ABSTINENCE-ONLY EDUCATION IN THE COURTS

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In the past two decades, the federal government has funneled hundreds of millions of taxpayer dollars into abstinence education, even though there is no credible evidence that this approach prevents teen pregnancy or the spread of sexually transmitted diseases, including HIV/AIDS. To the contrary, because these programs often present medically inaccurate or incomplete information about contraceptives and the transmission of sexually transmitted diseases, they interfere with the ability of teens to make healthy and responsible decisions if engaging in sexual activity. Moreover, although federal law does not permit government-funded programs to convey religious messages or impose religious viewpoints or practices, many abstinence-only programs continue to do so.

Since 1981, when Congress passed the first federal measure to promote abstinence education, the Adolescent Family Life Act (AFLA), concerned parents and advocates alike have brought a number of legal challenges against government-funded abstinence programs. The lawsuits have focused on the use of public dollars to promote religion, to disseminate medically inaccurate information, and to perpetuate gender stereotypes in taxpayer-funded sexuality education. Many of these challenges have been successful: in some cases, the courts have required abstinence-only programs to remove the offending content; in other cases, school districts have agreed to stop using the curricula in question; and in still other instances, faced with a court challenge, schools have expanded their sexuality education curricula to include more comprehensive approaches.

Despite these legal successes, proponents of abstinence-only education persist in their efforts to increase government funding for and religious involvement in abstinence-only programs. As a result, it is likely that the courts will continue to play an important role in curtailing and monitoring abstinence-only education. Below is an overview of the legal challenges that have been brought to date. Together these cases offer guidelines for future legal actions.

BOWEN V. KENDRICK: LAYING THE LEGAL GROUNDWORK

In 1983, the American Civil Liberties Union (ACLU) filed a lawsuit on behalf of a group of clergy, taxpayers, and the American Jewish Congress challenging the constitutionality of AFLA and the way that specific grantees were using AFLA funds. The case, *Bowen v. Kendrick*, proceeded to the United States Supreme Court, making it the first and only case the Court has decided, to date, addressing government-funded abstinence programs. As such, the decision provides guidance for what is and is not permissible in these programs.

Before the Supreme Court, the ACLU contended that AFLA violates the constitutionally mandated separation of church and state because it requires grant applicants to explain how they would involve religious organizations (among other groups) when providing services, it allows religious organizations to receive funds, and its program goals coincide with certain religious beliefs. The ACLU, therefore, argued that the statute should be struck in its entirety. The Supreme Court disagreed, holding instead that a statute may legitimately recognize "the important part that religion or religious organizations may play in resolving certain secular problems."[1] The Court further concluded that the goals of AFLA are not "religious in character" even if they coincide with certain religious beliefs.[2] And, despite this overlap, the Court refused to assume that religious organizations would promote religion in AFLA-funded programs.

The ACLU also called into question particular grants made under AFLA to religious organizations. In response, the Court clarified when religious groups may receive funds and what they may do with them. On the one hand, the Court explained that the government cannot give public dollars directly to an "institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religion's mission."[3] The Court reasoned that when public funds flow to such an institution—a church, a diocese, or a seminary, for example—there is a "substantial risk that [the] aid… would, knowingly or unknowingly, result in religious indoctrination."[4] On the other hand, the Court emphasized that public dollars can flow to other religiously affiliated groups so long as the dollars underwrite only secular content. For example, AFLA funds can go to a charity that is affiliated with a church, provided it does not use the money to promote religion. The Court, however, recognized that some AFLA grantees had been using federal funding to support religious activities. Consequently, it sent the case back to the lower court to determine whether specific AFLA grants constituted government-funded religion and to devise a remedy for addressing this problem. In 1993, the parties reached a settlement agreement.

Although *Bowen v. Kendrick* clarified that public money cannot be used to fund religious activities in a publicly funded sexuality education program, it did not stop the government from using taxpayer dollars to support fear-based, abstinence-only education. The federal government is free to fund abstinence-only education so long as programs do not use government dollars to promote religion. And advocates can challenge publicly funded abstinence-only programs on a case-by-case basis.

