South Carolina's "No Promo Homo" Law Overruled: Ensuring Student Access to Comprehensive and LGB-Inclusive Sex Education

I. OVERVIEW

Comprehensive and LGB-inclusive[1] sexual education programs have the potential to challenge heteronormative culture, provide affirming and truthful information for LGB youth about their sexuality from trusted authority figures, and protect the sexual health and well-being of all students. On February 26th, 2020, the Gay and Sexuality Alliance, Campaign for Southern Equality, and South Carolina Equality Coalition filed suit against Molly Spearman in her official capacity as the South Carolina State Superintendent of Education, and challenged the enforcement of a provision of South Carolina's Comprehensive Health Education Act ("the Act"), which prohibited public school districts from discussing any information about homosexuality (lesbian, gay, and bisexual sexual orientations, or LGB) except in the context of sexually transmitted diseases.[2] The Act stated that "any teacher who refus[ed] to

1. As the challenged law discussed in this Note only prohibits discussion of alternate sexualities/homosexuality and does not reference or prohibit discussion of gender identity, this Note will largely be limited to discussing sexual orientation, not gender identity. While sexual orientation and gender identity influence each other and are often discussed in tandem with one another, they are distinct concepts. Gender identity should be part of inclusive and comprehensive sex education curriculums, but the provision at issue only addresses sexual orientation. Accordingly, the acronym "LGB" will be used throughout this note instead of "LGBTQ+". Typically, LGBTQ+ is the preferred acronym as it fully encompasses the wide range of sexual orientations and gender identities, like transgender and non-binary identities, while LGB refers only to lesbian, gay, and bisexual sexual orientations.

2. Gender & Sexuality All. v. Spearman, No. 2:20-CV-00847-DCN, 2020 WL 1227345 at *1 (D.S.C. Mar. 11, 2020).

comply with the [sexual education] curriculum as prescribed by their local school board as provided in [the Act] [would be] subject to dismissal."[3]

The plaintiffs alleged that the challenged provision violates the Equal Protection Clause of the Fourteenth Amendment and sought an order declaring the provision unconstitutional, along with an order enjoining its enforcement by the state superintendent.[4] On March 11, 2020, the District Court entered a consent decree and judgement.[5] The United States District Court for the District of South Carolina *held* that South Carolina's prohibition of the discussion of LGB sexual orientations outside of the context of sexually transmitted diseases violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution. *Gender & Sexuality All. v. Spearman*, No. 2:20-CV-00847-DCN, 2020 WL 1227345 (D.S.C. Mar. 11, 2020).

II. BACKGROUND

In the federal scheme, education has traditionally been the purview of the states. As a result, sexual education varies widely by state and locality.[6] There are few federal cases directly addressing access to sexual education through public schools or equal treatment of LGBTQ+ students in sexual education curriculums as there are no federal laws governing these issues.[7] Access to and restrictions on sexual education have been litigated through state courts, with reasoning grounded on the balance between public schools' right to set their own curriculum and parental control over their children's upbringing, education, and religious beliefs.[8] Earlier cases challenging sexual education curricula focused on claims concerning parents' right to shield their children from sexual education,[9] while more recent challenges have seen efforts by groups to expand access to comprehensive sexual education and LGBTQ+ inclusive content.[10]

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3. *Id.* at *2.
4. *Id.*
5. *Id.* at *1,*3-6.
6. Melody Alemansour et al., *Sex Education in Schools*, 20 GEO. J. GENDER & L. 467, 468 (2019).
7. *Id.* at 483.
8. *Id.* at 483-84.
9. *E.g.,* Smith v. Ricci, 89 N.J. 514; Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525 (1st Cir. 1995); Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003).
10. *See* Alemansour et al., *supra* note 6, at 483-84.

