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Hey, What About Me?: Why Sexual Education Classes Shouldn’t Keep Ignoring LGBTQ Students

Sarah Camille Conrey*

Middle and high school can be a difficult, painful experience for LGBTQ1 teens. Sadly, many teens face discrimination not only from their fellow students, but also from the faculty. A national survey conducted in 2005 reported that ninety-two percent of lesbian, gay, bisexual, transgender, or questioning high school students reported hearing homophobic remarks from students, and nearly one in five of those students heard homophobic slurs from faculty and staff at their school.2 The majority of harassment of LGBTQ teens goes either unreported3 or does not prompt disciplinary action from school officials.4 The prevalence of homophobia in high schools is most likely directly related to the

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1. “LGBTQ” stands for “Lesbian, Gay, Bisexual, Transgender, [and] Queer.” I use this term because it was the most prevalently used and most inclusive term that I encountered. LGBT Terms and Definition, INTERNATIONAL + LGBT AT THE UNIVERSITY OF MICHIGAN, http://internationalspectrum.umich.edu/life/definitions (last visited Sept. 27, 2011).


4. Ninety-seven percent of anti-gay slurs are not challenged by school authorities. The Supreme Court has held that sexual harassment laws are limited to a male harassing a female victim, thereby excluding anti-gay harassment, and limiting avenues for challenges to schools’ failure to address anti-gay bullying. Vanessa Eismann, Protecting the Kids in the Hall: Using Title IX to Stop Student-On-Student Anti-Gay Harassment, 15 Berkeley Women’s L.J. 125, 127–28 (2000).
increased risk of suicide, homelessness and high-risk behavior that LGBTQ teens face. Recently there has been an increase in media attention to the problem of LGBTQ teens being bullied in middle and high schools. In 2010, the tragic suicide of several gay teens was widely reported in the media and attention was brought to the harassment that they had experienced at school, which many believed contributed to their deaths.

Discrimination against LGBTQ teens can be overt, through slurs or harassment, but there are also institutional elements of prejudice occurring in middle and high schools. The majority of sexual education classes in the United States fail to address LGBTQ teens. Not only is there a failure to address the needs of gay teens in sexual education curriculums, but a 2002 Lambda Legal report showed that seventy-seven percent of prospective high school health teachers would not encourage class discussions on homosexuality issues and a whopping eighty-five percent oppose integrating LGBTQ issues into their existing curriculums.

Furthermore, schools are actively keeping LGBTQ issues out of the classroom, even if that means violating state education codes. A 2003 study conducted by the American Civil Liberties Union of California on school districts revealed that sixteen percent of districts actually ban discussing homosexuality in sexual education classes, despite the fact that the state education code requires that schools that choose to implement sexual education teach material that is appropriate to students of all sexual orientations. Four states even have policies that are either discriminatory toward LGBTQ individuals or specifically provide that homosexuality must not be promoted or addressed as socially acceptable.

6. Eismann, supra note 4, at 128.
11. CAL. EDUC. CODE § 51933 (West 2011).
This Note explores the current state of public school sexual education curricula and the impact that ignoring LGBTQ teens in sexual education classes have on STD rates, self-esteem, depression and bullying. Part I introduces a background of sexual education in the United States and an overview of the role that the federal and state government and local communities play in regulating sexual education curriculums. Part II discusses the physical and mental health reasons for including discussions of homosexuality in classrooms and the negative effects of failing to discuss it. Part III looks to the role that courts play and what the outcome might be if parents were to sue a school or district for discussing LGBTQ issues in sexual education classes, and Part IV concludes with a prospective outlook on how changing sexual education is possible and why it is so important.

I, THE GOALS OF SEXUAL EDUCATION

Before delving too deeply into what should be included in sexual education programs, it is important to be clear on the origins of sexual education in public schools in the United States. It is also necessary to examine at which level of government sexual education is controlled, and what the modern goals of sexual education classes are.

A. THE DEVELOPMENT OF SEXUAL EDUCATION IN PUBLIC SCHOOLS IN THE UNITED STATES

Sexual education in schools began at the turn of the twentieth century, with the twin goals of promoting morality and reducing the rates of sexually transmitted diseases. Groups like The American Society of Sanitary and Moral Prophylaxis and The National Purity Association published pamphlets aimed at preventing venereal disease and warning girls about male lust. Though some local superintendents feared moral decay as a result of these classes, by 1922 about forty percent of public schools had some sort of sexual education, with curriculums still rooted in the notions of moral and sexual hygiene.

Sexual education later began moving away from Victorian ideas of purity, and by 1938 the American Association of School Administrators began supporting a new type of sexual education. The emphasis began shifting from presenting sex as something that was morally corruptive to viewing sex as something that could be positive and enjoyable within the confines of a loving marital relationship. Activities like masturbation and

14. Id.
15. Id.
16. Id.
17. Priluck, supra note 13, at C10.
“necking” were still heavily discouraged. In 1964 the Sexuality Education and Information Council of the United States was established and began advocating for a comprehensive sexual education curriculum, as it continues to do today.

When AIDS entered the consciousness of the United States in the 1980s, schools began either integrating an AIDS education component into sexual education classes or having separate AIDS awareness instruction in schools that did not teach sexual education. In 1996, sexual education again received attention when Congress allotted $250 million to be disbursed over five years to schools that promoted abstinence until marriage. By 2002, only fourteen percent of school districts had policies requiring abstinence and contraception be given an equal focus; the remaining eighty-six percent were teaching abstinence only. Although sexual education is not required under federal law, virtually every school teaches some form of it, whether it is a comprehensive or abstinence-only curriculum.

Many public health experts and researchers question the effectiveness of abstinence-only curriculums in preventing teen pregnancy and lowering STD rates. Studies have shown a range of discouraging findings from reports that schools were implying to students that condoms did not protect against STDs to empirical studies showing that comprehensive curriculums were in fact more effective at lowering pregnancy and STD rates.