Since the conclusion of this case, Congress has instituted two additional abstinence-only programs: the abstinence-only-until-marriage initiative which Congress enacted in 1996 in the context of overhauling the nation's welfare system (Section 510 of Title V of the Social Security Act), and the Special Projects of Regional and National Significance abstinence program initiated in 2000. [5]

GOVERNMENT-FUNDED RELIGION AND ABSTINENCE-ONLY EDUCATION

Despite the outcome of *Bowen v. Kendrick*, some government-funded abstinence-only programs continue to promote religion. In 2002, in the first lawsuit filed against a program funded through Title V, the ACLU challenged the use of taxpayer dollars to fund religion in the Louisiana Governor's Program on Abstinence (GPA). Basing its claim on reams of public records, the ACLU demonstrated in this case, *ACLU of Louisiana v. Foster*, that the governor's program had made hundreds of thousands of dollars in grants to programs that used the funds to support religious activities and promote religious messages. Groups receiving GPA funds highlighted their misuse of the dollars in their monthly reporting forms to the governor's office. For example, one group noted:

> December was an excellen[t] month for our program, we were able to focus on the virgin birth and make it apparent that God desire[s] sexual purity as a way of life. The virgin birth help[ed] many people to see and understand what Christmas is about. Abstinence only put things in the right perspective, this let us know that each individual must live to please God and not man.[6]

Groups also reported that they used GPA funds to operate a chastity program entitled "God's Gift of Life," to organize prayer vigils at abortion clinics, and to teach a curriculum that educated participants on the "spiritual need" for abstinence and addressed "[t]heir relationship with God."[7] Despite these and numerous other reports indicating blatant use of GPA funds to promote religion, the GPA did nothing to address these violations until it was ordered to do so by the court.

In response to the ACLU's legal challenge, a federal district court ordered the GPA office "to cease and desist from disbursing GPA funds to organizations or individuals that convey religious messages or otherwise advance religion in any way in the course of any event supported in whole or in part by GPA funds."[8] The parties eventually settled the case after the GPA agreed to stop funding religious activities and to monitor closely the activities of all funded programs. Under the agreement, programs discovered to be promoting or advocating religion in any way are subject to losing their funding if they do not remedy the problem within a specified timeframe.

MEDICAL INACCURACIES IN ABSTINENCE-ONLY EDUCATION

Another persistent problem with abstinence-only programs is the inclusion of medically inaccurate information. Challenges to medical inaccuracies in publicly adopted curricula have been filed in Florida, California, and Louisiana (in a case that preceded *ACLU v. Foster*).[9] Each challenge relied on state statutes setting forth requirements for sexuality education programs in the state's public schools. Each was either a legal or political success.

In Florida, in *Planned Parenthood v. Duvall County School Board*, Planned Parenthood joined a group of parents in 1993 to challenge the district's adoption of a Teen-Aid abstinence curriculum for use in seventh grade classrooms, as well as the board's failure to adopt, as required by state law at the time, comprehensive, age-appropriate sexuality education curricula for the remaining elementary and secondary school classes. Among other claims, Planned Parenthood argued that the Teen-Aid curriculum contained inaccurate information about human sexuality, pregnancy prevention, HIV transmission, abortion, and other related topics—all in violation of state law.[10]

The lawsuit challenged, for example, the Teen-Aid curriculum's assertion that, by the tenth to twelfth week of gestation, the fetus "learns and remembers things, hears, sees, and has a personality."[11] The lawsuit also objected to diagrams that confused external male and female reproductive or sex organs with internal organs,[12] as well as passages claiming that "no controlled scientific study supports the value of condoms in helping to protect against sexually transmitted diseases including HIV" and that "following abortion, women are prone to suicide."[13]

The lawsuit resulted in real change. After a four-year legal battle, the school board ultimately agreed to drop the offending program and adopt a comprehensive, age-appropriate sexuality education curriculum for kindergarten through twelfth grade. The new curriculum included an optional abstinence pledge for students in seventh grade and above.

