DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Public Health and Science

Provision of Abortion-Related Services in Family Planning Services Projects

AGENCY: Office of Population Affairs, OPHS, DHHS.

ACTION: Notice.

SUMMARY: This notice informs the public of the interpretations relating to the statutory requirement that no funds appropriated under Title X of the Public Health Service Act be used in programs in which abortion is a method of family planning.

FOR FURTHER INFORMATION CONTACT: Samuel S. Taylor, Office of Population Affairs, (301) 594–4001.

SUPPLEMENTARY INFORMATION: On February 5, 1993, the Department of Health and Human Services published in the **Federal Register** a notice of proposed rulemaking that proposed to revise the regulations at 42 CFR Part 59, Subpart A. Subpart A of Part 59 sets forth the program requirements applicable to grantees under section 1001 of the Public Health Service (PHS) Act, 42 U.S.C. 300, *et seq.* The notice of proposed rulemaking proposed to revise that subpart by readopting the program regulations as they existed prior to February 2, 1988. This action would have the effect of revoking the regulations published on February 2, 1988, commonly known as the ''Gag Rule,'' which set forth standards for the compliance by such grantees with section 1008 of that Act, 42 U.S.C. 300a–6.

The February 5, 1993 notice of proposed rulemaking also proposed to reinstitute the pre-1988 policies and interpretations regarding compliance with section 1008. 58 FR 7464. As explained in the notice of proposed rulemaking, those policies and interpretations derived from previous opinions of the Department concerning section 1008. To promote more useful public comment in the rulemaking process, the Department subsequently made available a more detailed summary of the policies and interpretations and reopened the public comment period. 58 FR 34042 (June 23, 1993).

A number of public comments on the prior policies and interpretations were obtained during the reopened comment period, and the public comments received during both comment periods were generally focused on the prior policies and interpretations rather than on the proposed regulatory language. The Department has changed one paragraph of the regulations and has modified its prior interpretations in several particulars based in part on the public comment received. These modifications, and the grounds therefor, are described in the preamble to the final rules published on this date in the rules section of the **Federal Register.** The interpretations, as so modified, are set out in the summary statement below. The summary below is also reorganized from the summary statement made available for public comment, for purposes of clarification.

Accordingly, to provide guidance to grantees in order to promote uniform administration of the program and facilitate grantee compliance with the interpretations that are being reinstituted in conjunction with the final regulations adopted on this date, provided below is a summary of the program regulatory requirements and interpretations that relate to section 1008 of the PHS Act.

Program Policies Regarding the Title X National Family Planning Program and the Section 1008 Abortion Prohibition

Section 1008 of the Title X statute, 42 U.S.C. 300a–6, states: ''None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.'' This prohibition applies not only to the performance of abortion by a Title X project, but also to the conduct of certain abortion-related activities by the project. However, the prohibition does not apply to all the activities of a Title X grantee, but only to those within the Title X project. This statement summarizes the Department requirements and interpretations in existence prior to the imposition of the 1988 ''Gag Rule'' with regard to implementation of section 1008, as modified following the rulemaking of 1993.

1. General Principles

In general, section 1008 prohibits Title X programs from engaging in activities which promote or encourage abortion as a method of family planning. However, section 1008 does not prohibit the funding under Title X of activities which have only a possibility of encouraging or promoting abortion; rather, a more direct nexus is required. The general test is whether the immediate effect of the activity in question is to promote or encourage the use of abortion as a method of family planning. If the immediate effect of the activity in question is essentially neutral, then it is not prohibited by the statute. Thus, a Title X project may not provide services that directly facilitate the use of abortion as a method of family planning, such as providing transportation for an abortion, explaining and obtaining signed abortion consent forms from clients interested in abortions, negotiating a reduction in fees for an abortion, and scheduling or arranging for the performance of an abortion, promoting or advocating abortion within Title X program activities, or failing to preserve sufficient separation between Title X program activities and abortion-related activities.

2. Abortion Counseling and Referral

Under 42 CFR 59.5(a)(5), a Title X project must:

Not provide abortion as a method of family planning. A project must:

(i) Offer pregnant women the opportunity to be provided information and counseling regarding each of the following options:

(A) Prenatal care and delivery;

(B) Infant care, foster care, or adoption; and

(C) Pregnancy termination.

(ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral on request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling.

However, there are limitations on what abortion counseling and referral is permissable under the statute. A Title X project may not provide pregnancy options counseling which promotes abortion or encourages persons to obtain abortion, although the project may provide patients with complete factual information about all medical options and the accompanying risks and benefits. While a Title X project may provide a referral for abortion, which may include providing a patient with the name, address, telephone number, and other relevant factual information (such as whether the provider accepts Medicaid, charges, etc.) about an abortion provider, the project may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient. Where a referral to another provider who might perform an abortion is medically indicated because of the patient's condition or the condition of the fetus (such as where the woman's life would be endangered), such a referral by a Title X project is not prohibited by section 1008 and is required by 42 CFR 59.5(b)(1). The limitations on referrals do not apply in cases in which a referral is made for medical indications.

3. Advocacy Activities

A Title X project may not promote or encourage the use of abortion as a method of family planning through advocacy activities such as providing speakers to debate in opposition to anti-abortion speakers, bringing legal action to liberalize statutes relating to abortion, or producing and/or showing films that encourage or promote a favorable attitude toward abortion as a method of family planning. Films that present only neutral, factual information about abortion are permissible. A Title X project may be a dues paying participant in a national abortion advocacy organization, so long as there are other legitimate program-related reasons for the affiliation (such as access to certain information or data useful to the Title X project). A Title X project may also discuss abortion as an available alternative when a family planning method fails in a discussion of relative risks of various methods of contraception.

4. Separation

Non-Title X abortion activities must be separate and distinct from Title X project activities. Where a grantee conducts abortion activities that are not part of the Title X project and would not be permissible if they were, the grantee must ensure that the Title X-supported project is separate and distinguishable from those other activities. What must be looked at is whether the abortion element in a program of family planning services is so large and so intimately related to all aspects of the program as to make it difficult or impossible to separate the eligible and non-eligible items of cost.

The Title X project is the set of activities the grantee agreed to perform in the relevant grant documents as a condition of receiving Title X funds. A grant applicant may include both project and nonproject activities in its grant application, and, so long as these are properly distinguished from each other and prohibited activities are not reflected in the amount of the total approved budget, no problem is created. Separation of Title X from abortion activities does not require separate grantees or even a separate health facility, but separate bookkeeping entries alone will not satisfy the spirit of the law. Mere technical allocation of funds, attributing federal dollars to non-abortion activities, is not a legally supportable avoidance of section 1008.

Certain kinds of shared facilities are permissible, so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities: (a) A common waiting room is permissible, as long as the costs properly pro-rated; (b) common staff is permissible, so long as salaries are properly allocated and all abortion related activities of the staff members are performed in a program which is entirely separate from the Title X project; (c) a hospital offering abortions for family planning purposes and also housing a Title X project is permissible, as long as the abortion activities are sufficiently separate from the Title X project; and (d) maintenance of a single file system for abortion and family planning patients is permissible, so long as costs are properly allocated.

Whether a violation of section 1008 has occurred is determined by whether the prohibited activity is part of the funded project, not by whether it has been paid for by federal or non-federal funds. A grantee may demonstrate that prohibited abortion-related activities are not part of the Title X project by various means, including counseling and service protocols, intake and referral procedures, material review procedures, and other administrative procedures.

Dated: June 28, 2000.

Samuel S. Taylor,

Acting Director, Office of Population Affairs.

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