In light of both the failure of abstinence-only sexual education to effectively lower STD rates and to attempt to regulate the great variations among sexual education curriculums, the Responsible Education About

19. Comprehensive sexual education emphasizes both abstinence and safe-sex practices for sexually active students, such as proper contraceptive use and sexually transmitted disease prevention, Sex Education, ADVOCATES FOR YOUTH, http://www.advocatesforyouth.org/sex-education-home (last visited Sept. 27, 2011).
22. Id. at 188.
24. Id. at 4.
Life (REAL) Act was first introduced in 2005. The bill, however, did not become law in the 108th congressional session. The bill was reintroduced in the 109th congressional session in the House of Representatives in 2007. The 2007 bill’s goal was to reduce sexual partners, increase condom and contraceptive use among teens, and target sexual education funding toward programs that provide teens with medically accurate, comprehensive sexual education. While this bill may certainly be a step in the right direction, the bill has not had any major action since it was re-introduced in 2007. Nonetheless, as the 2007 bill’s text stood it was possible for the Act to be implemented without any mention of sexual health for LGBTQ teens. If the Act becomes law, as long as students are provided comprehensive information about pregnancy and STD prevention, then the schools are in line with the guidelines of the Act; even if schools ignore LGBTQ issues while discussing those matters. The REAL Act requires that programs operating under federal grants be evaluated for their effectiveness in delaying initiation of sexual intercourse, preventing pregnancy, preventing sexually transmitted diseases, and increasing knowledge about contraception. The Act says that a state may receive money to carry out a program to teach, among many topics, “healthy attitudes about... sexual orientation.” The REAL Act thus does not require a state to teach comprehensive sexual education with information specifically geared toward both LGBTQ sex and tolerance for LGBTQ students and individuals. Ideally, schools should be required to teach tolerance toward LGBTQ individuals and safe sex practices for LGBTQ students in order to receive funding under the REAL Act.

The Obama administration initially attempted to remedy the failure of abstinence-only education by promoting an initiative that would provide over $110 million in funding for programs that were proven to reduce teen pregnancy. This had the effect of excluding abstinence-only programs from receiving funding. However, these efforts were halted with the passage of the new health care reform bills. The legislation restored $250 million over five years for abstinence-focused programs, to the delight of

29. Id.
30. Id.
32. Donovan, supra note 21.
33. H.R. 2553.
34. Id. at § 5.
35. Id. at § 3(c).
37. Id.
38. Id.
lobbying groups such as the National Abstinence Education Association. A spokesperson for the group Advocates for Youth called the bill’s provision “reckless and irresponsible” and criticized the bill for putting the health of youth at risk.

B. GOVERNMENTAL REGULATION OF SEXUAL EDUCATION

States determine whether to make sexual education programs mandatory and they can also mandate certain content requirements. As of 2010, twenty states and the District of Columbia require public schools to teach sexual education. Alternatively, some states do not require sexual education, but permit schools to teach it. If a school does choose to do so, then the content of such classes is regulated. For example, California does not require school districts to teach sexual education, but if a district does choose to teach sexual education then there are specific requirements including subjects to be covered, goals, training for educators and parental notice. Within the individual districts, wide latitude is generally given as to which subjects to cover and how to structure programs.

These laws may not necessarily be indicative of the reality of the content of such classes. A 2003 survey of California school districts that choose to teach sexual education revealed that forty-eight percent of schools responding to the survey failed to teach the required topics, despite being legally mandated to do so by the Education Code. In the California study, one quarter of schools did not have a district-wide program with respect to sexual education, meaning that the individual schools and oftentimes just teachers are left to create the curriculum as they see fit. These circumstances create major oversight problems.

In implementing sexual education programs, school districts oftentimes cave to community pressure, resulting in violations of statewide education codes. Religious groups, parents, teachers, school board members, and abstinence-only sex education supporters exert pressure on schools to change their curriculum. In one study, twenty-seven percent of schools that were pressured to alter their curriculums changed it, even though the

39. Stein, supra note 36.
40. Id.
41. COLLINS ET AL., supra note 23, at 7.
43. Id.
45. The report was based on data collected from 153 unified school districts in California and all but four counties are included in the sample. Burlingame, supra note 10.
46. Id. at 10.
47. Id. at 14.
48. Id. at 14.
49. Id. at 10.
change meant excluding information required by the state’s education code. Some states codify an acceptable level of parental involvement and influence over sexual education curriculums. Thirty-seven states require school districts to allow parental involvement in sexual education curriculums and thirty-five states and the District of Columbia allow parents to opt their children out of receiving instruction.

Abstinence-only curricula may seem more neutral in light of the deficiencies with respect to LGBTQ students in comprehensive curriculums because they send the message that any sex before marriage is ill-advised. However, there are two significant problems with this line of reasoning. First, same-sex marriage is not legal in the majority of states, which sends teens the message that same-sex sex is never socially acceptable. Second, abstinence-only programs tend to gloss over LGBTQ issues while discussing sexuality. The combined effect is to send the message to LGBTQ youth that because same-sex marriage is not legal and because sex is only permitted within a marriage; their sexual relationships are not socially acceptable.

Although the content of a school’s sexual education curriculum is governed primarily by state legislation, the actual content of the classes is likely to reflect the ideals of the individual school district, the teacher who has been left to her own devices to design the curriculum, or even the group that exerted the most pressure on the district to include or exclude a specific topic. Furthermore, because of federal funding favoring abstinence-only sexual education programs, schools may be forced to impose an abstinence-only class because of budget constraints.

