NOTE
H.B. 189: TEACHING CONTRACEPTION IN UTAH'S ABSTINENCE-ONLY PUBLIC SCHOOLS

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INTRODUCTION

Abstinence is 100% effective at preventing the spread of debilitating sexually transmitted diseases (STDs)[1] and keeping the mothers of unwanted children out of abortion clinics. This conservative social slogan acts as the cornerstone of the sex education curricula of Utah public schools. Faced with increasing infection rates of gonorrhea and chlamydia among Utah adolescents, however, State Representative Lynn N. Hemingway introduced House Bill 189[2] in part to increase the information about contraception included in public school curricula.[3]

Public schools principally function to foster the knowledge necessary to contribute to society and inculcate the youth with the community's values.[4] Consistent with this function, H.R. 189 proposes allowing more information regarding sexual health while not undermining the values reflected in the current sex education program. Specifically, H.R. 189 proposes three changes to the current statute: first, it requires the inclusion of the Utah Department of Health in evaluating instructional materials;[5] second, it statutorily codifies "medically

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[*1] Abstinence does not totally prevent the spread of illnesses categorized as STDs. Transfer of bodily fluids such as blood transfusions may lead to infections. This paper does not address other methods of STD transfer.

[2] H.R. 189, 58th Leg., 2009 Gen. Sess. ll. 79-84 (Utah 2009). For this paper all pincites will be made to the applicable line numbers on the amended bill available at the Utah State Legislature Homepage, http://le.utah.gov/~2009/bills/hbillamd/hb0189.pdf (last visited Dec. 18, 2009) [hereinafter H.R. 189].

[3] Rep. Hemingway introduced H.R. 189 into the House Health and Human Services Standing Committee on February 25, 2009. Following a short debate, this committee amended the bill and recommended it be held to the House Rules Committee. To become law, a bill must be reviewed by the appropriate standing committee, after which the bill "is returned to the full house with a committee report." *See* Utah State Legislature, *How an Idea Becomes a Law,* http://www.le.state.ut.us/documents/aboutthelegislature/billtolaw.htm (last visited Oct. 21, 2009).

[4] *See* Howard O. Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1, 58-59 (1983) (summarizing several sources, *inter alia* Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976), to state the two purposes of the educational forum are "transmit[ting] acquired knowledge" and "value inculcation").

[5] H.R.189, *supra* note 2, at l. 47.

accurate" information;[6] and finally, it provides succinct language allowing teachers to more completely address contraception, eliminating the prohibition on "the advocacy or encouragement of the use of contraceptive methods or devices. . . ."[7]

Voting against H.R. 189 would likely result from the Utah Legislature mistakenly prioritizing the inculcation of community values above education that would reverse STD infection trends. To support this assertion, this paper analyzes the changes proposed by H.R. 189 and their potential impact. Section II outlines the current statute, § 53A-13-101 of the Utah Code, and the resulting curriculum; Section III presents potential problems with sex education curricula; Section IV discusses the changes H.R. 189 will statutorily impose; and Section V presents arguments in favor of enacting H.R. 189.

Generally, in sex education debates, parties either advocate no sex education in public school and abstinence-only programs (AOP), or comprehensive sex education programs.[8] Throughout this paper, the underlying ideology of a source will only be addressed when it is particularly relevant.

I. THE CURRENT STATUTE AND RESULTING CURRICULUM

The Utah Constitution mandates the existence of public schools[9] and authorizes the State Board of Education (Board) to assert "general control" and "supervision" over the schools.[10] In exercising discretion, the Board is able to "[establish] minimum standards related to curriculum and instruction requirements . . ." and is granted the authority to "implement a core curriculum" through "consultation with local school boards, school superintendents, teachers, employers, and parents . . . ."[11] There are, however, sections of the public school curriculum not subject to the full discretion of the Board.[12] One of these subjects is sex education. The Utah Legislature provides a strict policy for the Board to follow when determining the sex education program.[13] This limited discretion reflects the

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[6] *Id.* at ll. 94-98. The definition is included *infra* Section III.

[7] *Id.* at ll. 59-60 (removing the prohibition of contraceptive advocacy).

