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If You Can't Stop Them, Protect Them: The Legal Tethers for Bringing Fully Comprehensive Sexual Education Policy to Tennessee

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**IF YOU CAN'T STOP THEM, PROTECT
 THEM: THE LEGAL TETHERS FOR
 BRINGING FULLY COMPREHENSIVE
 SEXUAL EDUCATION POLICY TO
 TENNESSEE**
 TESS ANDERSON*

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I. INTRODUCTION

In a nationwide debate, Americans are fighting over how to teach sexual education, if at all, in public schools. Currently, 38 states and the District of Columbia have sexual education requirements.¹ Statistics show that on the world health stage, the United States is lacking in sexual health education. For example, Switzerland and the Netherlands boast impressive teen pregnancy statistics, with only 8 in 1000 teens and 14 per 1000 teens becoming pregnant respectively, while the US averages 57 in 1000 teens.² While teen pregnancy is not the only indicator of sexual health, this statistic shows a large gap between the US and countries that adopt more comprehensive sexual education policies. Switzerland and the Netherlands start sexual education during early adolescence, offer low-cost emergency contraception, and expect sexually active teens to use contraception.³

These countries' approaches to sexual education are reflective of the United Nations Educational, Scientific and Cultural Organization and the World Health Organization recommendations.⁴ Using science-backed data, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization published the International Technical Guidance on Sexuality Education ("ITGSE").⁵ This guide takes an evidence-informed approach to sexual education and, when compared to state policy throughout the US, exposes major differences.⁶

In an effort to promote public health, all states alike need to adopt comprehensive sexual education programs that encourage safe sex practices, promote healthy relationships, and acquire medically accurate knowledge surrounding sex. Recently, the

¹ *Sex and HIV Education*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> (last visited November 4, 2021).

² *Teen Pregnancy Rates Declined In Many Countries Between The Mid 1990s and 2011*, GUTTMACHER INST. (Jan. 23, 2015), <https://www.guttmacher.org/news-release/2015/teen-pregnancy-rates-declined-many-countries-between-mid-1990s-and-2011>.

³ *Id.*

⁴ *International Technical Guidance on Sexuality Education: An Evidence-informed Approach* (Revised ed. 2018), UNITED NATIONS POPULATION FUND, <https://www.unfpa.org/sites/default/files/pub-pdf/ITGSE.pdf>.

⁵ *Id.*

⁶ *Id.*

Tennessee Family Life Curriculum (the “Curriculum”) has been updated to include a more comprehensive approach to sexual education.⁷ This plan, while more inclusive than the previous sexual education curriculum, still neglects to include critical subjects. The Curriculum needs another revamp to fully address all sexual health topics, as presented in the ITGSE.

This Note explores why Tennessee needs a comprehensive sexual education curriculum, how Tennessee can get it, and what should be included in the Curriculum. For the purposes of this Note, a comprehensive sexual education curriculum is scientifically-based, age appropriate, incremental, and inclusive of all sexual identities and genders.⁸ The Curriculum needs to cover an array of subjects including, but not limited to, sexual and reproductive issues, contraception, sexuality, human rights, violence, consent, relationships, and non-discrimination.⁹ While Tennessee expanded its Curriculum to include information on HIV, STDs, and to permit contraception to be taught, the Curriculum remains abstinence-based. By neglecting to require lessons about contraception, safe sex practices, abortion, and consent, Tennessee, along with dozens of other states, are leaving their youth uneducated while actively feeding into public health issues.

The Part II of this Note provides background on sexual health in the United States. Particularly, this section includes statistics surrounding STDs and teen pregnancy, the current sexual health policy in Tennessee, and examples of different sexual education curriculums currently being used throughout the United States.

Part III of this Note analyzes legal tethers that can help attain comprehensive sexual education in Tennessee including the Mature Minor Doctrine,¹⁰ Freedom of Religion,¹¹ the Fourteenth Amendment Liberty Interest,¹² Title IX,¹³ and Title V.¹⁴ These analyses show arguments for comprehensive education and how to overcome the opposition of comprehensive education.

Finally, this Note concludes with suggested improvements to Tennessee’s Family Life Curriculum policy based off the World Health Organizations International Technical Guidance on Sexual

⁷ Tenn. Code Ann. § 49-6-1301–8 (2021).

⁸ UNITED NATIONS POPULATION FUND, *supra* note 4.

⁹ *Id.*

¹⁰ TN Dept. of Health, *Mature Minor Doctrine*, https://www.tn.gov/content/dam/tn/health/documents/MatureMinor_Doctrine.pdf (last visited November 3, 2021).

¹¹ U.S. CONST. amend. X.

¹² U.S. CONST. amend. IV.

¹³ Education Amendments Act of 1972, 20 U.S.C. §§1681–1688 (2018). Title IX (2018).

¹⁴ The Social Security Laws, 42 U.S.C. §701-710, subchapter V.

Education and successful comprehensive sexual health curriculums currently being applied in the US.

II. BACKGROUND

The need for sexual education is rooted in its impact on public health. One can look to policies and statistics from other states and countries to see how sexual education policy can impact sexual health. Looking to STD rates, teen pregnancy rates, and current forms of sexual education helps reveal what is needed from Tennessee's Family Life Curriculum today.

A. Sexual Health Statistics

The United States is plagued by sexual health endemics that touch millions of Americans every year, from STD infections¹⁵ to teen pregnancy.¹⁶ The US continues to funnel billions of dollars into direct medical costs for STD treatment,¹⁷ yet remains a world leader for teen pregnancy.¹⁸

i. STDs

On any given day in 2018, one fifth of the US population had an STD, totaling nearly 68 million infections that year alone.¹⁹ Of these cases, 26 million are new STD cases, and nearly half of these new cases are individuals between the ages of 15 to 24.²⁰ STDs can cause long term health problems including pelvic inflammatory disease, infertility, tubal or ectopic pregnancy, cervical cancer, and perinatal or congenital infections in infants born to infected mothers.²¹ If the serious health concerns surrounding STDs and

¹⁵ Ctrs. For Disease Control and Prevention, *Sexually Transmitted Infections Prevalence, Incidence, and Cost Estimates in the United States*, <https://www.cdc.gov/std/statistics/prevalence-2020-at-a-glance.htm> (last visited November 3, 2021).

¹⁶ Isaac Maddow-Zimet, *Pregnancies, Births and Abortions in the United States, 1973-2017: National and States Trends by Age*, GUTTMACHER INST., <https://www.guttmacher.org/report/pregnancies-births-abortions-in-united-states-1973-2017> (last visited November 3, 2021).

¹⁷ *Key Statistics from the National Survey of Family Growth – P Listing*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nchs/nsfg/key_statistics/p.htm (last visited November 3, 2021).

¹⁸ Kathrin F. Stanger-Hall et al, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6 PLOS ONE (2011). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3194801/>

¹⁹ CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra*, note 15.

²⁰ CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra*, note 17.

²¹ Nat'l Inst. of Allergy and Infectious Disease, *Sexually Transmitted Diseases* (August 6, 2015), <https://www.niaid.nih.gov/diseases-conditions/sexually->

infections were not enough, there is also an astounding economic impact rooted in the spread of STDs. In 2018, new STDs throughout the US resulted in \$16 billion in direct medical costs, with 26% of that going towards treating 15-24-year-olds with STDs.²²

ii. Teen Pregnancy

The US continues to have one of the highest teen pregnancy rates out of all developed countries.²³ In 2017, there were 14 pregnancies per 1,000 women aged 15–17 and 57 pregnancies per 1,000 women aged 18–19.²⁴ While statistics show that there is a decline in teenage pregnancy, evidence shows there is a correlation between that decrease and an increase in teenage use of contraception and practice of abstinence.²⁵

Teen pregnancy has an immediate impact on the education of girls. Only 40% of teen moms finish high school and only 2% of teen moms finish college by the age of 30.²⁶ There is a clear correlation between teen birth rates and national graduation rates.²⁷ This lack of education also impacts the mother's earning potential and overall family income. Nationwide, nearly half of teen mothers live with incomes below the poverty line.²⁸ The Brookings Institution released a study that children of teen mothers without a high school diploma have family incomes of around \$50,000 by age 29, while their counterparts who delay their first birth by just two years and receive a high school diploma have yearly incomes that are nearly \$6,600 higher.²⁹

Teen pregnancies do not only affect the mother; their children also suffer consequences. Children of teenage mothers are more likely to drop out of high school, have health problems, be incarcerated during adolescence, become a teen parent themselves,

transmitted-

diseases#:~:~text=In%20addition%2C%20STDs%20can%20cause,infants%20born%20to%20infected%20mothers.

²² CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra*, note 17.

²³ Stranger-Hall, *supra* note 18.

²⁴ Maddow-Zimet, *supra* note 16.

²⁵ *Id.*

²⁶ *Why It Matters*, POWER TO DECIDE, <https://powertodecide.org/what-we-do/information/why-it-matters> (last visited November 3, 2021)

²⁷ *Id.*

²⁸ Nat'l Conference of State Legislatures, *Oklahoma: Teen Pregnancy- Impact on Education and the Economy* (April 2015) <https://www.ncsl.org/documents/health/TPreOKEducation415.pdf>.

²⁹ Emily Cuddy and Richard Reeves, *Teen Moms: The Difference Two Years and a Diploma Make*, BROOKINGS (August 18, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/08/18/teen-moms-the-difference-two-years-and-a-diploma-make/#:~:~text=Whereas%20children%20of%20teen%20mothers,that%20are%20nearly%20%24%2C600%20higher>.

and face unemployment.³⁰ Aside from the direct impact on the family, there is a nationwide economic impact. Between 1991 and 2015, the teen birth rate dropped 64%, which resulted in \$4.4 billion in public savings in 2015 alone.³¹

B. Sexual Education Policy Survey

i. Tennessee

The 2021-2022 school year marked the beginning of Tennessee's new Family Life Education Curriculum. The new curriculum scraps the previous policy that only required counties that have a teen pregnancy rate over 19.5 out of 1,000 girls aging 15 to 17 to have sexual education in schools.³² Now, each Local Education Agency ("LEA") must adopt a Family Life Curriculum that complies with the newly adopted statutory requirements.³³

As explained in Tenn. Code Ann. § 49-6-1304, the Curriculum has 13 requirements, as well as 4 topics that are forbidden.³⁴ The first requirement of the Curriculum calls for "emphatically promot[ing] only sexual risk avoidance through abstinence, regardless of a students' current or prior sexual experience."³⁵ Under the umbrella of promoting abstinence before marriage,³⁶ the Curriculum requires educators to explain "the physical, social, emotional, psychological, economic and educational consequences of nonmarital sexual activity,"³⁷ assist students in practicing refusal skills to resist sexual activity,³⁸ address the benefits of raising children in a marital relationship,³⁹ and teach the social science research support benefits of "reserving the expression of human sexual activity for marriage."⁴⁰

In addition to abstinence, the Curriculum calls for information to be factually and medically accurate,⁴¹ encourages communication with parents or other trusted adults about sex,⁴² discusses the interrelationship of teen sexual activity and exposure to other risk behaviors like drinking and smoking,⁴³ educates on

³⁰ *Id.*

³¹ Maddow-Zimet, *supra* note 16.

³² Tenn. Code Ann. § 49-6-1302 (2020).

³³ Tenn. Code Ann. § 49-6-1302 (2021).

³⁴ Tenn. Code Ann. § 49-6-1304 (2021).

³⁵ Tenn. Code Ann. § 49-6-1304(a)(1) (2021).

³⁶ Tenn. Code Ann. § 49-6-1304(a)(3) (2021).

³⁷ Tenn. Code Ann. § 49-6-1304(a)(2) (2021).

³⁸ Tenn. Code Ann. § 49-6-1304(a)(7) (2021).

³⁹ Tenn. Code Ann. § 49-6-1304(a)(8) (2021).

⁴⁰ Tenn. Code Ann. § 49-6-1304(a)(3) (2021).

⁴¹ Tenn. Code Ann. § 49-6-1304(a)(4) (2021).

⁴² Tenn. Code Ann. § 49-6-1304(a)(6) (2021).

⁴³ Tenn. Code Ann. § 49-6-1304(a)(9) (2021).

consent, puberty, pregnancy, child birth, and STDs including but not limited to HIV/AIDS,⁴⁴ teaches students how to identify healthy and unhealthy relationships,⁴⁵ informs about adoption,⁴⁶ and provides instruction on detection and prevention of child sex abuse,⁴⁷ human trafficking,⁴⁸ and dating violence⁴⁹.

However, the Curriculum forbids promoting any gateway sexual activity⁵⁰ (which is defined in section 1301 as “encouraging, advocating, urging or condoning gateway sexual activities”⁵¹), providing or distributing materials on school grounds that condone, encourage, or promote student sexual activity among unmarried students,⁵² and distributing contraception on school property.⁵³ Schools may, but do not have to, provide medically accurate information about contraception and condoms that is consistent with public policy and presented in a manner that emphasizes only abstinence removes all risk.⁵⁴ The statute allows parents to opt their student out of the lesson without penalty.⁵⁵ Tennessee’s approach to sexual education is representative of a middle ground in the US when compared to states like Mississippi and Vermont, that employ sexual education programs that are not fully abstinence based, but also not a fully comprehensive approach.

ii. Mississippi

Mississippi’s current sexual education program is essentially an “abstinence-only education.” The statute calls for every public-school district to adopt either an abstinence only or abstinence-plus education model.⁵⁶

Under the statute, the curriculum must teach the gains of abstaining from sexual activity and the negative effects of not abstaining;⁵⁷ the harmful consequences to a child, the child’s parents, and society when a child is born out of wedlock;⁵⁸ that abstinence before marriage and fidelity within marriage is the only certain way to avoid out of wedlock pregnancy, STDs and related

⁴⁴ Tenn. Code Ann. § 49-6-1304(a)(10) (2021).

⁴⁵ Tenn. Code Ann. § 49-6-1304(a)(11) (2021).

⁴⁶ Tenn. Code Ann. § 49-6-1304(a)(12) (2021).

⁴⁷ Tenn. Code Ann. § 49-6-1304(a)(13)(A) (2021).

⁴⁸ Tenn. Code Ann. § 49-6-1304(a)(13)(B) (2021).

⁴⁹ Tenn. Code Ann. § 49-6-1304(a)(14) (2021).

⁵⁰ Tenn. Code Ann. § 49-6-1304(b)(1) (2021).

⁵¹ Tenn. Code Ann. § 49-6-1301(7) (2021).

⁵² Tenn. Code Ann. § 49-6-1304(b)(2) (2021).

⁵³ Tenn. Code Ann. § 49-6-1304(b)(4) (2021).

⁵⁴ Tenn. Code Ann. § 49-6-1304(b)(4)(A) (2021).

⁵⁵ Tenn. Code Ann. § 49-6-1305(b) (2021).

⁵⁶ Miss. Code Ann. § 37-13-171(1) (2021).

⁵⁷ Miss. Code Ann. § 37-13-171(2)(a) (2021).

⁵⁸ Miss. Code Ann. § 37-13-171(2)(b) (2021).

health problems;⁵⁹ the current law of rape, paternity, child support, and homosexual activity;⁶⁰ and that a mutually faithful, monogamous marriage is the only appropriate setting for sex.⁶¹

In addition, schools may elect to have a discussion on condoms or contraceptives but there may not be a demonstration of how to use them.⁶² HIV may be discussed but it is not required under the statute.⁶³ The curriculums cannot teach about abortion.⁶⁴

iii. Vermont

Vermont is an exemplar of comprehensive health education in the US. Its comprehensive health program occurs throughout elementary and secondary education and covers an array of topics from sexual health to pollution to disaster relief.⁶⁵ Within the education system, Vermont requires family and mental health education which covers decision making about sexual activity, parent and student interaction, family life guidance, and signs of suicide.⁶⁶

Vermont also has a human growth and development requirement which calls for instruction on understanding the physical, emotional, and social elements of development and interpersonal relationships, possible outcomes of premature sexual activity, contraceptives, adolescent pregnancy, childbirth, and abortion.⁶⁷ Vermont has further instruction on utilizing health services, recognizing and preventing sexual abuse and violence, and instruction on parenting styles and methods.⁶⁸ Vermont schools may also include a module focusing on cervical cancer and the human papillomavirus (HPV).⁶⁹ Vermont also requires all public school districts to make condoms available for their students, free of charge.⁷⁰

iv. Comparison

Of the three varying approaches to sexual education, Vermont is representative of a comprehensive sexual education

⁵⁹ Miss. Code Ann. § 37-13-171(2)(d) (2021).