Anti-gay curriculum laws, or "No Promo Homo" laws in sexual education, should run afoul of Equal Protection,[11] yet the Equal Protection framework developed by the U.S. Supreme Court for LGB people has been applied piecemeal to states, requiring strategic litigation by pro-LGB groups to enjoin the enforcement of anti-gay curriculum statutes such as South Carolina's Comprehensive Health Act.[12] This is further complicated by the lack of a clear level of scrutiny expressed in the Equal Protection jurisprudence of the U.S. Supreme Court, resulting in a precedent of using the rational basis test, which offers a lower level of protection for LGBTQ+ people.[13] As a result, it is lower court decisions such as the noted case that push comprehensive and inclusive sexual education forward and increases access to affirming resources in public schools for LGB youth.

A. Sexual Education and Public Schools

In the seminal case *Wisconsin v. Yoder*, the Supreme Court held that Wisconsin's law requiring compulsory school attendance past eighth grade unduly burdened the free exercise of religion of Amish and Mennonite parents.[14] *Yoder* established the "high place" parental discretion in religious and educational upbringing holds in our society and legal system.[15] The Court declared that "however strong the State's interest in universal compulsory education," only the most compelling interest "of the highest order" can overcome the interest in the free exercise of religion.[16] Sexual education programs in public schools have been challenged in the same vein as *Yoder* by parents who claim the programs unduly burden their religious freedom and infringe upon their right to raise their children according to their beliefs.[17] However, if schools provide an "opt-out" provision in their sexual education programs, courts have generally upheld sexual education programs as constituting a legitimate state interest and passing rational review.[18] For example, in *Smith v. Ricci*, the New Jersey Supreme Court held that the state education board's

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11. *See* Ashley E. McGovern, Note, *When Schools Refuse to "Say Gay": The Constitutionality of Anti-LGBTQ "No-Promo-Homo" Public School Policies in the United States*, 22 CORNELL J. L. & PUB. POL'Y 465, 484 (2012).

12. *See Id.* at 467.

13. *See* Romer v. Evans, 517 U.S. 620, 620 (1996); Obergefell v. Hodges, 576 U.S. 644 (2015); United States v. Windsor, 570 U.S. 744 (2013).

14. Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972).

15. *Id.* at 213-14.

16. *Id.* at 215.

17. Alemansour et al., *supra* note 6, at 483.

18. *Id.* at 477; Smith v. Ricci, 89 N.J. 514, 523 (1982); Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 535 (1st Cir. 1995); Leebaert v. Harrington, 332 F.3d 134, 138 (2d Cir. 2003).

requirement that local school districts develop a "family-life education program" did not unduly burden the exercise of free religion.[19] There, a father argued that the "family-life education program" exposed his children to ideas and values about sexuality contrary to their religious upbringing.[20] The court reasoned that the opt-out provision allowing parents to remove their children from portions of the program they found offensive was a sufficient protection.[21]

In *Brown v. Hot, Sexy, and Safer Productions*, the First Circuit held that a one-time program on HIV/AIDS awareness did not violate privacy or First Amendment protections.[22] There, several parents argued that a HIV/AIDS awareness program put on by a private company at a school assembly included profane sexual content in violation of their privacy and religious rights.[23] The court reasoned that schools are not required to design their curriculum around particular students' family beliefs and have the right to set a standard curriculum to promote the health and wellbeing of students.[24] Additionally, in *Leebaert v. Harrington*, the Second Circuit ruled that a parent did not have the right to remove their child from the entirety of a 45-day health and hygiene unit, in which an opt-out provision was already provided for the 6-day sexual health unit.[25] The parent also argued that the program was a violation of privacy protections and religious freedom.[26] The court again reasoned that schools are not required to design their curricula around particular students' family beliefs and that the state has a legitimate interest in promoting the health of their students, and with opt-in provisions, sexual health programs pass rational basis review.[27]

Furthermore, in *Parker v. Hurley* the First Circuit affirmed a lower court ruling that dismissed a parent's claim that the school violated their religious freedom by sending home books that portrayed families with same-sex parents.[28] The parent argued that the school was attempting to "indoctrinate[e] young children into the concept that . . . homosexual relationships are moral and acceptable behavior."[29] The First Circuit again

