fate gag Rule

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

May 22, 2000

MEMORANDUM FOR THE DEPUTY DIRECTOR

FROM: John T. Spotila

SUBJECT: Potential Revisions to the Gag Rule

After further review of the draft final rule, we have the following observations:

- The draft submission will need some minor rewriting to add the new Section 59.5(a)(5) to the rule and to incorporate minor related changes in the preamble. We are unclear as to how long HHS would need to make the changes.

- Since the rule primarily finalizes the 1993 interim final revocation of the Gag Rule, the new language must emphasize that it is designed to clarify the Department's policy in this area, not change it fundamentally. If for any reason the new language were challenged successfully as going beyond the proposal, the Department would want to be able to fall back on the basic revocation (which tracks the proposal and the interim final rule exactly).

- It would be difficult to define the phrase "not promote or encourage" narrowly or with absolute precision. Historically, the Department has defined it by referring to a guiding principle and then citing examples. The proposed guidance and preamble reflect this traditional approach (see the attached pages).

- The Department's policy on nondirective counseling is identical to the pre-1988 policy. In the guidance, HHS mandates that clinics provide, upon patient request, comprehensive and balanced counseling on all treatment options.

- The Department's policy on referrals is essentially identical to its pre-1988 approach with one clarification. In discussing referrals to abortion providers, the pre-1988 guidance drew a distinction between making a "mere referral" and taking "further affirmative action to secure the services". In the former case, the guidance equated a "mere referral" to giving a patient the name, address and/or telephone number of the provider. The new guidance preserves this conceptual distinction, but allows the clinic to give the patient additional information on provider policies (customary charges; whether Medicaid coverage is accepted; other restrictions).

- The new guidance matches the pre-1988 guidance in its discussion of restrictions on advocacy. It also matches the pre-1988 guidance in its discussion of physical and financial separation of services, with one minor exception. It eliminates a confusingly vague reference in the earlier guidance to allowing "impermissible" abortion-related materials in common waiting rooms.

New Section 59.5(a)(5)

(5) Not provide abortion as a method of family planning. Each project must offer pregnant women the opportunity to be provided information and counseling regarding:

(A) Prenatal care and delivery;
(B) Infant care, foster care, or adoption; and
(C) Pregnancy termination.

If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, except for any options about which the pregnant woman indicates that she does not wish to receive information and counseling.

DRAFT GUIDANCE

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 policies 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. According to the 1981 Title X Guidelines:

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
>
> - o Prenatal care and delivery
> - o Infant care, foster care, or adoption
> - o Pregnancy termination.

There are limitations on what abortion counseling and referral is permissible under the statute: (a) a Title X project may not provide pregnancy 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; (b) a Title X project may provide a referral for abortion. A referral 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; and (c) 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 a backup method of family planning 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 bulks so large and is 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 are 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; 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: Nov 22, 1999

Denese O. Shervington
Deputy Assistant Secretary for Population Affairs

PREAMBLE

With respect to the comments objecting to the revocation of the Gag Rule or the use of tax dollars for abortion on moral grounds, the Secretary notes that, under the interpretations adopted in conjunction with the regulations below, the funding of abortion or activities that promote or encourage abortion with Title X funds has been and will continue to be prohibited. Rather, what changes under the interpretations reinstated in conjunction with the regulations below is which activities are considered to "promote or encourage" abortion. In contrast to the position taken under the Gag Rule, under the present view (which was also the Department's view of the statute prior to 1988), the provision of neutral and factual information about abortion is not considered to promote or encourage abortion as a method of family planning. Thus, the basic statutory interpretation underlying both the Gag Rule and the specific policies that governed the Title X program prior to 1988 -- that section 1008 prohibits activities that promote or encourage abortion as a method of family planning -- remains unchanged.

With respect to the contentions that the Secretary lacks a rational basis for revoking the Gag Rule and that it must justify each separate part of the Gag Rule that it is discarding, we do not agree that either contention is sound. Both the pre-1988 interpretations of the statute and the revised interpretation of the statute embodied in the Gag Rule are legally supportable; they represent different points on the spectrum of what is legal and, thus, both represent a permissible exercise of administrative discretion. The crucial difference between the two options is one of experience. Because of ongoing litigation, the Gag Rule was never implemented on a nation-wide basis, so that its proponents can point to no evidence that it can and will work operationally on a national basis in the Title X program. The policies and interpretations reinstituted in conjunction with the regulations below, on the other hand, have been used by the program for

abortions.