⁶⁰ Miss. Code Ann. § 37-13-171(2)(e) (2021).

⁶¹ Miss. Code Ann. § 37-13-171(2)(f) (2021).

⁶² Miss. Code Ann. § 37-13-171(3) (2021).

⁶³ *Id.*

⁶⁴ Miss. Code Ann. § 37-13-171(6) (2021).

⁶⁵ 16 V.S.A. § 131 (2021).

⁶⁶ 16 V.S.A. § 131(5) (2021).

⁶⁷ 16 V.S.A. § 131(8) (2021).

⁶⁸ 16 V.S.A. § 131(11) (2021).

⁶⁹ 16 V.S.A. § 133(c) (2021).

⁷⁰ 16 V.S.A. § 132 (2021).

program, while Mississippi falls on the opposite end of the scale, reflecting the policies of abstinence-only education. Tennessee's family life curriculum falls somewhere near the middle, but still leans toward the abstinence-only side of the policy scale.

Currently, only 39 states in the US require sexual education, with all 39 states requiring provision of information on abstinence and only 20 states requiring provision of information on contraception.⁷¹ There is strong data that shows a correlation between a state's approach to sexual education policy and its STD and teen pregnancy rates,⁷² however, this is not the only basis for sexual health.⁷³

v. **STDs, Teen Pregnancy Rates, and Sexual Education Styles**

When broken down on a state-by-state basis, sexual health crisis statistics tend to correlate with the sexual education program adopted by the state.⁷⁴ Additionally, there is strong connection between race, geography, and socio-economic factors and STD and teen pregnancy rates.⁷⁵ The spread of STDs can be tied to numerous social, economic, and behavioral factors.⁷⁶ Racial groups including African Americans, Hispanics, and Native Americans have higher rates of contracting STDs.⁷⁷ Those suffering from poverty and substance abuse are also more at risk of STDs.⁷⁸ Access to health care is crucial for early detection and reducing the spread of STDs.⁷⁹ Socially, negative stigma and discomfort surrounding STDs are one of the biggest differences between the US and other developed countries with low STD rates.⁸⁰

As previously mentioned, Mississippi is representative of an abstinence-based approach, Vermont is representative of a

⁷¹ GUTTMACHER INST., *supra* note 1.

⁷² Erin Blakemore, *Teens aren't receiving enough sex education, study says*, THE WASHINGTON POST (Nov. 28, 2021 at 9:00 a.m. EST) https://www.washingtonpost.com/health/sex-education-teens/2021/11/26/c005d154-4c98-11ec-b73b-a00d6e559a6e_story.html.

⁷³ STD and teen pregnancy rates are not the only basis for sexual health.

⁷⁴ *Id.*

⁷⁵ *Sexually Transmitted Diseases*, OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/sexually-transmitted-diseases#five> (last visited January 4, 2022).

⁷⁶ *Id.* (These factors are known to contribute to the vulnerability of populations and should be kept in mind when looking at the analysis below. This note does not account for the social differences between the states, just the types of sexual education).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

comprehensive approach, and Tennessee is representative of a middle point leaning towards the abstinence-based side. Mississippi consistently is in the top three states for rates of sexual health crises. In 2019, Mississippi had the highest Gonorrhea rate with an average of 404.1 out of 100,000 people,⁸¹ the second highest Chlamydia rate with an average of 847.2 out of 100,000 people,⁸² and the third highest Syphilis rate in the US.⁸³ Conversely, Vermont is consistently in the bottom two states for sexual health crises rates. In 2019, Vermont had the lowest Gonorrhea rate with 27.9 out of 100,000 in 2019,⁸⁴ the lowest Syphilis rate in the country at 1.8 out of 100,000 in 2019,⁸⁵ and the second lowest Chlamydia rate with 274.3 out of 100,000.⁸⁶

In 2019, Tennessee had the 12th highest rate for chlamydia,⁸⁷ 10th highest for Gonorrhea,⁸⁸ and 21st highest for syphilis.⁸⁹ While not as egregious as Mississippi, Tennessee has never come close to competing with Vermont's low rates.

In terms of teen birth rates, the states follow a similar trend. Mississippi has the second highest in the country with 29.1 out of 1,000 teens, Tennessee has a rate of 23.7 out of 1,000, and Vermont has a rate of 7.6 out of 1,000 teens.⁹⁰

⁸¹ Table 13. *Gonorrhea – Reported Cases and Rates of Reported Cases by State, Ranked by Rates, United States, 2019*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/std/statistics/2019/tables/13.htm> (last visited November 3, 2021).

⁸² Table 2. *Chlamydia – Reported Cases and Rates of Reported Cases by State, Ranked by Rates, United States, 2019*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/std/statistics/2019/tables/2.htm> (last visited November 3, 2021).

⁸³ Table 26. *Primary and Secondary Syphilis – Reported Cases and Rates of Reported Cases by State, Ranked by Rates, United States, 2019*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/std/statistics/2019/tables/26.htm> (last visited November 3, 2021).

⁸⁴ CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 81.

⁸⁵ CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 83.

⁸⁶ CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 82.

⁸⁷ *Id.*

⁸⁸ CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 81.

⁸⁹ Table 26. *Primary and Secondary Syphilis – Reported Cases and Rates of Reported Cases by State, Ranked by Rates, United States, 2019*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/std/statistics/2019/tables/26.htm> (last visited November 3, 2021).

⁹⁰ *Teen Birth Rate by State*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/pressroom/sosmap/teen-births/teenbirths.htm> (last visited November 3, 2021).

III. ISSUE

As shown above, the US continues to be plagued by sexual health crises. To combat these issues, international organizations recommend comprehensive curriculums. The ITGSE breaks their ideal curriculum down into 8 key concepts: relationships; values, rights, culture, and sexuality; understanding gender; violence and staying safe; skills for health and well-being; the human body and development; sexuality and sexual behavior; and sexual reproductive health.⁹¹ In addition to these 8 concepts, they further break down their guidance into 4 different age groups: 5-8 years, 9-12 years, 12-15 years, and 15-18+ years.⁹² Within those age groups they have learning objectives applicable to each of the 8 Key Concepts.⁹³

Opposers of comprehensive sexual education argue that sexual education should teach abstinence, often basing their preferences on religious beliefs and reaching to legal arguments to support them. Tennessee's abstinence-based approach to sexual education continues to be detrimental to the state's overall sexual health because it does not cover necessary topics that are included in a more comprehensive sexual education policy.

IV. LEGAL TETHERS

Under the Tenth Amendment, every state has the power to create and enforce its own educational requirements, because it is not otherwise mentioned in the US Constitution.⁹⁴ Every state is required by its own state constitution to provide education.⁹⁵ For example, under Art. XI Section 12 of Tennessee's constitution, the state "recognizes the inherent value of education and encourages its support" and "(t)he General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools."⁹⁶ However, not all states require sexual education as a requirement to providing education.⁹⁷

The debate over sexual education is often value-based. These value-based arguments are rooted within the United States

⁹¹ UNITED NATIONS POPULATION FUND, *supra* note 4.

⁹² *Id.* at 34.

⁹³ *Id.* at 35.

⁹⁴ U.S. CONST. amend. X.

⁹⁵ *Education, LEGAL INFO. INSTITUTE*, <https://www.law.cornell.edu/wex/education#:~:text=Each%20state%20is%20required%20by,children%20may%20receive%20an%20education.&text=The%20Equal%20Education%20Opportunities%20Act,%2C%20sex%2C%20or%20national%20origin>. (last visited January 4, 2022).

⁹⁶ TENN. CONST. Art. XI, § 12.

⁹⁷ GUTTMACHER INSTITUTE, *supra* note 1.