19. *Smith*, 89 N.J. at 519, 525.
20. *Id.* at 519, 520-21.
21. *Id.* at 523.
22. *Brown*, 68 F.3d at 534, 539.
23. *Id.* at 529.
24. *Id.* at 533-34.
25. Leebaert v. Harrington, 332 F.3d 134, 142-43 (2d Cir. 2003).
26. *See id.* at 137, 139.
27. *Id.* at 141.
28 Parker v. Hurley, 514 F.3d 87, 90, 107 (1st Cir. 2008).
29. *Id.* at 92.

emphasized that parents do not have the right to determine public school curriculum.[30] While this case does not directly relate to sexual education, it is important to note as it follows the same reasoning as *Smith*, *Brown*, and *Leebaert* and affirms public schools' right to determine their own educational curricula. *Parker* goes a step further by affirming public schools' right to present positive portrayals of LGBTQ+ people in their curriculum without the need to cater to intolerant religious beliefs of parents.[31]

Challenges to expand access to sexual education are much rarer than challenges to limit or remove sexual education.[32] In *American Academy of Pediatrics v. Clovis Unified School District*, the Superior Court of California held that the Clovis School District sexual education program violated a California state law requiring public schools to provide comprehensive sexual education.[33] There, the school district emphasized abstinence-only education, failed to provide adequate information on sexually transmitted infections, and "delivered instruction with an intentional gender or sexual orientation bias."[34] While the school district revised their curriculum after the filing of the law suit and the case was voluntarily dismissed, the parents still sought fees.[35] The court ultimately reasoned that the school had been in violation of the law for many years and that the parents' suit was part of the motivation for the school's revised sexual education program. [36]

B. LGB People and Equal Protection Jurisprudence

The Supreme Court has slowly constructed an Equal Protection jurisprudence for LGB people. In *Romer v. Evans*, the Court struck down a Colorado constitutional amendment that singled out LGB people and barred them from receiving status as a protected class under anti-discrimination laws.[37] In *Lawrence v. Texas*, the majority emphasized the liberty of consensual adults to engage in intimate relations with each other regardless of their sex as protected under the Due Process clause of the

30. *Id.* at 102.
31. *Id.* at 106.
32. Alemansour et al., *supra* note 6, at 488.
33. American Academy of Pediatrics v. Clovis Unified School Dist., No. 12CECG02608, 2015 WL 2298565, at *1 (Cal.Super. Apr. 28, 2015).
34. *Id.* at *2, *3, *5, *7, *8, *10, *14-15.
35. *Id.* at *1.
36. *Id.*
37. Romer v. Evans, 517 U.S. 620, 635-36 (1996).

Fourteenth Amendment.[38] Justice O'Connor's concurrence in *Lawrence* made a strong parallel argument based on the Equal Protection clause of the Fourteenth Amendment for LGB people.[39] In *Windsor v. United States*, the Court held that Defense Against Marriage Act discriminated against same-sex spouses and was unconstitutional under the Fifth Amendment's Due Process clause and Equal Protection clause.[40] In *Obergefell v. Hodges* the Court held that same-sex marriage was constitutional under a scheme of fundamental liberty, the Due Process clause, and the Equal Protection clause of the Fourteenth Amendment.[41] Finally, in *Bostock v. Clayton County*, the Court held that sexual orientation is a protected class under Title VII of the Civil Rights Act of 1964.[42] While the *Bostock* majority grounded the decision in statutory interpretation, not constitutional law, it still contributes to the Equal Protection jurisprudence that has developed around LGB people by recognizing discrimination based on sexual orientation as sex based discrimination prohibited by federal law and subject to intermediate scrutiny.[43]

Protections for LGB people have thus originated from several sources: the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments, a scheme of fundamental liberty, and sex discrimination.[44] With only the majority in *Romer* grounding its reasoning primarily in the Equal Protection clause, the jurisprudence surrounding LGB protections is muddled.[45] The Court in *Romer* used only a rational basis review, finding that the Colorado amendment denying anti-discrimination protections to LGB people specifically was motivated out of animus, which was not a legitimate state interest strong enough to overcome even rational basis review.[46] *Romer* emphasized that a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest."[47]