[8] There is some variation in the definitions of these terms, but "Abstinence Only" is defined Congressionally ("abstinence education" is used) by the Social Security Act 42 U.S.C.A. §§ 710(b)(2)(A)−(H) (West 2003). The term "comprehensive sexual education" is defined academically as sexual education that "emphasizes the benefits of abstinence while also teaching about contraception and disease-prevention methods . . . ." *See* Naomi Starkman & Nicole Rajani, *The Case for Comprehensive Sex Education*, 16 AIDS PATIENT CARE & STDS 313, 313 (2002).

[9] *See* UTAH CONST. art 10, § 1 (West 2009).

[10] *See* UTAH CONST. art. 10, § 3.

[11] *See* UTAH CODE ANN. §§ 53A-1-402.6 (West 2009).

[12] *See, e.g.*, UTAH CODE ANN. § 53A-13-201 (West 2009) (legislating requirements of driver's education); § 53A-13-209.

[13] *See generally* UTAH CODE ANN. § 53A-13-101 (West 2009) (establishing specific guidelines for items such as the adoption of instructional materials, appropriate subjects to be covered, and compliance with parental consent rules).

controversial nature of the relationship between human sexuality and numerous moral and social norms.[14]

Under § 53A-13-101, Utah public schools teach abstinence "before marriage" as a principal focus of the sex education curriculum.[15] Each local school district may choose to either adopt the instructional materials recommended by the Board, and commented on by the State Instructional Materials Commission, or adopt more conservative materials as provided by state board rule.[16] Before any classroom discussion, the school must send notice to parents outlining material containing sexual content, and obtain parental consent before adolescents may attend these classes.[17]

Specifically, under § 53A-13-101, one of the objectives is that students will be able to "[i]dentify common sexually transmitted diseases . . ." and "[r]ecognize symptoms, [and] modes of transmission . . . ."[18] The Board also lists as one of its objectives that students will "[u]nderstand . . . the challenges associated with teen and/or unintended pregnancies."[19] Throughout the Board-recommended core curriculum, the Board mentions the statutory prohibition of contraceptive advocacy[20] and reiterates the need to "[d]iscuss the advantages of abstinence over other methods in preventing sexually transmitted diseases."[21] However, the recommended core curriculum also has as one of its teaching objectives, "means of prevention of early and/or unintended pregnancy and sexually transmitted diseases . . ." including "contraception/condom use" as a means to prevent the transfer of STDs and unintended pregnancy.[22]

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[14] *See* Peter J. Jenkins, *Morality and Public School Speech: Balancing the Rights of Students, Parents, and Communities,* 2008 BYU L. REV. 593, 601-02 (2008) (stating that "so long as majorities respect the constitutional rights of students and parents, they should be free to craft educational curricula in light of community values.").

[15] § 53A-13-101 meets the federal definition of an "abstinence only" program. *See* the Social Security Act 42 U.S.C.A. §§ 710(b)(2)(A)−(H) (West 2003).

[16] *See* UTAH CODE ANN. §§ 53A-13-101 ¶¶ 1(c) (i)−(iii) (West 2009); UTAH ADMIN. CODE r. 277-474-6 (2009). The option of "abstinence only" school districts discussed below is allowable under the code sections cited here.

[17] *See* UTAH CODE ANN. § 53A-13-101 ¶ 3(a) (West 2009); *see also* UTAH CODE ANN. §§ 76-7-322 to -323 (West 2009) (requiring parental consent before any funds from the state or political subdivisions from the state can be used for providing contraceptive or abortion services to minor children).

[18] *See* UTAH STATE OFFICE OF EDUCATION, [Proposed] SECONDARY HEALTH EDUCATION CORE CURRICULUM 12 (2009), http://www.schools.utah.gov/curr/pe_health/documents/Secondary%20Health%20Core%20Master.pdf.

[19] *Id.* at 19.

[20] *Id.* at 4, 12, 18.

[21] *Id.* at 12, 18.

[22] *Id.* at 18-19.