Constitution via the First Amendment's Freedom of Religion Clause,⁹⁸ and the Fourteenth Amendment's Liberty Interest.⁹⁹ Other legal arguments made concerning sexual education include minors' ability to make health-related decisions,¹⁰⁰ and discrimination against women and members of the LGBTQ+ community.¹⁰¹ This section of the note analyzes various legal tethers and explains how the law supports an argument for a comprehensive sexual education.

A. Mature Minor Doctrine

Tennessee has a common law doctrine that allows minors to consent to medical treatment, known as the Mature Minor Doctrine.¹⁰² The Mature Minor Doctrine follows the Rule of Sevens: under the age of 7 parental consent is required due to a lack of capacity, unless a statutory exception applies; between the ages of 7 and 14 there is a rebuttable presumption that the child lacks capacity, so parental consent is generally necessary; and when treating minors ages 14 to 18, there is a rebuttable presumption of capacity, so physicians can treat the minor without parental consent unless they believe the minor lacks the capacity to make their own health care decisions.¹⁰³

In addition to the general doctrine discussed above, Tennessee has codified certain conditions¹⁰⁴ that allow minors to be treated without parental consent including treatment for drug abuse, STDs, emergency situations, provision of contraception, and provision of prenatal care.¹⁰⁵

Decker v. Carrol Academy addresses various challenges surrounding the Mature Minor Doctrine and challenges the constitutionality of the doctrine specifically concerning contraceptives for minors.¹⁰⁶ Carrol School officials referred Decker's daughter to a public health clinic, and that public health clinic then distributed birth control to Decker's daughter without parental consent.¹⁰⁷ Decker contended that the distribution of birth

⁹⁸ U.S. CONST. amend. X.

⁹⁹ U.S. CONST. amend. IV.

¹⁰⁰ *Mature Minor Doctrine*, *supra* note 10.

¹⁰¹ Education Amendments Act of 1972, 20 U.S.C. §§1681–1688 (2018). Title IX (2018).

¹⁰² *Mature Minor Doctrine*, *supra* note 10.

¹⁰³ *Id.*, *see also* Cardwell v. Bechtol, 724 S.W.2d. 739 (Tenn. 1987).

¹⁰⁴ In the argument here, the relevant Tennessee statutes are Tenn. Code Ann. § 68-10-104(c) concerning STD treatment for minors, Tenn. Code Ann. § 68-34-107 Concerning contraceptives for minors, and Tenn. Code Ann. § 63-6-223 concerning prenatal care for minors.

¹⁰⁵ *Mature Minor Doctrine*, *supra* note 10.

¹⁰⁶ *Decker v. Carroll Academy*, 1999 Tenn. App. LEXIS 336 (Tenn. Ct. App. May 26, 1999).

¹⁰⁷ *Id.*

control violated her parental rights under the First Amendment.¹⁰⁸ The Court sided with Carrol Academy, granting a motion to dismiss because Decker failed to rebut the presumption that her 14-year-old daughter had the capacity to consent to the medical treatment administered.¹⁰⁹

Informing mature minors about their sexual health allows them to make informed decisions about their own health. There is a rebuttable presumption that minors over the age of 14 have the capacity to make medical decisions concerning contraception and treatment of STDs.¹¹⁰ However, having the capacity to decide does not necessarily mean that a minor will be educated enough to understand all potential ramifications of their decisions. By providing comprehensive sexual education, minors will be better situated to make educated decisions regarding their health that they may otherwise not have as an uneducated minor.

B. Freedom of Religion

Both sides of the debate on sexual education root their arguments within the First Amendment's Freedom of Religion Clause. The first sixteen words of the First Amendment read: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."¹¹¹ Often intertwined, the first clause is the Establishment Clause, while the second clause is known as the Free Exercise Clause.

i. Establishment Clause

The Curriculum violates the Establishment Clause because it is coercive. The Establishment Clause prohibits the government from making any law respecting an establishment of religion.¹¹² Put simply, the government cannot make a law that favors one religion over another. Unfortunately, it is not that simple. The Establishment Clause, and its related tests, is a contentious subject amongst legal scholars and Justices alike. Previously, the test most associated with the Establishment Clause was the *Lemon Test*.¹¹³ Under *Lemon v. Kurtzman*, the Supreme Court established a three-prong test to determine whether a law violates the Establishment Clause known

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Mature Minor Doctrine*, *supra* note 10.

¹¹¹ U.S. CONST. amend. X.

¹¹² Stephen J. Shapiro, *Freedom Of Religion*, UNIV. OF BALTIMORE, https://home.ubalt.edu/shapiro/rights_course/Chapter5text.htm (last visited November 3, 2021).

¹¹³ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

as the “*Lemon Test*”.¹¹⁴ Under this test, first, the law must have a secular purpose.¹¹⁵ Second, the laws primary effect must not be to advance or inhibit religion.¹¹⁶ Third, it must not foster an excessive entanglement between government and religion.¹¹⁷

Under the *Lemon Test*, The Curriculum violates the Establishment Clause because it does not pass the first prong of the *Lemon Test*, as it lacks a secular purpose.¹¹⁸ The secular purpose prong requires the government’s actions to be justified by a primary, genuine, secular purpose.¹¹⁹ Different cases use the secular purpose prong differently.¹²⁰ In *Edwards v. Aguillard*, the Court looked to the actual purpose and required it to be clear and not merely a sham.¹²¹

The Curriculum currently leans towards abstinence and rejects comprehensive policy. In order to have a secular purpose, and survive the *Lemon Test*, Tennessee must show that the primary purpose behind the Curriculum is advancing a legitimate, secular state interest and not a religious ideal.

The Curriculum’s promotion of abstinence, banning of contraception distribution, and non-requirement of contraception education is more representative of a religious belief, not American values. For example, despite 64.9% of women in the US aged 15 to 49 using contraception,¹²² the Curriculum still claims the lack of contraception education is based on American values. However, this viewpoint is more like the Roman-Catholic belief that contraception should be banned because it is a sin against nature.¹²³ Other religions, including some Protestant denominations, some forms of

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See *Wallace v. Jaffree*, 472 U.S. 38 (1985) (deciding that if there is no obvious secular purpose, the court does not need to examine the other two prongs of the *Lemon Test*).

¹¹⁹ *Lemon*, 403 U.S. at 612-14.

¹²⁰ Compare *Edwards v. Aguillard*, 482 U.S. 578 (1987) with *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (requiring that the statute must be wholly motivated by religious motivations in order to be invalidated by the establishment clause).

¹²¹ *Edwards*, 482 U.S. at 578.

¹²² Kimberly Daniels, Ph.D., and Joyce C. Abma, Ph.D., *Current Contraceptive Status Among Women Aged 15-49: United States, 2015-2017*, NCHS DATA BRIEF No. 327 (December 2018) <https://www.cdc.gov/nchs/products/databriefs/db327.htm#:~:text=In%202015%E2%80%932064.9%25%E2%80%94or%2046.9%20million%20of,among%20women%20aged%2040%E2%80%9349.>

¹²³ J G Schenker and V Rabenou, *Contraception: traditional and religious attitudes*, 49 EUR. J. OBSTET. GYNECOL. REPROD. BIOL. (1993). <https://pubmed.ncbi.nlm.nih.gov/8365507/#:~:text=The%20Roman%20Catholic%20church%20forbids,denominations%20have%20allowed%20contraceptive%20use.>

Islam, Hinduism, and Buddhism allow for couples to prevent pregnancy.¹²⁴ As a result, the Curriculum should fail the first prong of the *Lemon* Test, because without a sincere intent, the Curriculum lacks a secular purpose.

Even if the intent behind the Curriculum is to promote sexual health and lower rates of STDs and teen pregnancy, it still fails the first prong of the *Lemon* Test. As a recipient of federal Title V funding,¹²⁵ Tennessee is adhering to a series of requirements that are not proven to help combat current sexual health crises.¹²⁶ One 2011 survey of sexual health programs revealed that the level of abstinence promoted in a curriculum positively correlated with teen pregnancy, meaning that teens in states that prescribe more abstinence education are more likely to get pregnant.¹²⁷ A congressionally mandated 2007 study additionally revealed that Title V programs had no beneficial impact on teen sexual behavior.¹²⁸ A proven rate of failure associated with the strategies utilized in the Curriculum shows that the government is electing to use policies that are not aligned with their intent.¹²⁹ This again causes the intent of the Curriculum to fall into the “sham” category because the state is not taking steps to ensure the outcome is achieving the intent of the policy, and ultimately fails the *Lemon* Test for lack of a secular purpose.

