



915 15th Street, NW Washington, D.C. 20005

(202) 544-1681 Fax (202) 546-0738

August 16, 2004

BY E-MAIL AND FAX

HIV Content Guidelines Comments
Centers for Disease Control and Prevention
1600 Clifton Road, N.E., Mailstop E56
Atlanta, GA 30333

Re: Comments on the Proposed Revision of Interim HIV Content Guidelines for AIDS-Related Material, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, Marketing, Advertising and Web Site Materials, and Educational Sessions in CDC Regional, State, Territorial, Local, and Community Assistance Programs

Dear Sir or Madam:

The American Civil Liberties Union respectfully submits these comments urging the Centers for Disease Control and Prevention ("CDC") to withdraw or substantially revise the Proposed Revision of Interim HIV Content Guidelines, 69 Fed. Reg. 33824 (June 16, 2004) ("Proposed Guidelines"). CDC lacks the authority to impose certain requirements in the Proposed Guidelines, provides insufficient guidance to grantees on how to comply with other requirements, and proposes requirements that will diminish the effectiveness of HIV prevention programs.

I. The Guidelines Should Explicitly State the Miller Test for Determining "Obscene," and Include a Specific Checklist for Determining Compliance with Section 2500

The core of the Proposed Guidelines is a requirement that recipients of CDC-funded HIV prevention programs must have educational and informational programs approved by a government-created Program Review Panel ("PRP") and certified by a state or local health official as complying with Section 2500 of the Public Health Service Act, which is codified as 42 U.S.C. 300ee. Section 2500 provides that educational and informational programs must: provide information on harms related to promiscuous sexual activity and intravenous drug use, provide information on the benefits of abstention, and avoid promoting directly homosexual or heterosexual activity--but the restriction on promotion of sexual activity cannot be construed to restrict programs providing accurate information on risk reduction, provided that the materials used are not obscene. The principal function of

the PRPs and state and local health officials under the Proposed Guidelines is to enforce compliance with Section 2500.

CDC should provide PRPs and state and local health officials with clear guidance on how to apply Section 2500. The statute is so convoluted that many reviewers could inadvertently misapply the standard. In addition, the test for determining "obscene" material, pursuant to the Supreme Court decision in Miller v. California, 413 U.S. 15 (1973), is a multi-part test that should also be clearly explained in the guidelines.¹

The first part (subsection b) of the Section 2500 test requires that "programs of education and information ... shall include information about the harmful effects of promiscuous sexual activity and intravenous substance abuse, and the benefits of abstaining from such activities." Of course, this does not require teaching abstinence only, but instead requires a statement of the benefits of abstention. This requirement should be fully met by any statement similar to the following statement from the CDC publication, "Male Latex Condoms and Sexually Transmitted Diseases": "The surest way to avoid transmission of sexually transmitted diseases is to abstain from sexual intercourse, or to be in a long-term mutually monogamous relationship with a partner who has been tested and you know is uninfected." Moreover, Section 2500 does not require such statement to be on each piece of HIV prevention material, but merely requires that it be included in the "program[] of education and information," which means that it must be included in the recipient's overall program but not necessarily in each piece of material.

The second part (subsection c) of Section 2500 provides that the funds may not be "used to provide education or information designed to promote or encourage, directly, homosexual or heterosexual activity or intravenous substance abuse." Particularly with the inclusion of "directly" in the subsection, discussions of homosexual or heterosexual sex or of gay or

¹ The question of how to apply to the Internet the "contemporary community standards" prong of the Miller test is still undecided. The Supreme Court held in Ashcroft v. ACLU, 535 U.S. 564 (2002) that, applying contemporary community standards to a worldwide medium such as the Internet did not alone render the Children's Online Protection Act ("COPA") overbroad, because the statute also required that the material appeal to the prurient interest and lack any serious literary, artistic, political, or scientific value for minors. However, the Court remanded the case to the Court of Appeals for further findings. The Third Circuit once again upheld its preliminary injunction against the act. In Ashcroft v. ACLU II, 124 S.Ct. 2783 (2004), the Supreme Court upheld the preliminary injunction against COPA, finding that it was likely the statute violated the First Amendment. The case is now being prepared for trial. If CDC extends the requirements of Section 2500 to Internet-based materials, it will likely expose itself, PRPs, and state and local health officials to significant litigation on the question of how to apply the "contemporary community standards" prong of Miller to these materials.

heterosexual relationships--or of the importance of establishing healthy relationships--are not prohibited.