The California lawsuit, *Hall v. Hemet Unified School District Governing Board*, raised similar issues. In 1994, a group of parents challenged the Hemet school district's decision to use abstinence curricula published by Teen-Aid, Respect, and Choosing the Best, in the district's middle and high schools. Among other claims, the parents argued that the curricula violated California statutes requiring accuracy in instructional materials.[14] The challenged curricula included misinformation designed to frighten students, such as, "Correct usage of condoms may not prevent HIV infection, but only delay it!"[15] The curricula also labeled the following statement as false: "Although condoms do not provide 100% protection against transmitting or acquiring HIV, they are highly effective, if they are used properly."[16] In response to the legal challenge, the Hemet school board dropped sexuality education from the district curriculum altogether and replaced it with HIV/AIDS prevention education.

The first Louisiana lawsuit, *Coleman v. Caddo Parish School Board*, brought by a group of parents in 1992, challenged the inclusion of medically inaccurate information in the abstinence-only curricula—*Sex Respect* and *Facing Reality*—taught in the local public schools. Among other arguments, the parents contended that inaccurate or misleading information in the curricula violated a state statute defining sexuality education as "the dissemination of factual biological or pathological information that is related to the human reproduction system" and mandating that sexuality education "shall not include… the subjective moral and ethical judgments of the instructor or other persons."[17]

As the lawsuit emphasized, the curricula included statements claiming that anyone who has an abortion will suffer numerous physical risks, including "damage to… reproductive organs, heavy loss of blood, infection… increased risk of miscarriage or birth complications with future pregnancies… [and possibly] infertility."[18] The curricula also included statements that were not only factually incorrect, but amounted to subjective moral judgments, including, "Well, no one can deny that nature is making some kind of comment on sexual behavior through the AIDS and herpes epidemic," and "Saving sex until marriage, by contributing to our emotional growth, will help us become better parents when we are married."[19] The court ruled that these and similar passages violated Louisiana law and had to be deleted before the challenged curricula could be used in the public schools.

GENDER BIAS IN ABSTINENCE-ONLY EDUCATION

In addition to medical inaccuracies, gender stereotypes were an issue in the curricula involved in the 1992 Louisiana lawsuit and in the California challenge. Again relying on state law, both cases succeeded in bringing those stereotypes to light and ensuring their removal from the classroom.

In the California lawsuit, Planned Parenthood argued that the challenged curricula violated a state law prohibiting the use of instructional materials that "reflect adversely upon persons because of their… sex."[20] For example, the curriculum portrayed teenage boys as uncontrollable, even violent, sexual aggressors: "When they are over-stimulated by what they see and hear, young males are tempted to provide sexual release for themselves by dwelling on thoughts or even forcing another person to have sex with them."[21] At the same time, the curriculum portrayed teenage girls as responsible for keeping boys' sexual proclivities in check:

> Females are generally less impulsive, more level headed, about sex… Since females generally become aroused less quickly and less easily, they are better able to make a thoughtful choice of a partner they want to marry. They can also help young men learn to balance in a relationship by keeping physical intimacy from moving forward too quickly.[22]

Again, in the face of the legal challenge, the school board removed the offending curricula from the schools.

The challenged curricula in Louisiana included similar gender stereotypes. The court considered whether the offending passages were inaccurate and therefore violated state law. One passage read, "A male can experience complete sexual release with a woman he doesn't particularly like, whereas a woman usually can't do so unless she loves her partner." This was but one example. The court ordered the removal of such passages.[23]

A LOOK AHEAD: KEEPING WATCH

Given the Bush administration's commitment to increasing federal funding for abstinence-only programs and interest in involving religious organizations in the administration of social and educational services, it is essential that the advocacy community continue to monitor how abstinence-only dollars are spent and to challenge the misuse of these funds in the courts. While the results of legal challenges may be limited to remedying specific problems within specific programs (rather than bringing an end to all abstinence-only programs), individual lawsuits can serve as fair warning to all abstinence-only programs receiving public dollars. Legal challenges can also help ensure that teens are not subjected to forced religious indoctrination, misled by medically inaccurate materials that can put their health and lives at risk, or exposed to offensive and damaging gender stereotypes.