Although the Curriculum fails under the *Lemon* Test, this long-maligned test has now been abandoned, requiring a new analysis. In *Kennedy v. Bremerton School District*, the Court abandoned the *Lemon* Test and in its place instructed that the Establishment Clause is to be interpreted by reference to historical practices and understandings.¹³⁰ Citing to cases including *Town of Greece v. Galloway* and *American Legion*, the Justices call upon the courts to draw a line “between the permissible and impermissible” reflecting the “understanding of the Founding Fathers.”¹³¹ While it is outside of the scope of this note to fully interpret this change in law, this note acknowledges how the Curriculum may still violate the Establishment Clause without fully interpreting this new rule.

¹²⁴ *Id.*

¹²⁵ Ass'n of Maternal & Child Health Programs, *AMCHP State Profile: Tennessee*, <http://www.amchp.org/Policy-Advocacy/MCHAdvocacy/2021%20State%20Profiles/Tennessee%202021%20FINAL.pdf> (last visited November 4, 2021).

¹²⁶ Stanger-Hall, *supra* note 18.

¹²⁷ *Id.*

¹²⁸ *A History of Abstinence-Only Funding in the U.S.*, SEXUALITY INFO. AND EDUC. COUNCIL FOR THE U.S., <https://siecus.org/wp-content/uploads/2018/07/4-A-Brief-History-of-AOUM-Funding.pdf> (last visited November 3, 2021).

¹²⁹ *Id.*

¹³⁰ *Id.* at 2428.

¹³¹ *Id.*; see *Town of Greece v. Galloway*, 572 U.S. 565 at 576; see also *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

As part of this new test, the ruling in *Kennedy* explained that the government cannot coerce people to observe religious practices.¹³² In *Kennedy*, the Court decided that a public high school football coach praying at the 50-yard line after football games was not coercive behavior.¹³³ In turn, the justices ruled that firing the coach for praying on the 50-yard line violated the Establishment Clause.¹³⁴

Unlike praying on the 50-yard line, an abstinence-based sexual education policy is likely coercive. The Curriculum limits access to comprehensive sexual education and presents a limited view reflective of Roman-Catholic beliefs. This format does not give students the opportunity to access comprehensive education and ultimately coerces them into learning an abstinence-based view of sexual education.

Overall, it is unclear how the new test for the Establishment Clause will be applied to sexual education. Whether the Curriculum is in line with the historical practices and understanding is a question for a later date. However, there is a strong argument that the Curriculum violates the Establishment Clause because it is coercive and forces students to learn the Roman-Catholic approach to sexual education, not a science-backed, religion-neutral approach. As a result, the Curriculum interferes with freedom of religion rights for students and their parents within public schools. Tennessee needs to adopt a curriculum that survives the Establishment Clause by not being coercive.

ii. Free Exercise Clause

Others who oppose comprehensive sexual education argue that it violates their religious rights under the Free Exercise Clause. Under the Free Exercise Clause, all individuals have the absolute right to hold any religious belief without interference by the government.¹³⁵

In *Citizens for Parental Rights v. San Mateo County Bd. Of Education*,¹³⁶ California parents challenged the implementation of family life and sex education programs by the school board.¹³⁷ The parents brought a slew of accusations including that the program interfered with the parents' and students' free exercise of religion

¹³² *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2430 (2022).

¹³³ *Id.* at 2429

¹³⁴ *Id.* at 2431

¹³⁵ Stephen J. Shapiro, *Freedom of Religion*, UNIV. OF BALTIMORE, https://home.ubalt.edu/shapiro/rights_course/Chapter5text.htm (last visited November 3, 2021).

¹³⁶ This case is not binding precedent in Tennessee.

¹³⁷ *Citizens for Parental Rights v. San Mateo Cnty. Bd. of Educ.*, 51 Cal. App. 3d 1, 4 (1975).

and that a statutory system of excusal from participation in the program would be unconstitutional.¹³⁸ The Superior Court dismissed the complaint and the Court of Appeals affirmed, finding the program to be constitutional because of the state's excusal program.¹³⁹

The court went on to apply the three-step analysis from *Sherbert v. Verner*.¹⁴⁰ This three-prong analysis determines whether a regulation of conduct based on a religious belief can be upheld by the court.¹⁴¹ First, the court assesses whether the regulation directly threatens the public safety, peace, or order.¹⁴² Second, it looks to whether the disqualification from receipt of benefits burdens the free exercise of the petitioner's religion in any way.¹⁴³ Third, if there is any incidental burden, the court determines whether it was justified by a compelling state interest.¹⁴⁴

In this case, the court found that it was apparent that the parents' refusal to send their kids to the program did not threaten public safety,¹⁴⁵ the election not to participate and the informal pressure surrounding it was not unduly burdening on the petitioner,¹⁴⁶ and there is a compelling state interest in education.¹⁴⁷ As a result, the court found that since the program was not compulsory, it did not violate the Free Exercise Clause.¹⁴⁸ Additionally, the court noted that "[a]bsent some serious contention of harm to the mental or physical health of the children of this state or to the public safety, peace, order or welfare, a mere personal difference of opinion as to the curriculum which is taught in our public school system does not give rise to a constitutional right in the private citizen to control exposure to knowledge."¹⁴⁹

Free Exercise jurisprudence has since changed since *Citizens*. The decision in *Employment Division, Dept. of Human Resources of Oregon v. Smith* altered Free Exercise law by refusing to grant religious exceptions from neutral, generally applicable criminal laws.¹⁵⁰ In *Employment Division, Dept. of Human Resources of Oregon v. Smith*, the plaintiffs were fired from their jobs after taking peyote for religious purposes, which violate Oregon's state law banning the use of controlled substances for non-

¹³⁸ *Id.* at 5.

¹³⁹ *Id.* at 5–6.

¹⁴⁰ *Id.* at 16; *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁴¹ *Citizens*, 51 Cal. App. 3d at 16.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 17.

¹⁴⁷ *Id.* at 19.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 18.

¹⁵⁰ *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

medicinal purposes.¹⁵¹ The plaintiffs were denied unemployment benefits because of their “workplace misconduct” and challenged the decision in court.¹⁵² Ultimately, the Court found that the Free Exercise Clause of the First Amendment permits the state of Oregon to criminalize religious practices that violate generally applicable laws.¹⁵³ Within the *Employment Division* decision, the Court explains that, along with other methods of suppressing religious liberty, the government may not compel affirmation of religious belief or lend its power to support one side of a religious argument.¹⁵⁴

Applying the *Citizens* test, along with the changes in *Employment Division*, to the issue at hand, a comprehensive sexual education program that provides an opt-out provision would not violate the free exercise clause. Currently, the Curriculum includes a provision under Tenn. Code Ann. § 49-6-1305 that requires notification of the parents prior to the commencement of the instruction of the Curriculum and allows for parents to submit requests for their child to be excused.¹⁵⁵ This is an example of a suitable optout provision.

C. Fourteenth Amendment Liberty Interest

The right of parents to decide how to raise their children is rooted within the Fourteenth Amendment of the Constitution. This Amendment states, “nor shall any State deprive any person of life, liberty or property . . .”¹⁵⁶ Under the liberty clause, the Supreme Court has identified unenumerated rights, including the right to marry,¹⁵⁷ establish a home,¹⁵⁸ and bring up children¹⁵⁹ through a series of cases. The unenumerated right most commonly included in sexual education arguments is the right to bring up children as the parents see fit.

Supporters of comprehensive sexual education look to *Meyers v. Nebraska*¹⁶⁰ and *Pierce v. Soc’y of Sisters*.¹⁶¹ In *Meyers v. Nebraska*, the Supreme Court struck down a Nebraska law that criminalized teaching a foreign language to any student that had yet

¹⁵¹ *Id.* at 874.