D. Abortion information and counseling. The Gag Rule prohibited the provision of information other than information directed at protecting maternal and fetal health to women determined to be pregnant; thus, it prohibited what is generally known as "options counseling", i.e., the provision to pregnant women in a nondirective fashion of neutral, factual information about all options for the management of a pregnancy, including abortion. See, 42 CFR 59.8 (1989 ed.). The pre-1988 policies, in contrast, required options counseling, if requested. As stated in the 1981 "Title X Guidelines" :

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
>
> - Prenatal care and delivery
> - Infant care, foster care, or adoption
> - Pregnancy termination.

The June, 1993 summary of the pre-1988 interpretations also stated that Title X projects were not permitted to provide options counseling that promoted abortion or encouraged patients to obtain abortion, but could advise patients of all medical options and accompanying risks.

Most of those comments supporting adoption of the proposed rules appeared to agree with the pre-1988 policies and interpretations. However, there appeared to be some confusion among those who agreed with the pre-1988 requirement for options counseling as to how much information and counseling could be provided. Several of these comments also suggested that that the "on request" limitation be deleted, particularly where State law requires the provision of information about abortion to women considering that option.

Several comments opposing adoption of the proposed rules and revocation of the Gag Rule also specifically addressed the issue of counseling. Several of these comments suggested that counseling on "all options" include the option of keeping the baby, and two comments suggested that the rules should contain an exception for grantees or individuals who object to providing such information and counseling on moral grounds.

In response to the apparent confusion as to the amount of counseling permitted to be provided under the pre-1988 interpretations, the interpretive summary published in the notices section of the Federal Register clarifies that Title X grantees are not restricted as to the completeness of the factual information they may provide relating to all options, including the option of pregnancy termination. However, the previous restriction as to the "kind" of information that may be provided about abortion continues: in keeping with the decision to adhere to the longstanding interpretation of the statute that projects may not "promote or encourage" abortion as a method of family planning, information and counseling provided by Title X projects on all options for pregnancy management, including pregnancy termination, must be nondirective. This interpretation, it should be noted, is also consistent with the requirement in the program's three most recent appropriations, Pub. L. 104-208 (110 Stat. 3009-243), Pub. L. 105-78 (111 Stat. 1478) and Pub. L. 105-277 (112 Stat. 2681), that pregnancy counseling in the Title X program be "nondirective." Thus, grantees may provide as much factual, neutral information about abortion as they consider warranted by the circumstances, but may not steer or direct clients toward selecting the option of abortion, or any other option, in providing options counseling.

The Secretary is retaining the "on request" policy in the interpretive summary published

have such objections to provide such counseling. However, in such cases the grantees must make other arrangements to ensure that the service is available to Title X clients who desire it.

E. Referral for abortion. The Gag Rule specifically prohibited referral for abortion as a method of family planning and required grantees to give women determined to be pregnant a list of providers of prenatal care, which list could not include providers "whose principal business is the provision of abortion." 42 CFR 59.8(a) (1989 ed.). The Gag Rule permitted referral to an abortion provider only where there was a medical emergency. 42 CFR 59.8(a)(2) (1989 ed.). The pre-1988 policies and interpretations, in contrast, permitted Title X projects to make what was known as a "mere referral" for abortion; a "mere referral" was considered to be the provision to the client of the name and address and/or telephone number of an abortion provider. Affirmative actions, such as obtaining a consent for the abortion, arranging for transportation, negotiating a reduction in the fee for an abortion or arranging for or scheduling the procedure, were considered to promote abortion as a method of family planning and thus to be prohibited by section 1008. The pre-1988 rules (§ 59.5(b)(1)) were interpreted by the agency to require referral for abortion where medically indicated. See, Valley Family Planning v. State of North Dakota, 489 F.Supp. 238 (D.N.D. 1980), aff'd., 661 F.2d 99 (8th Cir. 1981).

A number of comments, mostly from individuals and organizations supporting revocation of the Gag Rule, suggested modifications of the proposed referral policies and interpretations. Most of these comments suggested that the content limitations on referrals be broadened, with Title X grantees being permitted to provide other relevant information, such as comparative charges, stage of pregnancy up to which referral providers may under State law or will provide abortion, the number of weeks of estimated gestation, etc. These comments argued

that the provision of such factual information does not "promote or encourage" abortion any more than does the provision of the abortion providers' names and addresses and/or telephone numbers. One comment also suggested that the restriction on negotiating fees for clients referred for abortion conflicts with the requirement to refer for abortion where medically indicated.

Several comments opposing revocation of the Gag Rule also expressed problems with the proposed referral policies and interpretations. A few comments urged that referrals to agencies that can assist clients who choose the "keeping the baby" or adoption options should be required. Another comment criticized the requirement for referral where "medically indicated" as confusing. Revisions suggested were that "self-referrals" for abortion be specifically prohibited, to reduce commercialization and profiteering by Title X grantees who are also abortion providers and that grantees who objected to abortion on moral or religious grounds be permitted not to make abortion referrals.