C. THE GOALS OF SEXUAL EDUCATION IN PUBLIC SCHOOLS

It is important to keep in mind why we have sexual education in the first place. In 2001 then Surgeon General David Satcher stated “providing sexuality education in the schools is a useful mechanism to ensure that this Nation’s youth have a basic understanding of sexuality. In moving toward equity of access to information for promoting sexual health and responsible sexual behavior, school sexuality education is a vital component of community responsibility.” This statement reflects dual concerns: the promotion of physical health by reducing the risk of STDs and the advancement of emotional and social well-being by reducing teen

51. NAT’L CONF. ST. LEGIS., supra note 42.
pregnancy and teaching young adults how to cope with the emotional consequences of sex. The emphasis on “equity of access to information” in the Surgeon General’s statement suggests that an effective sexual education curriculum must be relevant to students from a variety of diverse backgrounds.

The Sexuality Information and Education Council of the United States (SEICUS), a national task force that researches sexual education and provides guidebooks and fact sheets for instructors, laid out four goals for comprehensive sexual education programs: (1) to provide accurate information about human sexuality, including sexual orientation, (2) to provide the opportunity for young people to question, explore, and assess their sexual attitudes in order to understand their family’s values, develop their own values, increase self esteem, develop insights concerning relationship with families and members of both genders, and understand their obligations and responsibilities to their families and others, (3) to develop interpersonal skills, and (4) to promote responsibility about sexual relationships. The SEICUS’s goals focused on the mental, emotional and social aspects of sexual behavior. Notably, the first thing mentioned is sexual orientation. This reflects an understanding of the current state of sexual education in the United States and the compelling need to make programs more inclusive for students of diverse sexual orientations.

Regardless of whether one takes a more conservative approach in favor of abstinence-only education or the liberal stance of SEICUS, it is apparent that sexual education is about more than preventing pregnancy and disease. There seems to be a general consensus that sexual education should address sexual values and personal responsibility with respect to sex. Sexual responsibility is viewed as necessary for both the individual and for the community as a whole. Though programs have evolved from the days of “moral and sexual hygiene,” society is still using sexual education as a tool to advance the twin aims of morality and physical health.

II. THE NEED FOR INCLUDING HOMOSEXUALITY IN PUBLIC SCHOOL SEXUAL EDUCATION CURRICULUMS

A. SOCIAL IMPACTS OF HETERONORMATIVITY AND HOMOPHOBIA IN PUBLIC SCHOOLS AND THE ROLE THAT SEXUAL EDUCATION PLAYS

By ignoring LGBTQ teens in sexual education curriculums, schools are perpetuating the notion that heterosexuality is the only socially acceptable sexual practice and therefore should be the sole focus. This in turn has the power to reinforce heteronormative beliefs among teens and fuel

56. Heteronormativity is the “privileging of heterosexuality, enforced compliance with culturally determined heterosexual roles, and assumptions about heterosexuality as ‘natural’
homophobia and bullying of LGBTQ teens in high schools. Institutionalized heteronormativity, which sends the message that heterosexuality is what is normal, silences discussions of homophobia despite policies that punish acts of homosexual prejudice. An example of this is a sexual education class that only discusses heterosexual intercourse, operating under the assumption the heterosexual sex is “normal.”

Coupled with homophobia, heteronormativity creates an environment that is both hostile to LGBTQ individuals and rigidly incapable of making substantial changes toward equality. That means that while a school will punish a student for bullying another student for being gay, the school may still have policies that send the subtle yet powerful message that being heterosexual is the norm. This message can be internalized by both straight and LGBTQ teens and affect their attitudes and behavior. The lack of awareness about the health needs of LGBTQ teens among healthcare providers, who often participate in school sexual education classes, contributes to LGBTQ teens’ depression, substance abuse, and running away. This is likely, at least in part, due to the disenfranchisement of LGBTQ teens in sexual education classes. “They made me feel like I wasn’t a real member of society,” wrote Elina Kuusisto, a former student who knew that she was a lesbian by age eleven, of sexual education. Kuusisto then went on to describe how the fact that homosexuality was ignored in the classroom coupled with peer and teacher harassment led to her depression, for which she had to enter counseling.

Additionally, LGBTQ teens are more likely than straight teens to engage in risky sexual behavior, including being much less likely than straight teens to use a condom, which increases the need for gay and

58. “Homophobia” has a variety of definitions, but is generally thought to be negative feelings toward nonheterosexual individuals and is manifested through jokes, physical attacks, and discrimination. Homophobia, Prejudice & Attitudes to Gay Men and Lesbians, AVERT.ORG, http://www.avert.org/homophobia.htm (last visited Sept. 8, 2011).
62. Id.
64. Zach Gottlieb, One in 10 Sexually Active Teens Has Same-Sex Partners, REUTERS
lesbian-specific sexual education. Some individuals attribute the correlation between sexual risk taking among LGBTQ teens to the failure of school sexual education programs to address LGBTQ teens. Elizabeth Saewyc, a health researcher at the University of British Columbia, attributed the increased likelihood of lesbian and gay teens' sexual encounters of being unprotected to the defects in sexual education curriculums: “Some teens I’ve seen tell me that they completely check out of sex ed because they feel what they were learning didn’t apply to them,” said Saewyc. Ruth Bell, author of Changing Bodies, Changing Lives: A Book for Teens on Sex and Relationships views the stigmatization of homosexuality in the classroom as having the potential to be as harmful to teens as failing to educate them about HIV or other sexually transmitted diseases.

While sexual education has the power to be a vehicle for promoting heteronormativity, and indirectly, the discrimination against LGBTQ teens, it can also be a vehicle for change. Feminist scholar Linda McClain views sexual education as having the power to address gender role stereotypes among adolescents and to promote agency and self-respect with regard to intimacy and sexuality. McClain suggests that social conservatism may use sexuality as a channeling mechanism for heterosexuality, particularly with the emphasis on marriage in abstinence-only education. In a society where same-sex marriage is not only looked down upon by many, but also illegal, in most states telling teens that sex is okay only if one is married, teens get the message that same-sex relationships are not socially acceptable. This may discourage teens from seeking information about safe-sex practices, either because of mistaken beliefs that if no health risks are mentioned, there must not be any, or because they feel that they will be subject to discrimination if they reveal their sexual orientation. Ignoring diverse sexualities and sexual orientations in the classroom disenfranchises LGBTQ teens and sends the message that their sexual relationships are not legitimate or worth discussing.