One of the ways states demonstrate this animus toward LGB people is through the promulgation of "No Promo Homo" laws. Otherwise known as anti-gay curriculum laws, these policies prohibit schools from

38. Lawrence v. Texas, 539 U.S. 558 (2003).
39. *Id.* at 579 (O'Connor, J., concurring).
40. United States v. Windsor, 570 U.S. 744, 745-47 (2013).
41. Obergefell v. Hodges, 576 U.S. 644, 675 (2015).
42. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1746-47 (2020).
43. *Id.* at 1746-47, 1754.
44. Romer v. Evans, 517 U.S. 620 (1996); *Obergefell*, 576 U.S. 644; *Windsor*, 570 U.S. 744; *Bostock*, 140 S. Ct. 1731.
45. *Romer*, 517 U.S. at 635, 639-40 (Scalia, J., dissenting).
46. *Id.* at 632-33.
47. *Id.* at 634.

discussing LGB sexual orientations, requiring teachers to adhere to a "don't-say-gay" policy, or only allowing discussion of LGB issues in the context of immorality or disease, as required by South Carolina's Comprehensive Health Act.[48] However, the inconsistent Equal Protection jurisprudence surrounding LGB rights has led to advocates having more success challenging these laws under the First Amendment. In *National Gay Task Force v. Board of Education of Oklahoma*, the United States Court of Appeals for the Tenth Circuit held that Oklahoma's "No Promo Homo" law was unconstitutional.[49] There, the law punished teachers for discussing LGB issues in the classroom.[50] The Tenth Circuit reasoned that this was a violation of the teachers' First Amendment rights.[51] A similar challenge was brought in *Gay Lesbian Bisexual Alliance v. Pryor*, where the United States Court of Appeals for the Eleventh Circuit held that an Alabama statute prohibiting the use of state funds for college organizations that promoted a gay lifestyle was unconstitutional under the First Amendment.[52] These successful challenges to "No Promo Homo" laws using the First Amendment demonstrate the different legal bases advocates can rely upon when arguing for LGB protections, while the noted case uses rational basis review and relies upon Equal Protection jurisprudence for LGB protections.

III. COURT'S DECISION

In the noted case, the United States District Court for the District of South Carolina held that South Carolina's prohibition of discussion of LGB sexual orientations in public schools outside of the context of sexually transmitted infections violated the Equal Protection clause of the Fourteenth Amendment.[53]

The opinion began by reciting the Consent Decree ("the Decree") both parties agreed to enter.[54] The Decree started with the relevant provision of the South Carolina Comprehensive Health Education Act, which prohibited "discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual

48. McGovern, *supra* note 11, at 467, 471.
49. Nat'l Gay Task Force v. Bd. of Educ. of Okla. City, 729 F.2d 1270, 1272 (10th Cir. 1984).
50. *Id*. at 1272, 1275; McGovern, *supra* note 11, at 465.
51. *Nat'l Gay Task Force*, 729 F.2d at 1274.
52. Gay Lesbian Bisexual All. v. Pryor, 110 F.3d 1543, 1549-1550 (11th Cir. 1997).
53. Gender & Sexuality All. v. Spearman, No. 2:20-CV-00847-DCN, 2020 WL 1227345 at *3, *6 (D.S.C. Mar. 11, 2020).
54. *Id.* at *1.

relationships except in the context of instruction concerning sexually transmitted diseases."[55] The plaintiffs alleged that the challenged provision was a violation of the Equal Protection clause as it subjects LGB students to negative treatment, while heterosexual students are not subject to such treatment.[56] The action was filed against Molly Spearman in her official capacity as South Carolina's State Superintendent of Education.[57] As superintendent, Spearman is responsible for exercising authority over the public school system and State Department of Education.[58] The State Department of Education is responsible for ensuring district compliance with the South Carolina Comprehensive Health Education Act and the challenged provision.[59]