The Secretary agrees with the comments advocating expanding the content of what information may be provided in the course of an abortion referral. The content (as opposed to action) restrictions of the "mere referral" policy proceeded from an assumption that the provision of information other than the name and address and/or telephone number of an abortion provider might encourage or promote abortion as a method of family planning. The Secretary now agrees, based on experience and the comments of several providers on this point, that the provision of the types of additional neutral, factual information about particular providers described above is likely to do little, if anything, to encourage or promote the selection of abortion as a method of family planning over and above the provision of the information previously considered permissible; at most, such information would seem likely to assist clients in making a rational

selection among abortion providers, if abortion is being considered. Moreover, it does not seem rational to restrict the provision of factual information in the referral context, when no similar restriction applies in the counseling context. Accordingly, the Secretary has revised the policies and interpretations summarized in the notice section to clarify that grantees are not restricted from providing neutral, factual information about abortion providers in the course of providing an abortion referral, when one is requested by a pregnant Title X client.

The Secretary is not accepting the remainder of the comments on this issue, as they either proceed from a misunderstanding of, or do not raise valid objections to, the proposed policies and interpretations. The comment arguing that the restriction on negotiating fees conflicts with the requirement to refer for abortion where medically indicated is based on a misunderstanding of that requirement: in such circumstances, the referral is not for abortion "as a method of family planning" (i.e., to determine the number and/or spacing of one's children) but is rather for the treatment of a medical condition; thus, the statutory prohibition does not apply, so there is no restriction on negotiating fees and similar actions. The suggestion that referrals to agencies that can assist clients who choose the options of "keeping the baby" or adoption be required is likewise rejected as unnecessary. Under the policy set out in the 1981 "Title X Guidelines" provision set out in the preceding section, the options of prenatal care and delivery and adoption are options that are required to be part of the options counseling and referral process; thus, referral to providers who can assist a client with one of these options is already required, where that option is selected by the client. The Secretary also rejects the criticism that the provision requiring referral for abortion where medically indicated is undefined and confusing. It is noted that this comment came from a law school, not a health care provider. The meaning of the

organizations and was negative. Although it was generally agreed that the financial separation of Title X project activities from abortion-related activities was required by statute and, in the words of one comment, "absolutely necessary," many of these comments objected that requiring additional types of separation would be unnecessary, costly, and medically unwise. The argument was made that the requirement for physical separation is unnecessary, as it is not required by the statute which, on its face, requires financial separation only. Further, it was argued that since Title X grantees are subject to rigorous financial audits, it can be determined whether program funds have been spent on permissible family planning services, without additional requirements being necessary. With respect to the issue of cost, it was generally objected that requiring separation of staff and facilities would be inefficient and cost ineffective. For example, one comment argued that --

> The wastefulness and inefficiency of the separation requirements is ... illustrated by the policy which allows common waiting rooms, but disallows "impermissible materials" in them. This puts grantees in the position of having to continuously monitor health information for undefined "permissibility" or to build a separate waiting room just to be able to utilize those materials....

It was argued that these concerns were particularly important for small and rural clinics "that may be the only accessible Title X family planning and/or abortion providers for a large population of low-income women." Of particular concern for such clinics was the duplication of costs inherent in the separation requirements, as they --

> cannot afford to operate separate facilities or to employ separate staff for these services without substantially increasing the prices of ... services. Nor can they offer different services on different days of the week because so many of their patients ... are only able to travel to the clinic on one day.

Many providers also pointed out that requiring complete physical separation of services would be

inconsistent with public health principles, which recommend integrated health care, and would impact negatively on continuity of care. As one comment stated, "women's reproductive health needs are not artificially separated between services: a woman who needs an abortion may also need contraceptive services, and may at another time require prenatal care." Several providers objected in particular that such a separation would, in the words of one comment, "remove ... one of the most opportune time[s] to facilitate the entry of the abortion patient into family planning counseling, which is at the post-abortion check-up." It was also pointed out that separation of services would burden women, by making them "make multiple appointments or trips to visit different staff or facilities." Finally, the separation policy was objected to by several of the comments that otherwise generally supported the proposed rule as unnecessarily broad, ambiguous, and vague.

Several of the comments opposing the revocation of the Gag Rule and the adoption of the proposed rules likewise objected specifically to the separation requirements, generally on the ground that the pre-1988 policies were vague and unenforceable. Two comments also argued that, if the pre-1988 requirement of physical separation was to be reinstituted, it made no sense to revoke § 59.9 of the Gag Rule in its entirety, as that section of the Gag Rule contained specific standards to implement this requirement; alternatively, it was argued that if the Secretary is going to use different standards to determine whether the requisite physical separation existed, those should be published for public comment.