Religion may be a contributing factor to the information gap with respect to LGBTQ-specific issues in sexual education. The materials for abstinence-only sexual education were originally developed by religious conservatives. Organizations such as the Family Research Council, a

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65. Lee, supra note 9.
66. Id.
67. Id.
69. Id.
Christian conservative organization, have been heavy lobbyists of abstinence-only sexual education, with the goal of promoting a “Christian standard of morality in all of America’s domestic and foreign policy.”

Homosexuality is stigmatized among many Christian conservatives. For example, a medical researcher for the Catholic Education Resource Center released a report on the health risks of LGBTQ sex. In the article, he attributed high STD rates among gay, lesbian, and bisexual people to promiscuity, and that social approval of homosexuality will increase that promiscuity, which he says is detrimental to society. The report suggests that homosexuality has become “chic” and is a social trend.

B. HEALTH IMPACTS

STDs are a significant health concern when one is talking about safe sex for LGBTQ teens. Research indicates that STD rates are affected by sexual education curriculums. By failing to educate teens about the risks of STDs presented by same-sex encounters and presenting pregnancy as the biggest risk of sex, teens may be misled into believing that homosexual sex is safe, particularly with respect to lesbian sex. For example, women who have sex with women are at an equal risk for STDs other than HIV as heterosexual women are, yet there is a myth that lesbian sex is risk-free.

Some STD information may also be specific to LGBTQ teens. For example, the national rate of gonorrhea is at an all-time low, but the rate among gay men is actually increasing. That means that an educator who is not concerned with LGBTQ-specific issues may not feel that something like gonorrhea is worth focusing much time on, and might even convey to students that the risks are not very high. Other diseases, such as Hepatitis

74. Id.
75. Id.
B, are more common among gay men, and some health educators attribute this to a lack of awareness about preventative measures such as vaccines.\textsuperscript{82} By taking the time to inform students about this increased risk and simple preventative measures, sex educators can help to lower these rates.

Sexual education has the power to affect sexual behaviors that increasingly put LGBTQ teens at risk of STDs. Studies indicate that sexual education curriculums do affect teen sexual behavior. A comprehensive analysis of studies conducted by sexual education researcher Douglas Kirby revealed that forty-three percent of comprehensive sexual education programs resulted in an increase in condom use among teens.\textsuperscript{83} Even more encouraging is a review of twenty-nine studies on comprehensive sexual education that demonstrated two-thirds of programs positively impact one or more sexual behaviors.\textsuperscript{84} The positive impact of programs potentially lasts beyond the length of the class. Research has shown positive behavioral effects of comprehensive programs lasting over a thirty-one-month period.\textsuperscript{85} Misguided approaches to sexual education can also affect teens’ sexual health. For example, syphilis was once on the verge of elimination, yet now it has experienced resurgence as a public health threat, with an eighteen percent increase in cases between 2007 and 2008; almost half of all new cases are seen in men who have sex with men.\textsuperscript{86} These findings suggest that providing LGBTQ-specific information on reducing the risk of sexually transmitted diseases would positively affect students’ sexual behavior.

LGBTQ teens would not be the sole beneficiaries of targeted sexual education. Health research indicates that teens who identify as straight are increasingly experimenting with same-sex partners. A 2010 study reported that 38.9 percent of teens with a same-sex partner identified as heterosexual.\textsuperscript{87} Furthermore, the teen years are widely thought of as a period of experimentation and changing sexual identity. Teens that identify as straight may be less willing to seek information about LGBTQ-specific safe sex practices even if they are having same-sex sexual encounters. Other teens may identify as straight, and later in their lives discover that they are not.\textsuperscript{88} Regardless of the circumstances, preparing students for the

\textsuperscript{82} Sowadsky, supra note 81.
\textsuperscript{83} Douglas Kirby, Abstinence, Sex, and STD/HIV Education Programs for Teens: Their Impact on Sexual Behavior, Pregnancy, and Sexually Transmitted Disease, 18 ANN. REV. SEX RES. 143, 155 (2007).
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{88} Sexual Attraction and Orientation, TEENSHEALTH (June 2009), http://kidshealth.
risks of a variety of sexual relationships and acknowledging the fluidity of human sexuality over time gives students valuable tools to carry throughout their lives. By reducing the stigma surrounding same-sex encounters, schools may make teens feel more comfortable asking health-care professionals about ways to reduce their risk of STDs, regardless of what they identify as.

III. CAN PARENTS KEEP HOMOSEXUALITY OUT OF PUBLIC SCHOOLS’ SEXUAL EDUCATION CLASSES?

If public high schools began implementing sexual education that included coverage about sexual orientation and LGBTQ sexual education on a large scale, would there be challenges by parents who did not wish for their children to learn about diverse gender identities and sexual orientations? Almost certainly, as judged by the studies cited regarding parent pressure on school districts to restrict sex education content. The more difficult question becomes whether parents can prevent schools from teaching their children about LGBTQ-issues in sexual education classes.

A. THE ROLE OF PARENTS IN THE CLASSROOM

A parent’s right over his or her child’s upbringing has been recognized as fundamental and protected under the Due Process Clause of the Fourteenth Amendment. This means that the court applies strict scrutiny to determine whether legislation that interferes with these rights is narrowly tailored to serve a compelling state interest. Parents have a right over their children, and more specifically their children’s education, but that right is not absolute and must be viewed alongside the states’ parens patriae interest in children’s education. In Wisconsin v. Yoder, the Court described this relationship as a balancing process that necessarily occurs between the parent’s interests in his or her children’s upbringing and the state’s interest in educating its citizens. This has not always been the case: in most of the nineteenth century, parents had near complete authority over their children’s upbringing, including deciding what level of education their children should reach. In the latter part of the nineteenth century, state and local control increased in response to the surge of immigration at

org/teen/sexual_health/guys/sexual_orientation.html.