The Act states that its purpose is to promote "good health . . . wellness, health maintenance, and disease prevention" in students.[60] The Decree noted that while the Act contains restrictions on the discussion of homosexual relationships, there are no similar restrictions on the discussion of heterosexual relationships.[61] The Act also provides that teachers who refuse to comply with the curriculum requirements are subject to dismissal.[62] The Decree next noted that the South Carolina attorney general's office issued an opinion in February 2020 recognizing that a court would likely conclude that the challenged provision of the Act is unconstitutional under the Equal Protection clause of the Fourteenth Amendment because it "overtly discriminates on the basis of sexual orientation" and there is no legitimate state interest advanced by the provision.[63] Both parties in the case agreed that the challenged provision was a classification based on sexual orientation and was not rationally related to any legitimate government interest, constituting a violation of the Equal Protection clause.[64]

The court then proceeded to their own judgement considering the Decree.[65] The court first found that subject matter jurisdiction and venue was proper, as the case involved a federal question, the defendant resided in South Carolina and the events that gave rise to the plaintiff's claim

55. *Id.*
56. *Id.* at *2.
57. *Id.* at *1-2.
58. *Id.* at *2
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at *3.
65. *Id.*

occurred in South Carolina.[66] The court then cited the relevant portion of the Fourteenth Amendment, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[67] The court reiterated that the challenged provision is a classification based on sexual orientation with no rational relationship to any legitimate state interest, thus failing rational basis review.[68] The court then permanently enjoined the superintendent and any of her officers or employees from enforcing or relying upon the challenged provision.[69] The court recognized Molly Spearman in her official capacity as superintendent as responsible for implementing the Decree, and stated that the Decree would apply to any successors to the superintendent position.[70] Next, the court ordered the superintendent to issue a memorandum to all members of the State Board of Education and superintendents of every public school district in South Carolina, and to issue a notice to the public on the websites of the State Board of Education and State Department of Education within sixty days.[71] The memorandum and notice were required to include a copy of the Decree, state that the challenged provision may no longer be enforced, and order that the South Carolina Comprehensive Health Act be implemented without regard to the challenged provision.[72] The Court ended the opinion with a statement retaining jurisdiction over the parties to enforce the Decree and decide any dispute that may arise under it.[73]

IV. ANALYSIS

The decision in the noted case represents an important building block in the effort to expand LGB protections and provide inclusive sex education programs to our youth. While the court provided little analysis on the extent of LGB protections in public schools or sex education programs, it affirmed that statutes that subject LGB people to negative treatment as compared to heterosexual individuals will be struck down as unconstitutional, even under the minimal protections of rational basis review.[74] Furthermore, the court impliedly affirmed all students' right to

66. *Id.* at *3-4.
67. *Id.* at *4.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at *5.
72. *Id.*
73. *Id.* at *6.
74. *Id.* at *5.

comprehensive and inclusive sexual education.[75] Whether students identify as part of the LGB community or not, sexual education programs that are comprehensive and non-judgmental benefit all students.[76]

While the court did the important work of striking down the "No Promo Homo" provision of South Carolina's Comprehensive Health Act, the opinion was notably bare in its analysis. Likely this is because both parties willingly entered into the Decree, which stated that the provision was a violation of the Equal Protection clause due to its negative treatment of LGB students, but the court could have provided a more robust analysis of its decision in the judgement portion.[77] Instead, the court simply recited the relevant portion of the Fourteenth Amendment and declared the provision unconstitutional under rational basis review.[78] While courts understandably do not want to take up the mantle of activists or impose personal beliefs on their decision-making, they also bear the responsibility of creating sound judicial precedent that is well-reasoned and reflects the principles of justice and fairness. This court falls short in this area, instead providing the bare minimum of judicial reasoning. The court follows the precedent of *Romer* by analyzing the statute using rational basis review but fails to acknowledge any of the other sources of Constitutional protections for LGB people developed by the courts: a fundamental scheme of liberty, the Due Process clause, or First Amendment protections.[79]

The Due Process clause and fundamental scheme of liberty argument for inclusive sex education could be a challenging position for a District court to adopt when there is no case law addressing a positive right to comprehensive sex education as guaranteed by the Due Process clause.[80] The only comparable case for this position is *Clovis*, which was based on California state law requirements for sex education and did not assert that comprehensive sex education was a Constitutional right.[81] However, there is some case law that supports the argument that prohibiting discussion of LGB sexual orientations beyond the context of disease is a violation of the

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75. *Id.*

76. *See* Alemansour et al., *supra* note 6, at 494.