II. POTENTIAL PROBLEMS WITH SEX EDUCATION CURRICULA

Generally, two indicators reveal problems of public school curricula. The first is through statistical data (i.e., STD infection rates, teen pregnancy rates, teen abortion rates, etc) showing the ineffective results of programs. The second is through lawsuits challenging whether the statute conforms to the constitutional limitations imposed on public school curricula. Each is presented in more detail below.

A. Utah STD Infection Rates, Teen Pregnancy Rates, and Teen Abortion

One issue that arises in sex education debates is how to determine the effectiveness of sex education programs, particularly where "there does not appear to be a correlation between sexually transmitted disease infection rates in a state and that state's requirement for sexually transmitted disease prevention education."[23] Utah's gonorrhea and chlamydia infection data, teen pregnancy data, and teen abortion data are presented here because it is available, dependable, and relied upon by advocates both for and against H.R. 189.

Cases of chlamydia in Utah increased nearly 50% between 2003 and 2007.[24] Averaged over this period, women ages fifteen to twenty-four accounted for 52% of all reported chlamydia cases; by 2007, the portion increased to 72%.[25] In 2007, the districts with the highest rates[26] of chlamydia infection were Salt Lake Valley Health District followed by Weber-Morgan Health District.[27] The health districts with the lowest rates of infection were the Utah Health District and Central Health District.[28]

The cases of gonorrhea rose 99% in Utah between 2003 and 2007.[29] Among females during this period, gonorrhea cases increased 125%.[30] Of this increase,

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[23] *See, e.g.*, David Rigsby, *Sex Education in Schools*, 7 GEO. J. GENDER & L. 895, 901 (2006).

[24] UTAH DEPT. OF HEALTH & BUREAU OF COMMUNICABLE DISEASE CONTROL, CHLAMYDIA AND GONORRHEA EPIDEMIOLOGICAL PROFILE: UTAH 2003-2007, at 2 (2009), http://health.utah.gov/cdc/hivsurveillance/std%20docs/STD%20Epi%20Profile.pdf. It is important to note that "the increase of chlamydia cases in Utah . . . is partly due to increased testing."

[25] *Id.* at 9.

[26] *See id.* at vii. A "case" is a single reported infection and a "rate" is the number of cases "per 100,000 persons" that are normalized by the population. *Id.*

[27] *Id.* at 5. Salt Lake Valley also had the highest number of chlamydia infection cases with 3,239.

[28] *Id.*

[29] *Id.* at 16. As with chlamydia, better methods of testing and increased testing may have contributed to this increase.

[30] *Id.* at 25.

64% were in women between the ages of fifteen to twenty-four.[31] In 2007, the districts with the highest rates of gonorrhea infection were Salt Lake Valley Health District followed by Weber-Morgan Health District.[32] The districts with the lowest infection rates were Tri-County Health District and Wasatch Health District, but 58% of all districts reported an infection rate of less than ten per 100,000 persons.[33]

The teen birth rate in Utah has decreased 36% since 1991.[34] However, there was a slight increase between 2005 and 2006.[35] Even with the increase, the teen birth rate was below the national average.[36] This positive result does not extend to Utah Hispanic populations where the teen birth rate was more than double the national average.[37] In 2004, "the public cost of teen births in Utah was at least $63 million. . . ."[38] Nonetheless, Utah's success in decreasing the teen birth rate "saved an estimated $42 million dollars in 2004 alone."[39]

The final statistic examined is the teen abortion rate. Utah has the lowest teen abortion rate in the country.[40] While the abortion rate in Utah has decreased by more than 50% from 1988 to 2000,[41] 650 adolescents, nineteen and younger, still chose to have an abortion in 2000.[42]

The recent rise in cases of chlamydia and gonorrhea amongst Utah teens together with the substantial number of teen births and abortions is evidence that the current school curriculum is not presenting enough information to prevent STD transfer and teen pregnancy.

B. Legal Challenges to Curricula

There have been relatively few legal challenges to sex education programs. From a broader perspective, however, challenges to public school curricula draw

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[31] *Id.*

[32] *Id.* at 20. Salt Lake Valley also had the highest number of gonorrhea cases with 552.