90. Id.

91. See, e.g., Reno v. Flores, 507 U.S. 292, 303-04 (1993). Parens Patriae grants the courts jurisdiction to protect children and other vulnerable groups. It is available to fill legislative gaps or on judicial review. This doctrine gives the courts the power to intervene to protect a child’s best interest. See generally 59 Am. Jur. 2d. Parent & Child § 18 (West 2011).


the turn of the twentieth century. This led to legislation concerning child protection, juvenile courts, and compulsory public education. Since that time there has been a tension between parents and public schools as both attempt to do what they feel is best to ensure the proper upbringing of their children.

The Supreme Court decided that parents’ rights over their children’s upbringing could be limited without violating the parents’ constitutional rights, reflecting the unique triangular relationship between the parent, the child, and the state. Interestingly, the courts have generally applied rational basis review when parents have challenged sexual education curriculums as interfering with their rights over their children’s upbringing despite the recognized fundamental rights of parents that are protected under the Due Process Clause.

In Prince v. Massachusetts, the Court faced a challenge to child labor, not education, but the overall message was clear in the Court’s statement that:

[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty... And neither rights of religion nor rights of parenthood are beyond limitations. Acting to guard the general interest in youth’s well being the state as parens patriae may restrict the parent’s control by requiring school attendance, regulating or prohibiting child labor, and in many other ways... [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.

In Parker v. Hurley, parents challenged a Massachusetts school district that had a diversity curriculum, beginning in kindergarten with books, such as one depicting a family as taking various forms, from the traditional nuclear family to single-parent homes to same-sex parents, ending with the message that a family can be many things and that the important commonality among the families was love. The goal of the program was to teach children that prejudice was detrimental, whether it is directed against an individual for race, class, gender, or sexual orientation. A student’s parents challenged the program on the basis that it was contrary
to their religious beliefs, it violated their free exercise rights, and it violated due process by interfering with their fundamental rights of parental control because the school did not allow children to opt-out of the diversity curriculum.\textsuperscript{103}

The court rejected the parents’ arguments. First, the court found that substantive due process did not create the right for parents to control what public schools teach and noted that the parents always had the option of sending their child to private school if they were unhappy with the public school curriculum.\textsuperscript{104} Next, the court rejected the parents’ establishment clause argument, finding that the program was not “indoctrinating” the children with homosexuality.\textsuperscript{105} The mere availability of books supporting homosexuality equally with heterosexuality did not amount to coercion. The court said that there is “no free exercise right to be free from any references in public elementary schools to the existence of families in which parents are of different gender combinations.”\textsuperscript{106} Although the court acknowledged that some of the materials did intend to influence children to accept homosexual families, it went on to hold that even requiring the child to read those books would not be coercive or interfere with the free exercise of religion.\textsuperscript{107} The opinion appears to suggest that wide latitude should be given to public schools in devising curriculum and that a much greater showing would be required for parents to have a viable due process or free exercise claim.

It is important to note that the curriculum at issue in \textit{Parker} was compulsory, whereas many sexual education programs in United States public schools are optional, giving parents discretion regarding their children’s participation.\textsuperscript{108} This distinction may give schools greater latitude in devising curricula because if a parent is unhappy with what the school is teaching, then the parent can simply have their child opt out with no detriment to the child academically. However, even a mandatory sexual education program with information about same-sex relationships could conceivably survive challenges. In \textit{Cornwell v. State Board of Education}, the Fourth Circuit rejected parents’ challenges to a law mandating sexual education curriculum in elementary schools and dismissed their request for an opt out provision.\textsuperscript{109}

Some legal scholars have argued that allowing an opt out provision, specifically for portions of sexual education curriculums that discuss

\textsuperscript{103} \textit{Parker}, 514 F.3d at 94.
\textsuperscript{104} Id. at 102.
\textsuperscript{105} Id. at 105.
\textsuperscript{106} Id. at 106.
\textsuperscript{107} Id.
\textsuperscript{108} NAT’L CONF. ST. LEGIS., \textit{supra} note 42.
homosexuality, is discriminatory. The American Civil Liberties Union has said that homosexuality can be taught without parental notification when done in the context of tolerance. In 1996, Massachusetts enacted the Parental Notification Statute that required schools to notify parents before discussing sexuality and homosexuality and allowed parents to exclude their children from such classes. Massachusetts enacted the statute in response to a failed lawsuit by parents arguing that children should not be required to learn AIDS awareness. This law is currently still in place despite criticism that it is discriminatory and sends a message of intolerance to students.

The court gave deference to a school's decision to have a controversial sexual education curriculum in Brown v. Hot, Sexy, and Safer Productions. In Brown, the court rejected a challenge by parents to a very sexually provocative sexual education curriculum, reasoning that the school could not alter its curriculum every time the parent raised a moral objection. They also argued that while parents did have a fundamental right to direct the upbringing of their children that right did not include the right to control public school curriculums. Though the First Circuit takes what might be characterized as a liberal approach to sexual education in both Parker and Brown, it is unclear how the Supreme Court would rule on the issue of LGBTQ-informed sexual education.

An important issue worth noting with respect to opt out policies is whether parents can request that their child opt out only of the portions of a sexual education class that have to do with LGBTQ-specific discussions, or if schools can require the parents to choose between either the complete curriculum or missing the class entirely. The Parker court was unwilling to let parents remove their children from solely the diversity portions of the curriculums. It is likely that courts would reject attempts by parents to tailor the curriculum, particularly given the relatively broad discretion they indicated that public schools have to set their curriculum.