¹⁵² *Id.*

¹⁵³ *Id.* at 890.

¹⁵⁴ *Id.* at 877.

¹⁵⁵ Tenn. Code Ann. § 49-6-1305(b) (2021).

¹⁵⁶ U.S. CONST. amend. IV.

¹⁵⁷ *See Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁵⁸ *See Moore v. East Cleveland*, 431 U.S. 494 (1977).

¹⁵⁹ *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *See also Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1924).

¹⁶⁰ *Meyer*, 262 U.S. 390.

¹⁶¹ *Pierce*, 268 U.S. 510.

to complete the eighth grade.¹⁶² The law was enacted following WWI as a reflection of the growing hostility towards German culture.¹⁶³ Here, Meyers was a parochial schoolteacher who was convicted of teaching German to a ten-year-old student.¹⁶⁴ The Court found that prohibiting the teaching of German interfered with the parents' desire to educate their children without a legitimate state interest, which falls under the parents' right to control and educate their children.¹⁶⁵

Similarly, in *Pierce v. Soc'y of Sisters*, the Court found that requiring children to attend public school violates the Fourteenth Amendment under the parents' right to bring up their children.¹⁶⁶ In this case, Oregon enacted the Compulsory Education Act that mandated children to attend public school, reasoning that the state's interest in overseeing the education of citizens was greater than the right to choose.¹⁶⁷ Two private educators sued to enjoin the Act. As a result, the Court found in favor of the educators, concluding that there was not a strong enough government interest in requiring public school education to infringe on parental rights.¹⁶⁸

Based on these two cases, some parents argue that by providing comprehensive sexual education, the government is interfering with their right to control and educate their children. Precedent shows that when a conflict about content of education arises, the decision-making power falls to the parents absent a strong government interest.¹⁶⁹ However, by providing an opt-out provision, as Tennessee already does, the parents still have control over their child's education. Should this not be enough, sexual health is a stronger government interest than hostility towards German culture or wanting kids to go to public school, so it may overcome the balancing test if necessary.

This liberty interest argument is a double-edged sword. While some parents argue that providing comprehensive sexual education violates their rights, others argue that not providing it will also violate their rights. By refusing to teach comprehensive sexual education, the government is placing the burden on the parents (a burden most parents may not be fit to carry). The government

¹⁶² *Id.* at 396.

¹⁶³ *Id.* at 402.

¹⁶⁴ *Id.* at 396.

¹⁶⁵ *Id.* at 401.

¹⁶⁶ *Pierce*, 268 U.S. 510.

¹⁶⁷ *Id.* at 530.

¹⁶⁸ *Id.* at 535-536.

¹⁶⁹ Jesse R. Mirriam, *Why Don't More Public Schools Teach Sex education? A Constitutional Explanation and Critique*, 13 WM. & MARY J. WOMEN & L. 539 (2007),

<https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1082&context=wmjowl>.

interest for not providing sexual education also is not very strong, giving the approach a chance to succeed.

For a curriculum to survive both sides of a potential Fourteenth Amendment liberty interest challenge, the government needs to show a strong government interest and allow for an opt-out provision.

D. Title IX

Title IX is a federal civil rights law that protects people from sex discrimination within educational institutions that receive federal funding.¹⁷⁰ Title IX of the Education Amendments of 1972 states, “[n]o Person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal funding.”¹⁷¹ Under Title IX, institutions that receive federal financial assistance, including schools, must operate their programs in a nondiscriminatory manner.¹⁷² Key areas that Title IX is usually applied to include admissions, athletics, sexual harassment, treatment of LGBTQI+ students, and single-sex education.¹⁷³

While there is not extensive case law covering the subject, sexual education curriculums may be violating Title IX.¹⁷⁴ For example, schools in Tennessee receive funding through Title V Abstinence education programs.¹⁷⁵ By receiving Title V funding, the Curriculum undoubtedly passes the first qualification of Title IX: it is an educational program that receives federal funding.¹⁷⁶ The more difficult point to prove is that individuals are being discriminated against on the basis of sex. Two arguments can be made that incompetent sexual education curriculums violate Title IX. The first argument is rooted in the gendered effects of inadequate sexual education. When a school neglects to adequately inform their students about use of birth control, girls’ education will suffer the consequences more than the boys’ education.

¹⁷⁰ Off. For Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC. (Aug. 2021) https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

¹⁷¹ *Id.* (quoting Education Amendments Act of 1972, 20 U.S.C. §§1681–1688 (2018). Title IX (2018)).

¹⁷² U.S. DEP’T OF EDUC., *supra* note 170.

¹⁷³ *Id.*

¹⁷⁴ Danny Morano, *Let’s Talk About Sex Ed, Baby: Sexual Education Programs and Curricular Exclusions Under Title IX*, 88 U. CHI. L. REV. ONLINE 1 (2021).

¹⁷⁵ Ass’n of Maternal & Child Health Programs, *supra* note 125.

¹⁷⁶ Education Amendments Act of 1972, 20 U.S.C. §§1681–1688 (2018). Title IX (2018).

Teen pregnancy is the primary reason that girls drop out of school.¹⁷⁷ According to the CDC, only 50% of teen mothers receive a high school diploma before the age of 22, while 90% of women who are not teen mothers graduate high school.¹⁷⁸ Researchers from the University of Washington found that teens who receive comprehensive sex education are less likely to become pregnant than teens who receive abstinence-only-until-marriage or no formal sex education.¹⁷⁹ Researchers found that teens who received comprehensive education were 60% less likely to become pregnant or impregnate someone than those who did not receive sexual education.¹⁸⁰

Aside from direct impacts of teen pregnancy, lack of sexual education can still negatively impact a woman's overall educational experience. In the US, dysmenorrhea is the leading cause of short-term absenteeism among adolescent girls.¹⁸¹ Dysmenorrhea causes severe and frequent cramps and pain during periods.¹⁸² One study revealed that 38% of girls missed school days within the past 3 months because of dysmenorrhea, while 59% had difficulty focusing in class because of it.¹⁸³ Symptoms may include pain and cramping in the lower abdomen and back, nausea, vomiting, diarrhea, headache, and fatigue.¹⁸⁴ Both NSAIDs and oral contraceptives can be used to manage symptoms of dysmenorrhea.¹⁸⁵ However, a study revealed that only 54% of white American adolescents know about this therapeutic treatment.¹⁸⁶ By limiting the instruction surrounding contraceptives, schools are not

¹⁷⁷ *About Teen Pregnancy*, CTRS. FOR DISEASE CONTROL AND PREVENTION, (last updated Sep. 3, 2021) <https://www.cdc.gov/teenpregnancy/about/index.htm>.

¹⁷⁸ *Id.*

¹⁷⁹ Marshall Bright, *Study Finds that Comprehensive Sex Education Reduces Teen Pregnancy*, AM. CIVIL LIBERTIES UNION (Mar. 28, 2008, 4:53 PM) <https://www.aclu.org/blog/reproductive-freedom/study-finds-comprehensive-sex-education-reduces-teen-pregnancy>.

¹⁸⁰ Health Behavior News Services, *Comprehensive Sex Education Might Reduce Teen Pregnancies*, NEWSWISE (Mar. 13, 2008) <https://www.newswise.com/articles/comprehensive-sex-education-might-reduce-teen-pregnancies>.

¹⁸¹ Chantay Banikarim et al, *Prevalence and Impact of Dysmenorrhea of Hispanic Female Adolescents*, ARCH. PEDIATR. ADOLSEC. MED. 2000 (Dec. 2000) <https://jamanetwork.com/journals/jamapediatrics/fullarticle/352652#:~:text=In%20the%20United%20States%2C%20dysmenorrhea,of%20short%2Dterm%20school%20absenteeism.&text=Several%20studies%20have%20shown%20that,the%20availability%20of%20effective%20medications>.