The Secretary agrees that the comments on both sides of this issue have identified substantial concerns with the pre-1988 policies and interpretations with respect to the issue of how much physical separation should be required between a grantee's Title X project activities

and abortion-related activities. The Secretary agrees with the comments that the pre-1988 interpretation that some physical separation was required was unenforceable. Indeed, since the pre-1988 interpretations had held that it was permissible to provide abortions on a Title X clinic site and to have common waiting areas, records, and staff (subject largely to proper allocation of costs), it was difficult to tell just what degree and kind of physical separation were prohibited. As a consequence, the agency attempted to enforce this requirement on only a few occasions prior to 1988. The Secretary does not agree with opponents of the proposed rules, however, who argued that the "physical separation" requirements in § 59.9 of the Gag Rule should be retained on the ground that they provide a necessary clarification of this issue. Although § 59.9 provided ostensibly more specific standards, the fundamental measure of compliance under that section remained ambiguous: "the degree of separation from facilities [in which prohibited activities occurred] and the extent of such prohibited activities," and "[t]he extent to which" certain materials were present or absent. Furthermore, since under § 59.9 compliance was to be determined on a "facts and circumstances" basis, this section of the Gag Rule provided grantees with less specific advance notice of the compliance standards than did the pre-1988 policies and interpretations. Moreover, the change in policy from the more concrete policies proposed during the Gag Rule rulemaking to the less concrete "facts and circumstances" standard ultimately adopted in the final Gag Rule as a result of the public comment suggests the practical difficulties of line-drawing in this area. In fact, since the Gag Rule was never implemented on a national basis, the precise contours of the compliance standards of § 59.9 were never determined. The Secretary has accordingly not accepted the suggestion from several opponents of the proposed rule that the policies of § 59.9 be retained.

respond to the remaining comments on the issue.

G. Advocacy restrictions. The Gag Rule, at 42 CFR 59.10 (1989 ed.), prohibited Title X projects from encouraging, promoting, or advocating abortion as a method of family planning. This section prohibited Title X projects from engaging in actions to "assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes," including actions such as lobbying for the passage of legislation to increase the availability of abortion as a method of family planning, providing speakers to promote the use of abortion as a method of family planning, paying dues to any group that as a significant part of its activities advocated abortion as a method of family planning, using legal action to make abortion available as a method of family planning, and developing or disseminating materials advocating abortion as a method of family planning. The pre-1988 policies and interpretations likewise prohibited the promotion or encouragement of abortion as a method of family planning through advocacy activities such as providing speakers, bringing legal action to liberalize statutes relating to abortion, and producing and/or showing films that tend to encourage or promote abortion as a method of family planning. However, under those prior policies and interpretations, it was considered permissible for Title X grantees to be dues-paying members of abortion advocacy groups, so long as there were other legitimate program-related reasons for the affiliation.

Very few comments were received concerning these proposed policies and interpretations. Those received from persons and entities that generally supported the proposed rules generally argued against the restriction on showing films advocating abortion, on the ground that it was possible to violate this restriction by showing a film that was purely factual and detailed relative risks. The few comments on this part of the policies and interpretations

received from those who generally opposed revoking the Gag Rule pointed out the similarity between the advocacy policies articulated in the proposed policies and interpretations and § 59.10 of the Gag Rule and argued that § 59.10 should accordingly be reinstated.

As set out above, the Secretary is of the view that the Gag Rule cannot and should not be adopted piecemeal, as recommended by these comments. Moreover, the Secretary is of the view that the prohibition against dues paying contained in § 59.10 is not required by the statute and does not represent sound public policy. Accordingly, the suggestion that § 59.10 be reinstated has not been adopted. With respect to the criticism of the prohibition against Title X grantees showing films advocating abortion as a method of family planning, it is recognized that the prohibition should not encompass the kind of neutral, factual information that grantees are permitted to provide in the counseling context; the policies and interpretations have been clarified accordingly. To the extent that these comments seek to further liberalize the advocacy restrictions, however, they are rejected as inconsistent with the Secretary's basic interpretation of section 1008.

H. Miscellaneous. A number of comments were received on miscellaneous issues. Those comments, and the Secretary's responses thereto, are summarized below.

1. Changes outside the scope of the rulemaking. Several comments were received advocating changes to other sections of the regulations on issues other than the issue of compliance with section 1008. These comments included the following suggestions: that the regulations be revised to permit natural family planning providers to be Title X grantees; that the regulations be revised to prohibit single method providers from participating in Title X projects; that the footnote in the regulation addressing Pub. L. 94-63 be revised to state that the law also