Leebert v. Harrington grappled with the issue of mandatory sexual education in public schools. In Leebert, a father wished to remove his child from mandatory sexual education classes. The father claimed that the

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111. Id. at 763.
112. Id. at 761.
113. Id.
117. The presentation included things like advocating for premarital sex, calling the loose-fitting pants of a student “erection wear,” having a student lick a condom, and using profane language. Id. at 529.
118. Leebert v. Harrington, 332 F.3d 134, 137 (2d Cir. 2003).
120. Leebert, 332 F.3d at 134.
sexual education curriculum violated his religious beliefs that sex should only occur within a marriage. When the child did not attend the class, his school gave him a failing grade. The father appealed the case to the Second Circuit, arguing that sexual education went against his religious beliefs, and therefore, the mandatory class was unconstitutional. The court rejected his arguments, holding that while parents do have a right to control their child’s upbringing they do not have a fundamental right to control a generally applicable public school curriculum. This case suggests that challenges to the inclusion of homosexuality in a sexual education curriculum could survive such a challenge. If a student’s religion does not approve of homosexuality, then the parent may have the fundamental right to home school the child or put him into private school, but the parent does not necessarily have the right to control the school’s curriculum.

Not all courts have been as deferential to schools’ authority to devise their own curriculum as the Parker court was. In Citizens for a Responsible Curriculum v. Montgomery County Public Schools, a local organization challenged a school’s updated sexual education curriculum that sought to educate children about human sexuality and to dispel myths about homosexuality. The portion of the curriculum that sought to dispel myths included information such as “homosexuality is not a mental disorder” and “sexual orientation is not a choice.” The curriculum also addressed the moral divides that face homosexuality and stated that religious opposition to homosexuality was a recent development and early Christians were in fact tolerant of homosexuality. There was also a portion of the curriculum that compared the present religious opposition to homosexuality to the prior stance of Baptist churches against African-Americans during segregation.

The Citizens for a Responsible Curriculum alleged that the curriculum violated their freedom of speech because the curriculum only presented the view that homosexuality was “natural and morally correct.” The plaintiffs also alleged that their rights under the Establishment Clause had been violated by the curriculum because it portrayed certain religions, particularly Baptists, as “unenlightened and Biblically misguided.”

121. Leebaert, 332 F.3d at 137.
122. Id.
123. Id.
124. Id. at 143–42.
126. Id. at *4–5.
127. Id. at *5–6.
128. Id. at *11–13.
129. Id. at *30.
130. Citizens for a Responsible Curriculum, 2005 U.S. Dist. LEXIS 8130, at *34.
131. Id. at *31–32.
court found a likelihood of irreparable injury and of the plaintiff’s success on the merits, and granted a temporary restraining order against the school prohibiting them from using the revised curriculum.\(^{132}\)

Although the curriculum in *Citizens* may have been open to challenge by delving deeply into the topic of religion rather than simply providing information about homosexuality in a more neutral, fact-based way, this case is an example of how schools’ efforts to diversify curricula can be stymied by opposition. Regardless of whether these challenges were successful, the threat of lawsuits and controversy could easily be enough to discourage a school from adopting such a curriculum.

Leebert makes the important point that in creating a public school curriculum, morality will inevitably be at issue. As Peter Jenkins puts it:

> Classroom time is a scarce resource, meaning at some point someone must decide what should be taught and what should be ignored or deemed unworthy of a student’s time. For instance, spending a high school English class discussing *To Kill a Mockingbird* instead of *The Da Vinci Code* necessarily implies that the school considers one a more valuable subject of study than the other. A government class’s discussion of major political parties at the expense of minor political parties also implies a value judgment. Even if the class moves beyond Republicans and Democrats to Libertarians and Greens, the teacher will probably draw the line before reaching, say, the Marijuana Party. Ultimately, curricular choices of necessity involve value judgments. Furthermore, the teaching of certain values, such as the value of individual rights and democracy, is likely to remain popular and desirable even if a minority objects.\(^{133}\)

By covering issues specific to LGBTQ teens in public school sexual education classes, the school is providing valuable knowledge to LGBTQ students, while others are free to ignore the subject. Similarly, some religions oppose the use of contraception, yet there is movement on the federal level to require schools to teach children about contraception.\(^{134}\) Sexual education classes that teach kids how to use condoms are not trying to change their students’ beliefs about the validity of pre-marital sex but are simply imparting upon them knowledge that is useful to some and that society as a whole believes is worth having their children learn about.

\(^{132}\) *Citizens for a Responsible Curriculum*, 2005 U.S. Dist. LEXIS 8130, at *38.


\(^{134}\) See, e.g., H.R. 2553.
B. FIRST AMENDMENT CHALLENGES

Another solution to the exclusion of LGBTQ issues in sexual education classes is framing it as a violation of the First Amendment right to receive information. The Court has said that schools present a unique context in which to analyze First Amendment issues and generally give administrators and teachers what they view as a necessary degree of discretion and deference in such cases.135 Of course, there are constraints on what teachers may say in the classroom, and the distinction between permissible and impermissible lies at the line between education and indoctrination.136 Discussing LGBTQ issues in sexual education classes does not necessarily qualify as indoctrination because it is merely showing students that sexuality can take different forms, without placing a value judgment on which sexual orientation is superior or more desirable. Indeed, specifically prohibiting schools from discussing LGBTQ issues could be considered indoctrination because it is sending the message that only one type of sexuality, heterosexuality, is acceptable to talk about whereas other genders and sexual orientations are inappropriate.