77. *Spearman*, 2020 WL 1227345, at *3-6.

78. *Id.*

79. *See* Romer v. Evans, 517 U.S. 620, 620 (1996); Obergefell v. Hodges, 576 U.S. 644 (2015); United States v. Windsor, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Gay Lesbian Bisexual All. v. Pryor, 110 F.3d 1543, 1549-1550 (11th Cir. 1997); Nat'l Gay Task Force v. Bd. of Educ. of Okla. City, 729 F.2d 1270, 1272 (10th Cir. 1984).

80. *See* Alemansour et al., *supra* note 6, at 488.

81. American Academy of Pediatrics v. Clovis Unified School Dist., No. 12CECG02608, 2015 WL 2298565, at *1 (Cal.Super. Apr. 28, 2015).

First Amendment.[82] This court could have strengthened LGB protections by holding the provision unconstitutional under the Equal Protection clause and the First Amendment. This line of reasoning is clearly supported by *National Gay Task Force* and *Gay Lesbian Bisexual Alliance*, where the Tenth and Eleventh Circuit held that laws that restrict the speech of public school teachers and university clubs from "promoting" LGB sexuality violated the First Amendment.[83] In the noted case, very similar facts were present as teachers who failed to comply with the challenged provision were subject to dismissal by their district.[84]

Moreover, the court could have analyzed LGB discrimination under the framework of sex discrimination and applied a higher level of protection with intermediate scrutiny. While *Bostock* was not announced until June 2020, three months after the noted case, the essential premises of the argument are the same here: but for the sex of the people who make up "homosexual" relationships, there would be no differential treatment.[85] Discussion of heterosexual interactions between a woman and a man are not prohibited by the Comprehensive Health Act, yet when the sex of one of the participants is changed, the Comprehensive Health Act prohibits discussion of that relationship.[86] While the holding in this case is the same whether using a rational basis review based on LGB identity or intermediate scrutiny based on sex discrimination, the court could have provided LGB students a higher level of protection by including the sex discrimination framework.

Though the noted case was minimal in its analysis, its affirmation of inclusive, comprehensive sexual education supports the public health needs of students. Students are subject to a constant influx of misinformation about sex from their peers, media, the internet, and pop culture.[87] Yet at the same time, sex is stigmatized as dirty and immoral.[88] This stigma is further heightened for LGB youth, who are subject to messages casting their sexuality as unnatural, disease-ridden, and morally wrong.[89] In South Carolina's case, this message was delivered by public

82. *See Pryor*, 110 F.3d 1543 at 1547; *Nat'l Gay Task Force*, 729 F.2d at 1274.

83. *See* Pryor, 110 F.3d 1543 at 1547; *Nat'l Gay Task Force*, 729 F.2d at 1274.

84. Gender & Sexuality All. v. Spearman, No. 2:20-CV-00847-DCN, 2020 WL 1227345 at *2 (D.S.C. Mar. 11, 2020).

85. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1742-43 (2020).

86. *Spearman,* 2020 WL 1227345 at *1.

87. Tiffany Pham, *Stepping Out of the Closet: Creating More Inclusive Sex Education Instruction for Texas Public Schools*, 17 TEX. TECH. ADMIN. L.J. 347, 359 (2016).

88. *See id.* at 352-53.