[33] *Id.* The districts with an infection rate of less than ten per every 100,000 persons included: Bear River, Central, Southeastern, Southwest, Tri-County, Utah, and Wasatch.

[34] *See* News Release, Utah Department of Health, Utah's Teen Birth Rate Up Slightly 1 (May 6, 2008), http://health.utah.gov/pio/nr/2008/050608-TeenBirthRate.pdf.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 1-2.

[38] THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, BY THE NUMBERS: THE PUBLIC COSTS OF TEEN CHILDBEARING IN UTAH (2006), http://www.thenationalcampaign.org/costs/pdf/states/utah/onepager.pdf.

[39] *Id.*

[40] Guttmacher Institute, *U.S. Teenage Pregnancy Statistics: National and State Trends and Trends by Race and Ethnicity* 11, tbl.3.1 (2006), *available at* http://www.guttmacher.org/pubs/2006/09/12/USTPstats.pdf.

[41] *Id.* at 13, tbl.3.3.

[42] *Id.* at 12, tbl.3.2 (This number could be 640. After reviewing the data, the Institute may have made an addition or round-off error here).

on the following constitutional principles:[43] (1) violation of the First Amendment Religion Clauses;[44] (2) constitutional challenges to the freedom of teacher expression;[45] and (3) challenges to a student's right to speak or the "right to learn."[46] Inherent in these conflicts is the balance between a state's educational or political interests and individual rights.[47]

Relevant case law offers the following conclusive statements: (1) "The State may establish its curriculum either by law or by delegation of its authority to the local school boards and communities";[48] (2) the free speech rights of teachers may be limited to the school curriculum;[49] (3) when the program in question is non-compulsory, parents have no legitimate cause of action against schools implementing that program because coercion is required for violation of the First Amendment Religion Clauses.[50] In conclusion, a statute with an opt-out provision and clear discernable limits on teacher expression created by the Board would prevail against common constitutional challenges.

III. THE CHANGES H.R. 189 WILL STATUTORILY IMPOSE

H.R. 189 includes proposals to modify three sections of the existing statute. First, H.R. 189 requires involvement of the Department of Health in evaluating instructional materials.[51] Under § 53A-13-101, the legislature required the Board to consider evaluations by the State Instructional Materials Commission and the

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[43] *See generally* Jenkins, *supra* note 14, at 597-602 (discussing various "[c]onstitutional [c]onstraints" that limit actions that schools can take); Hunter, *supra* note 4, at 14-15 (mentioning some challenges to school curricula similar to the categories used here).

[44] *See, e.g.,* Engel v. Vitale, 370 U.S. 421, 424-25 (1962) (holding recitation of an official prayer violated the Establishment Clause); "First Amendment Religion Clauses" includes the Establishment and Free Exercise Clauses. *See* U.S. CONST. amend. I, cl. 1-2.

[45] *See* Epperson v. Arkansas, 393 U.S. 97, 100 (1968); Mailloux v. Kiley, 323 F. Supp. 1387, 1390-93 (D. Mass. 1971) *aff'd* 448 F.2d 1243 (1st Cir. 1971) (finding teachers able to exercise some individual freedom in their teaching with regards to subject matter in the first case, and teaching manner in the latter).

[46] *See, e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (holding non-disruptive, "pure speech" by students is related to "primary First Amendment rights" and is constitutionally protected in public schools). The "right to hear" or "right to know" is discussed in Hunter, *supra* note 4, at 34 (citing *inter alia* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) for judicial origins of this concept).

[47] *See* Hunter, *supra* note 4, at 77-78. *See, e.g.,* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1068-69 (6th Cir. 1987).

[48] Mercer v. Michigan State Bd. of Educ. et al., 379 F. Supp. 580, 585 (S. Div. Mich. 1974) (citing *Epperson*, 393 U.S. at 104).

[49] *See, e.g., id.*

[50] *See, e.g.,* Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. App. 3d 1, 22 (Cal. Ct. App. 1975) (finding no Establishment Clause violation because the parents could not meet the coercion requirement).

[51] *See* H.R. 189, *supra* note 2, at l. 47.