Schools are sometimes considered a public forum for the purposes of the First Amendment.137 Restrictions are permitted to limit disruptive speech that interferes with a school’s purpose of education, but they are not permitted when intended to restrict a particular point of view.138 Schools are permitted to remain neutral in public debates, and if they choose to do that, then the court cannot make the school permit viewpoints from being expressed if that would seem to be done with the school’s approval.139 A teacher discussing LGBTQ issues could easily be characterized as doing so with the school’s approval since most classroom content is thought to be on behalf of the school. This means that a potentially successful First Amendment challenge to the school’s ban on discussing LGBTQ issues in sex education classes could be framed as a regulation intended to ban a viewpoint because discussing diverse genders and sexual orientations is not inherently disruptive.140 A school could defend such a challenge by arguing that excluding discussions of LGBTQ issues is merely an attempt to remain neutral on the subject. By broaching the issue of gender and

136. Id. at 1615–16.
139. Id. at 1623.
140. Id.
sexuality through sexual education classes, it is unclear how specifically forbidding the topic shows neutrality or irrelevance.\[141\]

The inclusion of LGBTQ issues in a public school’s sexual education curriculum is not to tell children that being lesbian, gay, bisexual, transgender, or questioning is good, or that they should even accept it regardless of what their moral and ethical convictions may be. Rather, the point is that the community as a whole has decided that being so is socially acceptable and that, conversely, it is not socially acceptable to discriminate against people for being of a different sexuality or gender identity.

IV. STEPS TOWARD CHANGING SEXUAL EDUCATION

California attempted to mitigate the discrimination against gay teens in public high schools by introducing Senate Bill 777 in 2007.\[142\] The bill prohibits instruction in public schools that reflects negatively on people because of their sexual orientation.\[143\] Also, it prohibits discrimination based on sexual orientation in public schools.\[144\] Of course, the bill does not require that educators present LGBTQ issues in a neutral or positive view, so even in light of the bill, sexual education instructors are free to ignore LGBTQ issues in their curriculum. Whether remaining silent on the topic of gender identity and sexual orientation qualifies as discrimination based on sexual orientation is yet to be decided. Opponents of the bill argued that the bill was unconstitutional and the general counsel for Advocates for Faith and Freedom, a religious nonprofit, criticized it as a “radical agenda” and as “brainwashing.”\[145\] A lawsuit was filed by Advocates for Faith and Freedom to repeal the bill, but in 2009 a Sacramento Superior Court dismissed the lawsuit.\[146\] Despite both the bill and the Education Code’s requirement that schools teaching sexual education provide instruction that is appropriate to pupils of all sexual orientations,\[147\] many schools caved in to local pressure and do not discuss homosexuality, while others went so far as to ban discussions of homosexuality entirely.\[148\]

\[141\] Tenney, supra note 135, at 1649.


\[143\] Id.

\[144\] Gottleib, supra note 64, at 603.


\[146\] CA Superior Court Upholds Student Civil Rights Act, MINORITY NEWS (Feb. 15, 2011), http://blackradionetwork.com/ca_superior_court_upholds_student_civil_rights_act;


\[147\] Lee, supra note 9, at 107.

\[148\] Id.
Restrictions on discussions about sexual orientation in public schools are generally grouped into three categories of statutes.\textsuperscript{149} The first category bans the topic entirely: the subject cannot be broached from a positive or a negative viewpoint.\textsuperscript{150} The second category of statutes prohibits schools from presenting homosexuality as acceptable; for example, Arizona has a statute prohibiting instructors in AIDS curriculums from condoning homosexuality.\textsuperscript{151} The third category requires that schools emphasize that homosexuality is unacceptable.\textsuperscript{152}

This means that for schools to actually begin including discussions about sexual orientation and safe sex for LGBTQ teens, school districts will have to create written standards about what they want sexual education classes to teach, to make sure that the classes are conforming to those standards and to stay strong in the face of local pressures by community members to alter that content. Leaving the matter to individual school districts, however, may be an ineffective way to handle LGBTQ issues in public schools. This could result in schools in conservative school districts banning or continuing to ignore homosexuality while liberal communities include it, effectively preaching to the choir. Federal regulation, such as making sexual education funding contingent on the inclusion of LGBTQ issues the way that it is for abstinence currently may be a more effective way to target the problem of ignoring LGBTQ students in sexual education classes on a large scale. Unfortunately, given the current state of federal sexual education regulation and the continuation of abstinence-only funding, this is most likely not going to happen any time soon. This means that a gradual, district-by-district approach may be the only way to target the issue in light of the heavy conservative influence over federal sexual education regulation and funding.

An important message in \textit{Parker v. Hurley} was that schools do not exist simply to teach the “three Rs”; schools exist also to socialize our community’s children to make them cooperative, contributive members of society.\textsuperscript{153} The role of schools has been described as not only promoting things like literacy, but also the necessary skills to help students communicate and coexist with others.\textsuperscript{154} One cannot take the horrors that many LGBTQ teens endure in middle and high school lightly. By failing to discuss diverse genders and sexual orientations in a class discussion about sex, schools are sending the message to both LGBTQ and straight

\textsuperscript{149} Tenney, \textit{supra} note 135, at 1641–42.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 1643. For example, Alabama has a statute requiring that sexual education emphasize “in a factual manner and from a public health perspective that homosexuality is not a lifestyle acceptable to the general public.” \textsc{Ala. Code} § 16-40A-2 (1992).
\textsuperscript{153} See generally Parker v. Hurley, 514 F.3d 87 (2008).
\textsuperscript{154} Tenney, \textit{supra} note 135, at 1642.
teens that being LGBTQ is not appropriate to discuss because there is something socially unacceptable about it.

In a period of growth and transformation where most teens spend more time at school than with their parents, schools have a responsibility to ensure that they are creating a safe environment where children will be free from harassment and can emerge as members of society who are able to live and work cooperatively with people who may be different from them. The point is not to promote LGBTQ issues or to persuade children to abandon the religious or ethical convictions that they might have grown up with. The reason for including discussions of diverse genders and sexual orientations within sexual education classes is so that students will receive accurate information that can help protect them against potentially life-long diseases. Perhaps it is equally important to encourage compassion and understanding in communities so that children will not receive messages of hatred for simply being themselves. If a person disapproves of homosexuality, then presumably all they will take from such a presentation is that while they do not need to accept homosexuality in their own life, homosexual people are just as deserving of dignity and respect as anyone else.