References

1. *Bowen v. Kendrick,* 487 U.S. 589, 607 (1988).
2. Id. at 605.
3. Id. at 610 (internal quotations omitted).
4. Id. at 612 (internal quotations omitted).
5. As originally conceived, AFLA was not an abstinence-only program; instead, it was more broadly designed to address the adverse effects of teenage sexual activity and childbearing. In 1997, the Maternal and Child Health Bureau issued guidelines requiring AFLA grantees to comply with the narrow eight-point definition of abstinence education that had been enacted in 1996, when Congress passed Section 510 of the Social Security Act (42 U.S.C. § 710). Regarding Maternal and Child Health Bureau guidelines, *see* Maternal and Child Health Bureau, Department of Health and Human Services, MCHJ116, Focus on Abstinence Education (1997). As a result, AFLA is now an abstinence-only program as well. See H.R. CONF. REP. NO. 107-347, at 113 (2002). Likewise, in 2000, Congress authorized the Special Projects of National and Regional Significance (SPRANS), a third abstinence-only program. Regarding SPRANS, see Military Construction Appropriations Act of 2001, Pub. L. No. 106-246, 114 Stat. 511 (2000).
6. Mem. of Law in Support of Mot. for Prelim. Inj. at 4, *American Civil Liberties Union v. Foster*, No. Civ.A. 02-1440, 2002 WL 1733651 (E.D. La. Jul. 24, 2002).
7. Id. at 9, 12.
8. *American Civil Liberties Union v. Foster*, No. Civ.A. 02-1440, 2002 WL 1733651, at (E.D. La. Jul. 24, 2002) (order granting preliminary injunction).
9. Throughout this article, any descriptions or quotations of the curricula involved in the Florida and California cases are drawn entirely from the documents filed in these cases, rather than from the curricula themselves.
10. Fl. Stat. §§ 230.2319 (repealed 1994), 233.067 (repealed 1997) & 233.0672 (repealed 2003). As noted, the statutes on which the case relied have since been repealed and replaced by other statutes mandating HIV/AIDS and abstinence-centered sex education as a requirement merely for high school graduation. See Fla. Stat. §§ 1002.20, 1003.42 & 1003.43.
11. Compl. for Decl. J. & Inj. Relief 62, *Planned Parenthood v. Duvall County Sch. Bd.*, No. 92-01638 (Fla. Cir. Ct. 1993).
12. Id. 60.
13. Id. 59, 64.
14. CA Educ. § 60045.
15. Compl. for Decl. J. & Inj. Relief 46, *Hall v. Hemet Unified Sch. Dist. Governing Bd.* (Cal. Super. Ct. 1994) [hereinafter Hall Compl.].
16. Id. 44.
17. LA Rev. Stat. Ann. § 17:281.
18. *Coleman v. Caddo Parish Sch. Bd.*, 635 So. 2d 1238, 1257 (La. Ct. App. 1994).
19. Id. at 1252, 1256.
20. Hall Compl., *supra* note 15, 50
21. Id. 45.
22. Id.
23. Coleman, 635 So. 2d at 1267-68.

NEW RESOURCE FROM AGI

The Alan Guttmacher Institute has recently released *Sex Education: Needs, Programs and Policies,* a PowerPoint slide set that looks at the role of sex education in helping teenagers make healthy and responsible decisions about sex, the current status of sexuality education in the United States, and the ongoing debate over abstinence-only-until-marriage programs.

The presentation includes slides on:

- sexual activity among American youth;
- sex education policy and practice in public schools;
- the effectiveness of programs designed to delay sexual activity and to prevent unintended pregnancy and sexually transmitted diseases (STDs) among teenagers;
- increased federal funding for abstinence-only education; and
- the disconnect between public opinion and public policy in this area.

The presentation can be downloaded at: http://www.guttmacher.org/pubs/ed_slides.html