¹⁸² *Dysmenorrhea*, JOHNS HOPKINS MED., [HTTPS://WWW.HOPKINSMEDICINE.ORG/HEALTH/CONDITIONS-AND-DISEASES/DYSMENORRHEA](https://www.hopkinsmedicine.org/health/conditions-and-diseases/dysmenorrhea) (last visited November 4, 2021).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Banikarim, *supra* note 181.

informing females about uses for birth control other than avoiding pregnancy.¹⁸⁷ Male students do not suffer from dysmenorrhea, and therefore are not as severely impacted by the lack of information regarding contraceptives.¹⁸⁸

Furthermore, a lack of comprehensive education can also impact the LGBTQI+ community. In 2019, men who identify as gay or bisexual accounted for 70% of new HIV infections within the US, making them a particularly vulnerable portion of the population.¹⁸⁹ Anal sex is the riskiest type of sex for transmission of HIV, but the risk can be mitigated by using a condom or preventative medicine.¹⁹⁰ Additionally, lack of inclusion of LGBTQI+ information in sexual education curriculums can contribute to hostile school environments, including bullying.¹⁹¹ The Curriculum does not currently require LGBTQI+ materials to be taught during sexual education.¹⁹² Not only does a lack of conversation about sexual identity create an increasingly hostile environment,¹⁹³ but also the lack of condom education can put LGBTQI+ students at greater physical risk.¹⁹⁴

By failing to adopt a fully comprehensive sexual health curriculum, girls, and members of the LGBTQI+ community, are being denied the full benefits of a sexual education, and there is a discriminatory impact. Females are more at risk of dropping out of school, having increased absentee rates, and lower success rates when faced with challenges that could be prevented through proper

¹⁸⁷ *Id.*

¹⁸⁸ JOHNS HOPKINS MED., *supra* note 182.

¹⁸⁹ *HIV Incidence*, CTRS. FOR DISEASE CONTROL AND PREVENTION, (last updated Sept. 16, 2021) <https://www.cdc.gov/hiv/group/msm/msm-content/incidence.html>.

¹⁹⁰ *HIV*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/hiv/group/msm/msm-content/prevention-challenges.html> (last visited Jan. 4, 2022).

¹⁹¹ *A Call to Action: LGBTQ Youth Need Inclusive Sex Education*, THE HUM. RIGHTS CAMPAIGN, <https://www.hrc.org/resources/a-call-to-action-lgbtq-youth-need-inclusive-sex-education> (last visited Jan. 4, 2022).

¹⁹² Kaia Hubbard, *Few States Require LGBTQ-Inclusive Sex Education, Report Finds*, U.S. NEWS (May 26, 2021) <https://www.usnews.com/news/best-states/articles/2021-05-26/few-states-require-lgbtq-inclusive-sex-education> (According to US News, California, Colorado, New Jersey, Oregon, Rhode Island, Washington, and the District of Columbia require LGBTQ+-inclusive sex education. Delaware, Iowa, Massachusetts, South Carolina and Wisconsin require that if sexual education is taught, it does not affirm or discriminate against LGBTQ+ students. On the opposite end of the spectrum, Florida, Illinois, Louisiana, Mississippi, North Carolina, Oklahoma, and Texas have ban sexual education promoting of a homosexual lifestyle and focus on “monogamous, heterosexual marriage”).

¹⁹³ *Id.*

¹⁹⁴ *HIV Prevention*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/hiv/group/msm/msm-content/hiv-prevention.html> (last visited Jan. 4, 2022).

education.¹⁹⁵ Members of the LGBTQI+ community are also faced with discrimination, as the education focused on the risks and protections are focused on heterosexual individuals and do not cover some risks that members of the LGBTQI+ community may face.¹⁹⁶ Without a fully comprehensive sexual education program, Tennessee schools are risking liability by violating Title IX.

E. Title V

While there is no federal law that dictates what sexual education curriculums in schools must entail, the government uses federal funding to control how the programs approach the topic.¹⁹⁷ Currently there are no federal programs that fund access to comprehensive sexual education.

Title V, Section 510(b) of the Social Security Act sets up federal grants for state abstinence-only-until-marriage programs.¹⁹⁸ The intent of this program was “to align Congress with the social tradition . . . that sex should be confined to married couples.”¹⁹⁹ Within this statute, the federal government defined the meaning of abstinence education, stating “its exclusive purpose [is to] teach[] the social, psychological, and health gains to be realized by abstaining from sexual activity.”²⁰⁰ Under this program, for every \$1 the federal government allocates, the state must provide \$3.²⁰¹ These funds go to a variety of other causes within the sphere of maternal and child health.²⁰²

While all states except for California have accepted Title V funding in the past, many states began to decline funding in the early 2000s when studies showed that there was no statistically significant beneficial impact on young people’s sexual behavior as a result of the initiative.²⁰³ However, Tennessee continues to receive funding from Title V.²⁰⁴ In 2019 alone, Tennessee received \$11,875,637 in MCH Block Grant Funds.²⁰⁵ The allotment of these funds is reflective of a series of factors, including the number of low-income children in the state.²⁰⁶ These funds, distributed over a multitude of causes, also contribute to Tennessee’s “Adolescent Pregnancy

¹⁹⁵ *About Teen Pregnancy*, *supra* note 177.

¹⁹⁶ THE HUM. RIGHTS CAMPAIGN, *supra* note 191.

¹⁹⁷ SEXUALITY INFO. AND EDUC. COUNCIL FOR THE U.S., *supra* note 128.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Ass’n of Maternal & Child Health Programs, *supra* note 125.

²⁰³ SEXUALITY INFO. AND EDUC. COUNCIL FOR THE U.S., *supra* note 128.

²⁰⁴ Ass’n of Maternal & Child Health Programs, *supra* note 125.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

Prevention Program” where health educators provide information on healthy relationships, adolescent health, and positive youth development.²⁰⁷

This poses a challenge to establishing a comprehensive sexual education program in Tennessee because it must abide by the requirements of Title V. For example, Section 510(b)(4) forbids certain forms of education including demonstrations, simulations, or distribution of contraceptive devices.²⁰⁸ While this may pose issues, Tennessee may opt out of funding from Title V for their Curriculum, while still accepting funding for all the other important initiatives that Title V covers. For example, Vermont still receives Title V for a multitude of programs including newborn screening, oral health, and palliative care services, but does not apply it towards their sexual health programming.²⁰⁹ As a result, they are able to shape their programming without the limitations under Title V.²¹⁰

V. RECOMMENDED POLICY CHANGES FOR TENNESSEE

When crafting the new Curriculum for Tennessee, legislators should look to established sexual education programs and scientifically backed recommendations to shape new policy. States including Vermont,²¹¹ California,²¹² and the District of Columbia²¹³ are making strides towards fully comprehensive sexual education programs. Other countries like the Netherlands and Switzerland are active examples of using education to lower negative statistics. Organizations like the World Health Organization²¹⁴ and The Guttmacher Institute²¹⁵ continue to publish scientifically backed strategy guides on comprehensive sexual education that can provide guidance and act as templates. Tennessee legislators should also look to states like Mississippi, to see what their policies are and how they are yielding negative results, in order to find similar flaws in Tennessee’s policy.

²⁰⁷ *Id.*

²⁰⁸ Social Security Act §510, 42 U.S.C. 710 (2002).
https://www.ssa.gov/OP_Home/ssact/title05/0510.htm.

²⁰⁹ Ass’n of Maternal & Child Health Programs, *AMCHP State Profile: Vermont*, amchp.org <http://www.amchp.org/Policy-Advocacy/MCHAdvocacy/2021%20State%20Profiles/Vermont%202021%20FINAL.pdf>.

²¹⁰ *Id.*

²¹¹ 16 V.S.A. § 131 (2021).

²¹² Cal. Ed. Code § 51931-9 (2021).

²¹³ CDCR 5-E2305.

²¹⁴ UNITED NATIONS POPULATION FUND, *supra* note 4.

²¹⁵ A Definition of Comprehensive Sexuality Education, GUTTMACHER INSTITUTE, https://www.guttmacher.org/sites/default/files/report_downloads/demystifying-data-handouts_0.pdf.