In addition to the social benefits within schools, the research indicates that parents want their children learning about a range of topics, including contraceptives, sexually transmitted diseases, emotional consequences of sex, and, yes, sexual orientation.\footnote{155} In a survey conducted by the Sexuality Information and Education Council of the United States, seventy-six percent of parents reported wanting their children to learn about sexual orientation in sexual education classes.\footnote{156} This indicates that at least among the parents responding to the survey, the inclusion of content relating to sexual orientation in sexual education classes would be supported.

Even when teachers are given permission by the school to cover “sensitive” subjects, local pressures have led many teachers to avoid covering these subjects within sexual education curriculums because of the fear of receiving complaints from parents and the community.\footnote{157} One


\footnote{156. The study was conducted nationwide by the Kaiser Family Foundation and the responses consisted of 1,501 student-parent pairs, 1,001 sexual education teachers, and 313 principals. See News Release, Henry J. Kaiser Family Found., \textit{National Study on Sex Education Reveals Gaps Between What Parents Want and Schools Teach} (Sept. 26, 2000), available at http://www.kff.org/youthhivstds/upload/National-Study-on-Sex-Education-Reveals-Gaps-Between-What-Parents-Want-and-Schools-Teach.pdf.}

\footnote{157. One-third of teachers who responded in a 2001 Guttmacher Institute survey reported avoiding covering topics that they were permitted to teach in sexual education curriculums because of the concerns about community backlash. Dailard, \textit{supra} note 155.}
option is for schools to have a guest speaker lecture; that way, pressure will most likely be directed toward the school board for allowing the topic to be covered and the guest speaker may be more prepared to handle grievances than a teacher receiving direct complaints for speaking about an issue. Groups such as the Triangle Speakers go to local schools at their request and present a panel that typically includes a lesbian, a gay man, a bisexual person, a transgender person, and the family member or ally of an LGBTQ person who are members of the local community.¹⁵⁸ Students are able to hear narratives from the speakers about their experiences and get the opportunity to ask questions.

A benefit of this sort of presentation is that students get to meet openly LGBTQ people, which for some may be a first, and that can dispel the fear or myths that students may have about them. Additionally, students might be less likely to receive misinformation and to have a more unbiased discussion with panels such as the Triangle Speakers than with a teacher, who may privately disapprove of or just not know a lot about LGBTQ people. Many states, such as California, have fact sheets for teachers to ensure that sexual education provides accurate information, but these tend to be restricted to topics like birth control and sexually transmitted diseases.¹⁵⁹ This means that information about human sexuality has the potential to be left to a teacher’s personal knowledge, which may not necessarily be accurate or unbiased. Bringing in guest speakers who may have firsthand knowledge about what it means to be gay, bisexual, or transgender, will not only increase the likelihood that students get correct information but also can show LGBTQ students that there is a supportive community out there for them.

Another option for teachers who do not wish to use a guest speaker but want to teach accurate information about sexual orientation is to use a guide like the one published by the Sexuality Information and Education Council of the United States (SIECUS). SIECUS publishes age-appropriate guidelines for schools divided into three levels depending on the grade level to ensure that information is age appropriate.¹⁶⁰ Level one, written for students age five through eight, includes messages such as “People deserve respect regardless of who they are attracted to,” and “Making fun of people by calling them gay (e.g., homo, fag, queer) is disrespectful and hurtful.”¹⁶¹ Level two, directed at ages nine through twelve, includes “Sexual orientation is just one part of who a person is,” and “Gay men, lesbians, bisexuals, and heterosexuals are alike in most ways.”¹⁶² Level three, for

¹⁵⁹ Nat’l Conf. St. Legis., supra note 42.
¹⁶⁰ Nat’l Guidelines Taskforce, supra note 57, at 17.
¹⁶¹ Id. at 29.
¹⁶² Id.
ages twelve through fifteen, contains messages like “People do not choose their sexual orientation,” “Many of the sexual behaviors people engage in are the same regardless of their sexual orientations,” and “Understanding one’s sexual orientation can be an evolving process.” Lastly, level four, for ages fifteen through eighteen, includes “The understanding and identification of one’s sexual orientation may change over the course of his/her lifetime,” and “many states ban discrimination against people based on their sexual orientation.” This is in addition to sections on gender identity and sexual orientation-neutral information about sexually transmitted diseases. The benefit of using materials like those published by SEICUS is that teachers are provided with a thorough guide on what messages are important to send and ensures that children receive age-appropriate information.

Finally, even if a teacher did not want to spend class time discussing LGBTQ issues because of administrative or personal barriers, there are still options for students. Research has shown that computer-based interactive programs containing sexual education are as effective as in-person instruction. These programs have the advantage of not requiring a facilitator and can be accessed either at home or on classroom computers. Simply by referring teens to online resources for LGBTQ-specific sexual education a teacher could increase the chances of positively impacting the student’s sexual health.

V. CONCLUSION

Sexual education plays an important role in the lives of teens. It has the power to positively impact their lives by increasing sexual autonomy and reducing the risk of teen pregnancy and sexually transmitted diseases. Sexual education also has the potential to perpetuate heteronormativity and homophobia, which can have devastating effects on the emotional and physical wellbeing of LGBTQ teens. Educators have the power to promote positive change by including information for LGBTQ teens in a way that shows students that “normal” human sexuality can take various forms. By creating a safe, positive environment where students of all orientations are recognized and validated, sexual educators can have a profound impact on the lives of LGBTQ teens.

164. Id.
165. Id. at 17.
166. Id. at 63.