If the program under review satisfies both the first and second parts (subsections b and c) of Section 2500, then the program must be approved. The PRP or state or local health official must approve the program because the third part (subsection d) of Section 2500 applies only if there is some question of whether the program passes the second part of the Section 2500 test.

For those programs which might "promote or encourage, directly, homosexual or heterosexual activity," the PRP or state or local health official must apply the third part (subsection d) of Section 2500, which provides that:

"Subsection (c) may not be construed to restrict the ability of an educational program that includes the information required in subsection (b) to provide accurate information about various means to reduce an individual's risk of exposure to ... [HIV], provided that any informational materials used are not obscene."

In other words, subsection (c) cannot stop a program from providing risk reduction information, as long as the program is not "obscene."

A reviewer applying Section 2500 should assess whether materials are "obscene" only when the prohibition against directly encouraging or promoting sexual activity interferes with providing risk reduction information. Presumably, it will be a rare instance in which any PRP or state or local health official will ever have reason to determine whether any submitted materials are "obscene."

In determining whether materials are "obscene," the reviewer must apply the test defined by the Supreme Court in Miller. It is a three-part test and the material must fail all three parts in order to be considered "obscene." Specifically, the reviewer must determine:

"(a) Whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;

"(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable ... law; and

"(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Miller, 413 U.S. 15, 24 (ellipsis deletes the word "state") (citations omitted). Any program, taken as a whole, that is effective in educating persons on reducing the risk of transmission of HIV should per se have "serious ... scientific

value." Only those programs that, taken as a whole, lack serious scientific value can ever be considered "obscene."

Unless the final guidelines explicitly state the Miller test--and explain that a program must fail all three parts in order to be determined "obscene"--CDC will be creating a review process rife with error, as reviewers apply their own interpretation of "obscene." CDC should avoid such misinterpretations of Section 2500.

CDC should provide further clarity to reviewers by providing a specific checklist or decision tree to reviewers on how to interpret the convoluted language of Section 2500, with an overlay of the three-part Miller test. Presumably, the review of nearly all HIV prevention materials submitted to PRPs or state or local health officials will end after consideration of the first two parts of Section 2500. But without further clarity and a specific checklist or decision tree, reviewers will waste endless hours in the arcane world of First Amendment law.

II. State and Local Health Departments Should Have the Authority to Establish Separate PRPs for the Review of Materials for Specific Intended Audiences

The proposed elimination of PRPs established by recipients or other nongovernmental organizations will likely reduce the number of PRPs with expertise in the review of materials for specific intended audiences. The ACLU strongly opposes the elimination of the option for recipients to designate their own PRP or a PRP of another nongovernmental organization. However, the problem is compounded by the requirement in the Proposed Guidelines that "no single intended audience shall dominate the composition of the PRP," except for PRPs reviewing materials intended for racial or ethnic minorities.

CDC should revise the Proposed Guidelines to permit the creation of separate PRPs for the review of materials intended for a specific audience--and then allow the composition of the PRP to be predominantly members of the intended audience. Each jurisdiction should have at least one general PRP, but those

jurisdictions that have the ability and interest to create additional specialized PRPs should not be prohibited from creating and using them.

For those jurisdictions that have the resources to create special PRPs, their use would help ensure that HIV prevention materials are better tailored to the needs of specific target communities. CDC implicitly recognizes the importance of specialized PRPs because it authorizes their use if the materials are intended for racial minorities. The same rationale should apply to materials intended for other specific audiences.