What sets comprehensive curriculums like Vermont's and the program outlined in ITGSE apart from other programs, such as those in Mississippi and Tennessee, is their in-depth coverage of a wide variety of topics. The ITGSE is based on the idea that sexual education can be used to help with public health crises like HIV, AIDS, and teen pregnancy, as well as social concerns like gender-based violence, human rights, and sexuality acceptance.²¹⁶ Meanwhile, The Guttmacher Institute takes a rights-based approach to sexual education that recognizes that all people are sexual beings and goes beyond merely covering disease prevention; all of these programs focus on adapting the information to be age appropriate, some starting as young as age four.²¹⁷

To keep the policy guidance relevant to this Note, this section of the Note focuses on the 15-18-year age group presented in the International Technical Guidance and their 8 Key Concepts:²¹⁸ relationships; values, rights, culture, and sexuality; understanding gender; violence and staying safe; skills for health and well-being; the human body and development; sexuality and sexual behavior; and sexual reproductive health.²¹⁹ The 15-18-year age group falls into the "presumed capacity" category of the Mature Minor Doctrine in Tennessee.²²⁰ Despite overlooking the younger age group in these recommendations, Tennessee should adopt curriculum for all age groups in order to reflect the recommendations in the ITGSE.

The seventh and eighth concepts are the most relevant. Covering sexuality, sexual behavior, sexual health, and reproductive health,²²¹ these topics are most closely tied to the public health statistics mentioned in the first section of this Note. The seventh concept covers sexuality and sexual behavior.²²² Not only should the Curriculum cover what sex is, but it should also cover sexual feelings, the biological, social, psychological, spiritual, ethical, and cultural dimensions within it.²²³ In addition, this section covers sexual pleasure and the associated responsibilities.²²⁴ Covering risk reduction strategies, other than abstinence, needs to be mandatory in Tennessee's curriculum. By providing these risk reduction

²¹⁶ UNITED NATIONS POPULATION FUND, *supra* note 4.

²¹⁷ GUTTMACHER INSTITUTE, *supra* note 215.

²¹⁸ These ideals are similar to the recommendations of many other respected institutions. Prior to initiating new policy, Tennessee and other policy makers should consult other sources including The Guttmacher Institutes Information Handout on Comprehensive Sexuality Education mentioned in the footnote above.

²¹⁹ UNITED NATIONS POPULATION FUND, *supra* note 4.

²²⁰ *Mature Minor Doctrine*, *supra* note 10.

²²¹ UNITED NATIONS POPULATION FUND, *supra* note 4 at 69-80.

²²² *Id.* at 69.

²²³ *Id.* at 70.

²²⁴ *Id.* at 72.

strategies, individuals will be informed on how to protect themselves if they choose to be sexually active and will be aware of the risks associated with sex. Explaining that the use of condoms and contraceptives can reduce unintended consequences of sex and that there are dangers of non-penetrative sex is recommended by the ITGSE.²²⁵

The eighth concept covers sexual and reproductive health.²²⁶ This topic, again, stresses the importance of teaching about contraception including effectiveness, side effects and benefits of abstinence, condoms, and other forms of contraception.²²⁷ This will help minors make educated choices regarding their sexual health. In addition, covering the benefits of contraception will highlight uses like dealing with dysmenorrhea, which can prevent absenteeism of girls in school.²²⁸ Finally, understanding how to access health services relating to STDs, HIV, and unintended pregnancy will help diminish the negative consequences of sexual activity. The Curriculum needs to include a complete and clear presentation of abstinence, condoms, and other contraception to fully educate minors on their sexual health options. In addition, Tennessee should learn from Vermont's practices²²⁹ and provide condoms to prevent lack of access. Educating minors about different forms of contraception will help them understand the necessity of utilizing at least one of the methods, whether it be abstinence or not, and how it can impact their health in other ways.

Within the first concept, relationships, Tennessee has already checked off a number of boxes, including forming and identifying healthy relationships, explaining the consequences of sexual activity on relationships, confiding in trusted adults, and the challenges of having a child before marriage along with the benefits of raising children within marriage.²³⁰ However, there are a number of ways the Curriculum can improve to provide better education surrounding relationships. For one, the Curriculum should include how forced marriages can also lead to negative social consequences that are similar to unintended pregnancy. By overlooking issues that can occur within marriage, the Curriculum would continue to blindly support the institution of marriage reflected in religion that is not a current American reality. The Curriculum should also explore the stigma and discrimination surrounding health statuses, sexual orientation, and gender. Addressing the stigma and discrimination surrounding these topics uses education to shift from

²²⁵ *Id.*

²²⁶ *Id.* at 73.

²²⁷ *Id.* at 75.

²²⁸ JOHNS HOPKINS MED., *supra* note 182.

²²⁹ 16 V.S.A. § 132 (2021).

²³⁰ UNITED NATIONS POPULATION FUND, *supra* note 4 at 37-47.

an automatically negative perspective to an informed perspective on the subject. This allows people to see statuses from a neutral, informed stance before forming their own opinions. Finally, the Curriculum should identify support systems, not only trusted adults but also community resources. Providing minors with trusted resources allows them to seek guidance from trustworthy sources when making decisions that they do not fully understand.

The second recommended concept covers values, rights, culture, and sexuality.²³¹ For one, this section emphasizes the importance of one's own values when making decisions surrounding sexual behavior.²³² This step allows students to identify their values, commonly in line with their religion, and explore how it will impact their decision making, without the teachers emphasizing one religion over another. Additionally, this section should address rights and laws surrounding reproductive health, including what health services they have at their disposal and how cultural and social norms play a role.

Understanding gender is the third concept that needs to be covered.²³³ Tennessee's curriculum currently overlooks the role of gender entirely. The new curriculum should include acknowledging gender roles and biases and how they impact individuals including people with "nontraditional" gender identities. Gender roles and identities are rapidly evolving, and education is playing a part in that change. New norms are forming around respecting nontraditional gender identities; thus, it is necessary to provide the information to minors to be aware of these different points of view. This section also includes gender equality, and how contraception and life planning can have different gendered effects. Finally, this section should cover gender-based violence, something that Tennessee already does. Overall, this gender-based section is crucial for meeting the requirements of Title IX, as it provides an opportunity for all genders and gender identities to be seen as equal. It provides an opportunity for acknowledgment as how girls and members of the LGBTQI+ community may have different needs or issues than boys surrounding relationships and sexual health.

Violence and safety are further explored in the fourth concept.²³⁴ Tennessee already covers child sexual abuse, human trafficking, and consent. To expand on this solid foundation, all types of sexual abuse should be covered and the dangers of sexual media along with the role of internet in relationships should be covered.

²³¹ *Id.* at 45–48.

²³² *Id.*

²³³ *Id.* at 49–52.

²³⁴ *Id.* at 53–57.

The fifth concept covers skills for health and well-being, including decision making, peer influence, and communication in relationships.²³⁵ While Tennessee currently addresses decision making and how to say no to sexual activity, it is critical to talk about decision making if an individual chooses not to practice abstinence. This method, while not promoting “saying yes to sex” informs individuals on what can impact rational decision making and the possible consequences. By talking about decision making, minors are equipped with tools for having safe and consensual relationships.

The sixth concept, the human body and development,²³⁶ is mainly covered by the human growth and development curriculum. Referring to this section of the ITGSE when developing the human growth and development curriculum would be beneficial to ensure Tennessee’s current curriculum covers all of the important aspects of the human growth and development cycle in an age-appropriate manner.

No matter the information presented, it is critical that the Curriculum still provides an opt-out provision. This opt-out provision will continue to protect the Curriculum from freedom of religion claims along with Fourteenth amendment liberty interest challenges.

VI. CONCLUSION

The United States has a sexual health crisis. Teen pregnancy rates continue to be the highest in the industrialized world. One fourth of the US population has an STD. Economically, the country is funneling billions of dollars into remedying these unintentional consequences of sexual activity, when sexual education programs could be preventing them. Tennessee needs a LGBTQI+ friendly, comprehensive sexual education program that teaches about the uses of contraception, condoms, and abstinence to prevent STDs and teen pregnancy that includes an opt-out provision. The Curriculum will overcome Freedom of Religion and Liberty Interest hurdles, adhere to Title IX expectations, and provide minors with a suitable level of knowledge to safely utilize the Mature Minor Doctrine.

²³⁵ *Id.* at 58–63.

²³⁶ *Id.* at 64–68.