religious control and discipline. Furthermore, the statute involved the necessity of comprehensive and continuing state surveillance to insure obedience to restrictions as to the courses which could be taught and the materials which could be used. The Pennsylvania program involved reimbursement of nonpublic schools for teachers' salaries, textbooks, and instructional materials used in the teaching of specific secular subjects. The Court found the statute provided direct aid to church schools and developed an intimate and continuing relationship arising from the state's post audit power to inspect and evaluate schools' financial records and to determine which expenditures were religious and which were secular, and that both posed a danger of divisive political activity and the possibility of progression leading toward the establishment of state churches and state religion.

⁶³ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁶⁴ *Bowen v. Kendrick*, 487 U.S. 589 (1988).

⁶⁵ See Donald L. Drakeman, *Church-State Constitutional Issues: Making Sense of the Establishment Clause* 35 (Greenwood Press, 1991).

⁶⁶ *Id.*

⁶⁷ *Epperson*, 393 U.S. at 97.

⁶⁸ *Id.* Justices Kennedy and Scalia, in a concurring opinion, stated that even if the aid flowed to a pervasively sectarian institution, the act would still withstand constitutional challenge. This position, however, has not been adopted by a majority of the Court.

⁶⁹ *Kendrick v. Bowen*, 657 F.Supp. 1547, 1564-66 (D.D.C. 1987).

⁷⁰ The Henry J. Kaiser Family Found., *Abstinence-Only Sex Education Programs Have Little Effect on Texas Teenagers' Behavior; Study Says* at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=27894. The study was funded by the Texas Department of Health and was presented to state officials during the last week of January 2005. Legislators should be particularly interested whether state funds are being efficiently appropriated to legitimate programs with a proven record of effectiveness.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Fiscal Year 2005 Budget Mirrors State of the Union Promise, available at www.siecus.org/policy/pupdates/pdate0089.html, last visited July 7, 2005.

⁷⁴ The Henry J. Kaiser Family Found., *supra* note 70. Mike Young who helped develop the abstinence-only program "Sex Can Wait", admits that there are a "bunch" of different abstinence curricula out there, but they have no way of knowing whether they are effective.

⁷⁵ *Hearings*, *supra* note 30, at 3.

⁷⁶ *Id.*

⁷⁷ www.sacurrent.com/site/news.cfm?newsid=7028568&BRD=231.

⁷⁸ See STAFF OF HOUSE COMM. ON GOV'T REFORM, 108th CONG., POLITICS AND SCIENCE IN THE BUSH ADMINISTRATION 4 (Comm. Print 2003), available at http://www.house.gov/reform/min/politicsandscience/pdfs/pdf_politics_and_science_rep.pdf (citing D. Kirby, National Campaign to Prevent Teen Pregnancy, *Emerging Answers: Research Findings on Programs to Reduce Teen Pregnancy* 88 (May 2001)).

⁷⁹ *Id.*

⁸⁰ *Bowen*, 487 U.S. at 605.

⁸¹ *Id.* at 607.

⁸² *Id.* at 623.

⁸³ The District Court coined this term in ruling that the AFLA unconstitutionally advanced religion in violation of the second prong of the *Lemon* test.

⁸⁴ Elizabeth Arndorfer, *The Constitution and Our Children in the New Millennium*, 27 *Hastings Const. L. Q.* 585 (2000) where author reports that a randomized controlled study of African-American adolescents found longer term benefits from a safer sex intervention program than from an abstinence intervention.

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TMSL – TSU
3100 Cleburne, Box #1156
Houston, TX 77004
713-313-1139
713-313-1049 (fax)
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