III. Requiring Certification of Compliance by State or Local Health Official Creates Local Governmental Censors of Federal Programs

The Proposed Guidelines compound the problems contained in the new requirements by giving state and local health officials the exact same authority that PRPs have to review HIV prevention materials. Particularly when the Proposed Guidelines already require an "employee of a state or local health department with expertise in the area under consideration" to serve on each PRP, there is no reason for giving the same authority to individual state and local health officials--who are not required to have any expertise at all.

As a result, a single state or local health official, who may even be an elected official with no public health expertise, could gain absolute veto power over all CDC-funded HIV prevention programs in his or her jurisdiction. There is no public health or public policy reason for transferring important decisions about how to prevent the transmission of HIV to state and local health officials, without safeguards against misuse of that power.

IV. CDC Cannot Use Its Funds to Commandeer Decisions on the Content of All HIV Programs of a Recipient

CDC does not have any authority to force recipients to subject HIV programs that are not funded by CDC to the PRP and state governmental review process established by the Proposed Guidelines. At most, CDC control over content extends only to those HIV programs that it is funding.

For this reason, CDC cannot subject all HIV educational materials on a recipient's website to the CDC review process. The explanatory section of the Proposed Guidelines states that CDC proposes to "require that HIV/AIDS educational materials placed on a grantee's Web site be reviewed and approved by the organization's designated PRP." Even if this review is applicable to CDC-funded materials on the recipient's website (which we dispute), it certainly cannot extend to materials funded by the recipient with funds other than CDC dollars.² The

²The failure to distinguish between CDC-funded and privately funded internet-based materials will compound the already significant First Amendment issues discussed in footnote one of these comments.

final guidelines should clarify that the review requirement extends only to those materials directly funded by CDC.

Similarly, the Proposed Guidelines require "a certification that accountable state or local health officials have independently reviewed ... [HIV prevention materials] for compliance with Section 2500 and 317P of the Public Health Service Act and approved the use of such materials in their jurisdiction for directly and indirectly funded community-based organizations" (emphasis added). This requirement seems to impose a certification requirement on all HIV prevention materials of any funded organization. At most, the certification requirement should apply only to directly funded materials of any recipient organization--not to all materials of directly or indirectly funded organizations.

V. Proposed Requirement on Titles of Materials Could Undermine Effectiveness of the Materials

Although presumably the titles of most HIV prevention materials already "reflect the content of the activity or program," the imposition of a new requirement on the content of titles could undermine the effectiveness of the materials. Although titles should not misrepresent content, recipients should have sufficient discretion to use titles that will enhance the marketability of the materials, i.e., ensure that the intended audience will actually read or view the materials, or participate in the program. CDC should either delete this requirement or change it to preclude misrepresentation instead of requiring wholly descriptive titles that may have little appeal to hard to reach intended audiences.

VI. CDC Can and Should Provide Clear Guidance to Recipients on Compliance with Section 317P

CDC can and should provide clear guidance to recipients on compliance with Section 317P, which requires that "educational materials ... that are specifically designed to address STDs ... shall contain medically accurate information regarding the effectiveness or lack of effectiveness of condoms in preventing the STD the materials are designed to address." In the context of HIV prevention materials, the "STD the materials are designed to address" is HIV. Thus, the "medically accurate information" on condom effectiveness relates only to the effectiveness of condoms in preventing HIV infection.

CDC has been extraordinarily explicit and clear on the effectiveness of condoms in preventing the transmission of HIV. In its fact sheet, "Male Latex Condoms and Sexually Transmitted Diseases," CDC places in a highlighted box the statement that:

"Latex condoms, when used consistently and correctly, are highly effective in preventing the sexual transmission of HIV, the virus that causes AIDS."

CDC should revise the Proposed Guidelines to ensure that any material that includes the above statement is per se in compliance with Section 317P. Establishing this clear safe harbor will ensure that local health officials cannot second-guess or undermine the sound medical conclusion of CDC on the question of the effectiveness of condoms in preventing HIV transmission.

