



MAIN OFFICE
2639 S. La Cienega
Blvd
Los Angeles, CA
90034
(310) 204-6010

VIA ELECTRONIC MAIL TO: HIVComments@cdc.gov

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

RE: Comments from the National Health Law Program in opposition to the Proposed Revision of Interim HIV Content Guidelines for AIDS-Related Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, Marketing, Advertising and Web Site Materials, and Educational Sessions in CDC Regional State, Territorial, Local and Community Assistance Programs

To Whom it May Concern:

We are writing to you today to oppose the Proposed Revision of Interim HIV Content Guidelines for AIDS-Related Materials, Pictorials, Audiovisuals, Questionnaires, Survey Instruments, Marketing, Advertising and Web Site Materials, and Educational Sessions in CDC Regional State, Territorial, Local and Community Assistance Programs ("the revised Guidelines") which was published in the Federal Register on June 16, 2004. The National Health Law Program (NHeLP) is a national public interest law firm that advocates for access to health care for low-income people. HIV disease poses a direct and growing threat to the populations that we serve.

In particular, we oppose the revised Guidelines on the following grounds:

Oversight of CBOs by a Program Review Panel (PRP) composed of state and local health officials undermines HIV prevention education.

Current HIV Content Guidelines require that CBO grantees establish their own Program Review Panel (PRP) with representation of a reasonable cross section of the general population or to use a PRP established by a health department or another CDC-funded organization. This allows grantees to determine how best to obtain input on materials that will serve the needs of the communities that they serve. The revised Guidelines would eliminate this option and require that PRPs established by a state or local health department review and approve all materials. 69 Fed. Reg. 33,825 (June 16, 2004). At best, this proposed requirement would subject the development of HIV prevention education materials to unnecessary, lengthy bureaucratic processes. At worst, it can subject HIV prevention materials to local political ideologies and pressures that have nothing to do with effectiveness

of materials and reaching public health goals. Requiring this drawn out process could also interfere with grantees' ability to satisfy grant requirements for outreach and material development within the grant periods, thus causing unnecessary and unavoidable contract compliance and funding issues. In its consideration of the Health Omnibus Programs Extension of 1988, one of the first national attempts to deal with the HIV/AIDS epidemic in the U.S., the Senate Committee on Labor and Human Resources stated that "the AIDS crisis demands the most comprehensive and rapid possible response of the federal government." Senate Report No. 100-133 at 53 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4176, 4187.

Oversight by a PRP composed of state and local health officials takes responsibility for HIV prevention messages away from the people who best understand how to reach diverse audiences. Local, community-based organizations work with the target communities daily and better understand the needs of those communities. Requiring PRP approval of all educational materials severely hampers the ability of grantees to address the needs of their communities. Allowing political appointees to second-guess what the local community needs contradicts Congress' intent for a rapid national response. We are additionally concerned if the PRPs would have the authority to censor materials that are developed with funding from other sources.

Requiring that Titles Reflect the Content of the Activity or Program May Impede the Ability of Grantees to Best Market Their Materials

It is important for grantees to be able to creatively use messages that encourage targeted, high-risk groups to read the life-saving materials that they produce. This revision, if read too narrowly, will have the effect of censoring and impeding creative approaches. The CDC should either delete this change or at least clarify that it is not to be read narrowly to prevent effective message development and marketing.

The revised Guidelines' requirement of reviewing educational materials for obscenity according to an "average person" standard is misguided, incorrect and should be deleted .

The revised Guidelines would measure whether materials could be considered "obscene" by utilizing a standard of what is obscene to an "average person." In doing so, the agency imports the test for "obscenity" as set forth in *Miller v. California*, but then narrowly applies it. 59 Fed. Reg. 33,824 (June 16, 2004). In order for education materials to be effective, they must resonate with target populations, especially those at highest risk of contracting HIV. What an average person finds to be obscene is not necessarily what a member of a high risk group will find to be so. Yet, materials that are geared towards an average person (however that is defined) may be completely ineffective as an HIV prevention tool, and thus waste scarce public resources and miss important public health prevention opportunities.

In Senate hearings on AIDS, both the Dean of the Harvard School of Public Health and the co-chair of the AIDS Panel of the National Academy of Sciences "made clear the necessity of reaching the highest risk groups by whatever means will catch their attention." Senate Report No. 100-133 at 6 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4176, 4181. Congress noted that "[d]ue to the anticipated difficulties of reaching populations at high risk through conventional means, the Committee believes that creative and innovative approaches to

conveying information are desirable.” Senate Report No. 100-133 at 58 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4176, 4191. Among those groups are “homosexual/bisexual males, intravenous drug users and their sexual partners, [and] prostitutes....” Senate Report No. 100-133 at 56 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4176, 4189.