Board could request input from the Department of Health.[52] However, with the inclusion of more information concerning contraceptives, STDs, and pregnancy this requirement ensures the accuracy of the information provided.

A second change proposed by H.R. 189 is to statutorily define "medically accurate" as:

> mean[ing] verified or supported by research conducted in compliance with scientific methods and published in peer-reviewed journals, where appropriate, and recognized as accurate and objective by professional organizations and agencies with expertise in the relevant field, including the federal Centers for Disease Control and Prevention and the American College of Obstetricians and Gynecologists. [53]

This is a minor change because the Utah Administrative Code similarly defines "medically accurate."[54] Again, the change here is the inclusion of the "federal Centers for Disease Control and Prevention and the American College of Obstetricians and Gynecologists" rather than the "American Medical Association."[55] Similar to an evaluation by the Department of Health, these organizations would ensure accuracy of the sex education information.

The third, more significant, change proposed by H.R. 189 is to the required instructional materials. H.R. 189 removes the prohibition of teachers' "advocacy or encouragement of the use of contraceptive[s]."[56] Under H.R. 189, the required educational material:

> (iv) provides information about the health benefits and side effects of all contraceptives and barrier methods as a means to prevent pregnancy, including accurate information about effectiveness; (v) provides information about the health benefits and side effects of all contraceptives and barrier methods as a means to reduce the risk of contracting sexually transmitted diseases, HIV/AIDS, and other diseases. . . .[57]

Despite the proposed modifications, H.R. 189 does not remove the opt-out provision, and does not create a dual system where parents are making the choice between "abstinence only" or "comprehensive" programs.[58] Instead, the local school board will continue to determine the curriculum that will be taught, and

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[52] *See* UTAH CODE ANN. § 53A-13-101(1)(c)(i) & (2)(b) (West 2009).

[53] H.R. 189, *supra* note 2, at ll. 94-98.

[54] *Cf. id. with* UTAH ADMIN CODE r. 277-474-1 ¶ G (2009).

[55] *Id.*

[56] H.R. 189, *supra* note 2, at ll. 59-59(a).

[57] *Id.* at ll. 79-84.

[58] *Cf. id.* at ll. 102-04 *with* UTAH CODE ANN. §53A-13-101 ¶ 3(a)(ii) (West 2009) (these provisions are identical requiring parental notification and review).

base it on abstinence.[59] What H.R. 189 does do, however, is allow schools to more comprehensively teach contraception as a preventative method for STDs and unintentional pregnancy.[60]

IV. ARGUMENTS FOR H.R. 189 ENACTMENT

H.R.189 improves the level of information provided to adolescents who participate in the sex education program and it clarifies the teacher requirements without tossing aside the conservative undertones of the entire statute. Specifically, H.R. 189 remedies potential legal issues stemming from ambiguous statutory language, and incomplete educational needs in Utah sex education programs without undermining the underlying traditional values.

A. Legal Issues: Removing Ambiguity while Maintaining Conservative Foundation

H.R. 189 clarifies proper teacher conduct, but retains the language that helps to forestall First Amendment Religious Clause lawsuits. Prior to H.R. 189, any teacher discipline[61] resulting from violation of § 53A-13-101 by "the advocacy or encouragement of the use of contraceptive methods"[62] would be legally challenged because of the ambiguity of this language and seemingly contradictory regulations that stem from it.

To illustrate, imagine a situation in which a teacher has described the symptoms of a STD, and then goes on to state that contraceptives may prevent an STD transfer. Is this advocating or encouraging contraceptive use? What if a teacher states that a condom is 87% effective at preventing the transfer of an STD, but Tetracycline (a common oral contraceptive) is not effective at preventing the STD? Is that advocating condom use? If a teacher was disciplined for either of the above discussions, a legal challenge would likely result.

However, there is no Utah case law directly challenging this ambiguous statutory language. In addition, there is no case law in which a teacher, disciplined for contraceptive advocacy, challenged the grounds of that discipline.