VII. CDC Should Make Clear that the Guidelines Cannot Be Used to Compel the Teaching of Abstinence-Only-Until-Marriage

The Proposed Guidelines obviously do not allow PRPs or state or local health officials to use them to compel the teaching of abstinence-only-until-marriage. However, given the tremendous political push to limit HIV prevention programs to the teaching of abstinence-only-until-marriage, the ACLU urges CDC to include a specific statement in the Guidelines clarifying that the Guidelines cannot be used to compel these programs.

While the discussion of abstinence may be an important component of educational programs about human sexuality, the ACLU opposes programs that focus exclusively on abstinence and censor other valuable information that can help young people to make responsible and safe decisions about sexual activity. Moreover, in addition to their restrictions on free speech, abstinence-only programs endanger the health of young people, create a hostile environment for lesbian and gay youth, and dangerously entangle the government with religion.

There is no compelling data that demonstrate that abstinence-only programs are effective in helping to delay sexual initiation or to reduce risk-taking behaviors among young people. In fact, the overwhelming weight of evidence suggests that programs that include messages about both abstinence and condom use are most effective in reducing the spread of sexually transmitted diseases, such as HIV.

Moreover, by excluding information about safer sex practices and teaching about sex only in the context of marriage, abstinence-only programs stigmatize gay and lesbian teens and undermine efforts to educate those teens about HIV and STD prevention. Abstinence-only programs also create a hostile environment for lesbian and gay youth. These programs rely on fear and shame and address same-sex sexuality only as a context for HIV transmission. At least two widely used abstinence-only curricula--Clue 2000 and Facing Reality--are overtly hostile to lesbians and gay men. Such hostility violates the rights of lesbian and gay youth to attend school free of discrimination.

Abstinence-only programs entangle the government with religion. Many abstinence-only curricula use religious doctrines as guidelines for determining appropriate behavior and values. These curricula violate the First Amendment's guarantee of the separation between church and state by using taxpayer money to endorse religious beliefs. A popular abstinence-only curriculum called "Sex Respect," for example, was originally designed for parochial school use. While it now uses the term "nature" in place of "God," it still has strong religious undertones and references religious publications. Although federal guidelines do not permit abstinence-only grant recipients to convey religious messages and to impose religious viewpoints, in practice, many of these programs do precisely that. In Louisiana, for example, the Governor's Program on Abstinence, which runs on federal and state funds, has made thousands of dollars in grants to programs that are overtly religious. The misuse of tax dollars to promote religion in this fashion violates the Constitution.

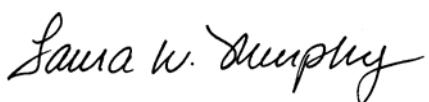
VIII. CDC Has No Reason to Adhere to an Artificial Deadline for Finalizing the Guidelines

The Proposed Guidelines state that "CDC anticipates publishing a Final Guidance document within 120 days after the conclusion of the comment period." Although the ACLU does not oppose timely action by CDC in finalizing the guidelines, there is no reason for CDC to adhere to an artificial deadline of 120 days when addressing difficult questions of statutory interpretation, constitutional law, and programmatic efficacy. Given that CDC has not updated the guidelines for more than twelve years, the urgency of updating the guidelines on an expedited schedule appears to be driven more by the political calendar than by any legal or medical requirements. 120 days after the end of the comment period is December 14, 2004, which is six weeks after the presidential election and less than six weeks before the start of a new presidential term.

The political pressure to respond to critics of CDC-funded HIV prevention programs should not cause CDC to abandon its historical commitment to good science and faithfulness to the law. Instead of adhering to its announced 120-day period for finalizing the guidelines, CDC should not finalize the guidelines until it has thoroughly examined and effectively responded to all of the comments criticizing the Proposed Guidelines.

Thank you for your attention to these comments. Please do not hesitate to call us if you need any additional information regarding this matter.

Respectfully submitted,



Laura W. Murphy
Director



Christopher E. Anders
Legislative Counsel