89. *See id.* at 349.

schools as well, as the Act prohibited discussion of LGB sexual orientations except in the context of sexually transmitted infections.[90] However, the state of sexual education in the United States is overwhelmingly deficient, either non-existent or stressing ineffective and shame-based abstinence-only programs.[91] Half of states do not require any sexual education and most do not require the information to be medically accurate.[92] Since the 1980s, the federal government has expressed a preference for abstinence-only education despite issues with medical accuracy and Christian religious promotion in many of these programs.[93] Some progress has been made, such as the Affordable Care Act's Personal Responsibility Education Program (PREP) which provides funding for comprehensive sexual education.[94] However, abstinence-only programs still receive significant funding from the federal government, and many states and school districts still teach abstinence-only education.[95]

Abstinence-only education deprives LGB youth of knowledge about their health and safety concerning sexuality and deprives heterosexual students of the same information.[96] Abstinence-only sex education also has the unfortunate effect of slut-shaming individuals who are sexually active, resulting in guilt and feelings of secrecy around sexual activity that leaves individuals vulnerable to abuse and exploitation.[97] This same effect is replicated in LGB youth who are not represented in their sexual education programs, and may have additional feelings of shame and guilt surrounding their sexuality generated from family, religion, or community norms that are homophobic.[98] Furthermore, abstinence-only programs that stress the need to refrain from sexual activity often fail to educate students on practices of consent.[99] These programs thus fail to provide students with the skills they need to set healthy boundaries and make self-determined choices about what activities they want to engage in when they do become sexually active. Comprehensive sex education programs that acknowledge

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90. *Spearman*, 2020 WL 1227345 *2.

91. *See* Peggy Rowe, *States' Rights or States' Wrongs? The Constitutional Argument for Medically Accurate and Comprehensive Sex Education*, 62 ARIZ. L. REV. 539, 541, 547, 562 (2020).

92. *Id.* at 542.

93. Kendall Orton, *Abstinence-Only Sex Education on Trial*, 31 BRIGHAM YOUNG UNIV. PRELAW REV. 87, 90 (2017).

94. *Id.* at 91.

95. *See* Rowe, *supra* note 91, at 547; Orton, *supra* note 93, at 90, 92.

96. *See* Tiffany Pham, *supra* note 87, at 365.

97. *See* Rowe, *supra* note 91, at 545, 562.

98. *See id.* at 548-50.

99. *See id.* at 570 n.80.

the reality that teenagers do have sex thus prepare students to navigate their sexual health safely and without shame or exploitation.[100]

Some parents and lawmakers express concern that comprehensive sexual education encourages students to engage in sexual activity at an earlier age because it provides them with information on contraceptives like condoms and other forms of birth control rather than only presenting information on abstinence.[101] However, studies have shown that the opposite is true.[102] Abstinence-only programs have had "no significant effect in delaying the initiation of sexual activity or in reducing the risk for teen pregnancy and [STIs]."[103] They are ineffective at preventing teenagers from engaging in sex, as the U.S. has the highest teen pregnancy rate in the developed world and young people make up half of the population who contract preventable STIs.[104] However, comprehensive sex education programs have been found to effectively reduce the risk of teenage pregnancy without increasing the likelihood of sexual activity any more than abstinence-only programs or no sex education programs.[105]

Ultimately, the noted case appropriately applied precedent concerning LGB rights under the existing Equal Protection jurisprudence and affirmed LGB student's right to receive information about their sexual health and well-being. However, it did little beyond affirming the agreement the parties had already come to concerning the constitutionality of the provision. The District Court missed an opportunity to provide sound judicial reasoning and precedent for future challenges to LGB discrimination or expound on the rights of students to access medically accurate, comprehensive and inclusive sex education.

Anna Carter*

100. *See* Pham, *supra* note 87, at 370, 373.

101. *See* Orton, *supra* note 93, at 96.

102. *Id.*

103. *Id.* (citing Pamela Kohler, *Abstinence-Only and Comprehensive Sex Education and the Initiation of Sexual Activity and Teen Pregnancy*, 42 J. OF ADOLESCENT HEALTH 344, 344-351 (2008)).

104. Rowe, *supra* note 91, at 541.

105. Orton, *supra* note 93, at 96.

* © 2022 Anna Carter, J.D. Candidate 2023, Tulane Law School; B.A. 2020, Women's, Gender, and Sexuality Studies, University of Louisville.