Regardless of the lack of case law, as a preemptive measure, the statute should clarify the contradictory direction. By eliminating the ambiguous language and specifying the limits of the contraceptive discussions, teachers are on notice of

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[59] *See* H.R. 189, *supra* note 2, at l. 73 ("teach[ing] that abstinence is the only sure way to avoid pregnancy or sexually transmitted diseases.").

[60] *Id.* at ll. 79-84.

[61] *See* UTAH ADMIN. CODE r. 277-515-4(C)(5) (West 2009). "Failure to adhere to the following may result in licensing discipline . . . . A professional educator: . . . shall teach the objectives contained in the Utah Core Curriculum." For the Utah Core Curriculum, see Utah Education Network Webpage, *Health Education II (9-12),* http://www.uen.org/cc/uen /core/pub/displayCoreCourse.action?ccId=7150 (last visited Oct. 21, 2009).

[62] UTAH ADMIN. CODE r. 277-474-3(3) (West 2009); UTAH CODE ANN. § 53A-13-101(1)(c)(iii)(A)(III) (West 2009).

what conduct is unacceptable,[63] and Utah will avoid legal challenges following disciplinary actions. Further, this specific language is likely to protect a teacher from any wrongful accusations.

The second type of legal challenge to school curricula is that sex education is a violation of the First Amendment Religion Clauses.[64] Courts dismiss the majority of these challenges due to the "opt-out" provisions and the lack of government compulsion in the statute.[65] H.R. 189 does not affect the opt-out provision of § 53-13-101.[66]

B. H.R. 189 Presents a Compromised Approach

Taking a step back in this discussion, the entire premise of H.R. 189 is that § 53-101-13 inadequately educates Utah adolescents, and with more information adolescents will make decisions that prevent STD transfer and/or unintended pregnancy. Each part of this premise will be discussed separately.

1. A Complete Assessment of the Data Indicates Problems with Sex Education

Advocates of H.R. 189 present the statistics in Section III.A as evidence that the current school curriculum is not presenting enough information to prevent STD transfer and teen pregnancy. Opponents, however, interpret the statistics differently. Opponents of H.R. 189 point to the low teen pregnancy rate and lower abortion rate in Utah as evidence of success.[67] Another interpretation relies on the data showing that the school districts in which more conservative, abstinence-only curricula are taught have the lowest instance of STDs.[68] The argument, therefore, is that the only change should be to implement a conservative, abstinence-only curriculum throughout Utah.[69]

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[63] Lisa Schencker, *Debate Continues Over Utah Sex Ed Changes*, SALT LAKE TRIB., Aug. 26, 2009, at 1, *available at* http://www.sltrib.com/education/ci_13212084. "Though teachers are allowed to talk about contraceptives, they're not allowed to encourage their use, leading many to avoid the topic out of fear of accidentally crossing the line, [Lynn] Hemingway said."

[64] *See, e.g.,* Medeiros et al., v. Kiyosaki et al., 478 P.2d 314, 316 (Haw. 1970).

[65] *See, e.g., id.* at 318.

[66] *Cf. H.R. 189*, *supra* note 2, at ll. 102-04 *with* UTAH CODE ANN. § 53A-13-101(3)(a)(ii) (West 2009) (these provisions are similar in that they require parental notification and review).

[67] The audio recordings of the debates are located on the Utah State Legislature Website, *H.B. 189: Instruction in Health Amendments*, http://le.utah.gov/~2009/htmdoc/hbillhtm/HB0189.htm (follow the "House Health and Human Services Committee 2/25" link) (this argument was presented by Mary Ann Kirk, Utah PTA, speaking in opposition to H.R. 189) [hereinafter *Committee Debate*].

[68] *See supra* notes 26, 27, 31, 32 and accompanying text. The school districts that teach "abstinence only" programs are Jordan, Provo, Nebo, and Alpine. Note however, the Jordan school district is in Salt Lake County.

[69] *See Committee Debate*, *supra* note 67 (statement of Rep. Brad Daw).

Although opponents to H.R. 189 correctly assessed the individual data sets, their conclusions remain incomplete. The problem is that these explanations fail to account for the STD infection rate data. That is, given that both pregnancy and STDs result from sexual activity, why would the rate of teen pregnancy be decreasing and the rate of STD infection increasing?