Applying a narrowly construed “average person, applying contemporary community standards” definition of obscenity would severely undercut efforts to provide risk education to communities that have needs and customs significantly different than those of the average person, and whom Congress intended that HIV prevention education target.

Even the “average person” standard under the *Miller* case is too narrowly applied by the CDC. In that case, the Court offers a three-part test to determine whether a particular publication is obscene, “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, [citation omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15 at 24, 93 S. Ct. 2607 at 2615 (1973). In the revised Guidelines, the CDC applies the first prong of this test, but then fails to include the considerations stated in parts (b) and (c). The last prong, in particular, is an important consideration for materials meant to address HIV prevention, where “scientific value” also should include scientific research that supports public health goals.

Requiring funded recipients to certify that health officials have approved educational materials as not “obscene” in such a narrow manner is contrary to Congress’s legislative intent to deal with this public health emergency with “creative and innovative approaches to conveying information.” Senate Report No. 100-133 at 58 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4176, 4191. In enacting the Health Omnibus Programs Extension of 1988, P.L. 100-607, which includes the language now appearing at 42 U.S.C. § 300ee(d), Senate Report No. 100-133 states, “The Secretary may review the content of any educational or informational materials developed under these grants only for scientific and factual validity.” Senate Report No. 100-133 at 81 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4176, 4216. Preoccupation with whether educational materials might be considered “obscene” devoid of consideration of the target audiences will have a chilling effect on the Congressional call for “vigorous AIDS information and education campaigns aimed at groups who are at highest risk of becoming infected.” Senate Report No. 100-133 at 57 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4176, 4191.

The revised Guidelines must clarify the importance and high effectiveness of condom use in combating HIV.

The CDC should clarify the requirement that “educational materials...contain medically accurate information regarding the effectiveness or lack of effectiveness of preventing the STD the materials are designed to address” must include information about the “strong evidence for the effectiveness of condoms in reducing sexually transmitted HIV. *See* National Institute of Allergy and Infectious Diseases, National Institutes of Health, Department of Health and Human Services, *Workshop Summary: Scientific Evidence on Condom Effectiveness for Sexually Transmitted Disease (STD) Prevention*, prepared July 20,

2001. Also see, Karen R. Davis and Susan C. Weller, *The Effectiveness of Condoms in Reducing Heterosexual Transmission of HIV*, Family Planning Perspectives, 1999, 31(6):272-279.

The revised Guidelines should require materials that are meant to educate individuals about HIV prevention to include information on the effectiveness of condoms in preventing Human papillomavirus (HPV), most types of which are harmless, according to the Department of Health and Human Services. While research has not confirmed that latex condoms prevent the transmission of HPV, studies do suggest that condoms can reduce the risk of developing the disease. We are extremely concerned that information that suggests that condoms are not effective in HPV prevention could discourage the use of condoms to prevent HIV, or HPV for that matter. The priority for this program must be HIV prevention. Anything that discourages such a highly effective prevention method should be deleted.

Guidelines for School-Based Assisted Programs

The concerns that we raise in the comments above also apply to the proposed revised guidelines related to school-assisted programs. In addition, we strongly suggest that PRPs that review materials for use to educate school-age students include youth who can effectively represent the perspectives of high risk teens to whom the education material should be targeted. It is imperative that these materials not include an “abstinence-only” message, but rather comprehensive education that includes abstinence, but which also allows teens who engage in activities and behaviors that can expose them to HIV to be equipped to protect themselves. Likewise, materials should not limit “mutually monogamous relationships” to those within the context of marriage as such a message has no real world relevance to gay and lesbian youth for most of whom marriage is not an option. We read the *Guidelines for Effective School Health Education to Prevent the Spread of AIDS* to require a comprehensive message. The CDC should make these points clear.

Conclusion

We do not believe that the changes to the 1992 Guidelines are necessary at this time and should be withdrawn. In the event that the CDC moves forward with any changes, we strongly urge the CDC to address the issues in the comments above and to act credibly as one of the preeminent science-based governmental bodies charged with addressing pressing public health concerns.

Sincerely,

Randolph T. Boyle
Lourdes A. Rivera
National Health Law Program