Increasing STD infection transfer can only indicate unprotected sexual activity.[70] However, either abstinence, contraceptive use, or a combination of these factors could cause the decreases in pregnancy and abortion rates. This indicates a change in the method of contraception used by adolescents—an increase in the use of condoms, hormonal contraceptives (such as the "pill," Norplant or Depo-Provera), or both—methods that protect against pregnancy, but not always STDs. The data indicates this exact trend.[71] Between 1995 and 2002,[72] adolescent use of oral hormonal contraceptives has increased approximately 10%,[73] injectable hormonal contraceptive use more than doubled,[74] and use of dual contraceptive methods (condom and a hormonal method) has increased from 8% to 20%.[75]

Relying solely on the decrease in pregnancy and abortion rate as evidence of abstinence, while ignoring the contradicting data, is erroneous and irresponsible. "To date, however, no education program in this country focusing exclusively on abstinence has shown success in delaying sexual activity."[76] The Alan Guttmacher Institute states that 75% of the decline in U.S. teen pregnancy between 1988 and 1995 was due to contraceptive use and 25% was attributed to fewer teenagers engaging in sexual activity.[77] Stemming from these studies, the conclusion is "some teens will respond to a message of abstinence while others will respond to improved access to contraception."[78]

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[70] *See supra* text accompanying note 1 (stating that this note does not consider STD transfer through non-sexual means such as blood transfusions).

[71] Kerry Franzetta et al., Child Trends Research Brief, *Trends and Recent Estimates: Contraceptive Use Among U.S. Teens* 2 (2006), http://www.childtrends.org/Files/Contra ceptivesRB.pdf. As of the most recent study that analyzed the same information from 1982 until 1995 the results are mixed. While the use of oral and hormonal contraceptives remained constant and condom use increased substantially, pregnancy and STD trends were similar. The trends between 1982 and 1995 indicate the relationships are much more complex and can be broken down into sub-age and racial groups.

[72] These are national statistics, but are used here to illustrate trends among adolescents.

[73] *See* Franzetta et al., *supra* note 71, at 3.

[74] *Id.* at 4.

[75] *Id.* at 5.

[76] Cynthia Dailard, *Understanding 'Abstinence' Implications for Individuals Programs and Policies*, 6 THE GUTTMACHER REPORT ON PUBLIC POLICY 4, 6 (2003).

[77] *Id.* at 5.

[78] Child Trends Research Brief, *Trends in Sexual Activity and Contraceptive Use Among Teens* 5 (2000), http://www.childtrends.org/Files/Child_Trends-2000_01_01_RB_ Teentrends.pdf.

2. More Information will Help Solve the Problem

The premise of H.R. 189, proposing that with proper education adolescents will make healthy decisions, remains under considerable debate.[79] However, comprehensive sex education significantly reduces the rate of both teen pregnancy and the transfer of STDs.[80] Analogously, information dissemination in homosexual communities following an increase of AIDS infection rates have shown the effectiveness of education to combat STD transfer. [81]

Further, the key to H.R. 189 is it allows the majority's view to remain the central point of sex education while simply improving information dissemination that prevents health concerns. To illustrate, imagine five adolescents who will be referred to as A, B, C, D, and E. A's parents strictly adhere to a religious philosophy and chose to educate their children in accordance with those beliefs at home and church. B's parents pay lip service to the same religious doctrine but do not take active measures to instruct their children about sexual activity. C's parents are totally distracted by other issues and do not have time to discuss sexual activity with their adolescent child. D's parents are secular and would like the school to discuss contraceptives with their child but also intend to take their child to a medical professional to supplement classroom discussions. E's parents are not educated enough to discuss contraception but are comfortable discussing the moral aspects of sexuality with their children.

H.R. 189 accommodates each of these adolescent's situations. The opt-out provision allows for A's and B's parents to prevent any sex education at school. B is likely out of luck, but B is out of luck regardless of the content of sex education taught in school. The parents of C, D, and E may choose to allow health education for their children, including discussions of contraceptives. The school better informs the children about the medically accurate aspects of contraception without undermining the supplemental or possible lack of supplemental information from home. Enacting H.R. 189 presents a compromise. It respects the wishes of those opposed to public school sex education, allowing these students to opt-out of the program. It only improves the discussion already occurring with those students participating in the program.

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[79] *See* Keith Brough, *Sex Education Left at the Threshold of the School Door: Stricter Requirements for Parental Opt-Out Provisions*, 46 FAM. CT. REV. 409, 411 (2008).

[80] *See* Pamela K. Kohler et al., *Abstinence-Only and Comprehensive Sex Education and the Initiation of Sexual Activity and Teen Pregnancy*, 42 J. ADOLESCENT HEALTH 344, 349-50 (2008).

[81] Deborah Milham, Comment, *The Constitutional Issue Presented by the Communications Decency Act's Application to HIV/AIDS Information on the Internet,* 8 ALB. L.J. SCI. & TECH. 195, 215 (1997) ("Education has been an effective deterrent to the spread of AIDS as evidenced by the homosexual community's successful educational programs in major metropolitan areas." (citing David L. Chambers, *Gay Men, AIDS and the Code of Condoms*, 29 HARV. C.R. C.L. L. REV. 353, 356-57 (1994))).

However, opponents to H.R. 189 proffer three counter-arguments: (1) sex education should be kept within the family;[82] (2) even with an opt-out provision for parents, students disseminate some contraceptive information outside the classroom;[83] and (3) basing the program on abstinence while discussing contraception sends mixed messages.[84] "It's like saying, '[w]e want you to abstain, but we don't believe you can.'"[85]

Although these arguments reflect legitimate concerns, there are inherent problems. First, stating that sex education should remain in the home forces the questions: Why keep the existing program? Why aren't advocates of this position calling for a repeal of this entire statute? This counter argument is not addressing the issue. It is like asking whether we can have chicken rather than steak for dinner and someone replying that she is a vegetarian so chicken is not an option.

Public Schools have incorporated health education to promote healthy habits in the community. Significant health concerns among adolescents are STDs and unintended pregnancy. Addressing the leading cause of these health concerns means addressing sexual activity.

Second, while information dissemination among students is unavoidable, at least under H.R. 189, the information discussed among the students will be accurate. Regardless, this concern does not outweigh the solutions H.R. 189 presents.

The third counter argument stated above disregards the diversity in the population and the specific recommendations cited above.[86] Contrary to the "mix message" fear, a combination of abstinence and contraceptive education is the most effective method at reducing instance of teen pregnancy and STD infection given the fact that not all adolescents exercise abstinence.[87] In addition, 46% of adolescents ages fifteen to nineteen in the nation have had sex at least once.[88] The discussion of contraceptives should be included because any belief that adolescents will abstain from sexual activity is not grounded in fact.

CONCLUSION

Statistical evidence illustrates an alarming problem regarding adolescent sexual behavior. The changes proposed by H.R. 189 present a solution to that

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[82] *See Committee Debate, supra* note 67 (statement of Rep. Brad Daw).

[83] *See id.* (statement of Galye Ruzicka, Utah Eagle Forum).

[84] *See* Ronda Tommer, *New Sex Education Bill Pushes Abstinence-Only Aside*, THE SPECTRUM, Sept. 15, 2009, at 1, *available at* http://www.thespectrum.com/apps/pbcs.dll/article?AID=200990915003.

[85] *Id.*

[86] *See* Child Trends Research Brief, *supra* note 78, at 5.

[87] *Id.*

[88] GUTTMACHER INST., *Facts on American Teens' Sexual and Reproductive Health* 1 (2006), http://www.guttmacher.org/pubs/fb_ATSRH.pdf. The age range complicates this number. For adolescents under the age of fifteen about 13% have had sex while about 70% of nineteen-year-olds have engaged in sexual intercourse.

problem through dissemination of information. Doing nothing, and ignoring the trends of STD infection rates, is not justifiable under the inculcation function of public schools because H.R. 189 does not undermine the social policies of the current sex education curricula. Further, H.R. 189 creates a more complete curriculum from which adolescents may make an informed decision.