



April 25, 2007

Michael O. Leavitt
Secretary of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Notice of Violations of 42 U.S.C. § 247b-17(c)(2) in Abstinence-Only-Until-Marriage Programs

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Dear Secretary Leavitt:

On behalf of the American Civil Liberties Union (ACLU), Advocates for Youth (Advocates), and the Sexuality Information and Education Council of the United States (SIECUS), we ask that you take immediate action to remedy ongoing violations of 42 U.S.C. § 247b-17(c)(2) by the Department of Health and Human Services (HHS). This federal statute governs a broad category of educational materials and requires that those materials include medically accurate information about the effectiveness of condoms in preventing sexually transmitted infections (STIs).¹ In this letter and the exhibits and other supporting documents submitted with it, we address a number of abstinence-only-until marriage materials that are covered by 247b-17(c)(2), but fail to meet its requirements. Instead, they omit vital information about condom effectiveness and contain inaccuracies suggesting that condoms fail to protect against infection, when in fact they are highly effective at doing so. If HHS fails to take sufficient measures within 30 days to correct the violations of § 247b-17(c)(2) highlighted in Part II of this letter, the ACLU intends to bring legal action.²

I. **Federal Law Requires Medical Accuracy about Condom Effectiveness for a Broad Category of Educational Materials.**

Pursuant to § 247b-17(c)(2),

Educational material [related to the human papillomavirus (HPV)], and all other relevant education and prevention materials prepared and printed from this date forward for the public and health care

¹ The statute uses the term STDs (sexually transmitted diseases) rather than STIs. For purposes relevant to this letter, the terms STIs and STDs are interchangeable.

² As discussed further below, the recent changes to the Community Based Abstinence Education (CBAE) program guidance are insufficient to correct these violations.

providers by the Secretary [of HHS] (including materials prepared through the Food and Drug Administration, the Centers for Disease Control and Prevention, and the Health Resources and Services Administration), or by contractors, grantees, or subgrantees thereof, that are specifically designed to address STDs, including HPV shall contain medically accurate information regarding the effectiveness or lack of effectiveness of condoms in preventing the STD the materials are designed to address. Such requirement only applies to materials mass produced for the public and health care providers, and not to routine communications.

Section 247b-17(c)(2)'s medical accuracy requirement applies when educational materials are "specifically designed to address STDs"; when they are produced by HHS or by HHS "contractors, grantees, or subgrantees," who include recipients of federal abstinence-only-until-marriage funding³; and when they are produced "in large quantities for those members of the public for whom the materials are appropriate."⁴

II. Educational Materials Used In Conjunction With Federally Funded Abstinence-Only-Until-Marriage Programs Violate § 247b-17(c)(2).

We have strong reason to believe that many popular abstinence-only-until-marriage curricula used by recipients of federal funding violate the mandates of § 247b-17(c)(2).⁵ This letter focuses on three such curricula – *Me, My World, My Future*⁶ and *Sexuality, Commitment & Family*,⁷ published and used by abstinence-only grantee Teen-Aid, Inc.⁸; and *Why kNOW*,⁹ published by abstinence-only

³ See Letter from Gary L. Kepplinger, General Counsel, U.S. Gov't Accountability Office, to Michael O. Leavitt, Secretary of HHS, at 3 (Oct. 18, 2006) [hereinafter GAO Letter] (attached hereto as Exhibit B) (noting that § 247b-17(c)(2) "[b]y its own terms . . . is quite broad.").

⁴ *Id.*

⁵ See, e.g., U.S. HOUSE OF REPS., COMM. ON GOV'T REFORM – MINORITY STAFF SPECIAL INVESTIGATIONS DIV., THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 8-11 (2004) (attached hereto as Exhibit H) (describing inaccurate information about condoms and STIs in several abstinence-only curricula used by recipients of federal funding); see also SCOTT H. FRANK, REPORT ON ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN OHIO 13-14 (2005) (describing inaccurate information about condoms in abstinence-only curricula used in Ohio, including materials used by recipients of federal funding).

⁶ NANCY ROACH & LEANNA BENN, *ME, MY WORLD, MY FUTURE* (1998).

⁷ STEVE POTTER & NANCY ROACH, *SEXUALITY, COMMITMENT & FAMILY* (1998).

⁸ Teen-Aid is the recipient of Community Based Abstinence Education (CBAE) and/or Special Programs of Regional and National Significance (SPRANS) grants running from July 2001 through June 2007. Between 2001 and 2004, Teen-Aid reported distributing "28,000 Curricula related pieces to students and their parents via school districts and community agencies." Teen-

grantee AAA Women's Service/Why kNOw Abstinence Education, Inc. – as well as HHS's 4parents.gov website and *Parents, Speak Up!* pamphlet.

The Teen-Aid curricula and *Why kNOw* devote significant space to discussions of the symptoms, treatment, and potential long-term effects of a number of STIs, including HIV.¹⁰ These discussions represent entire chapters in the curricula. For many of the STIs discussed in the curricula, no information at all is given about condom effectiveness. For other STIs, including HIV, each of the three curricula includes medically inaccurate information. The attached declaration of Dr. John S. Santelli, Chairman of the Heilbrunn Department of Population and Family Health and Professor of Clinical Population and Family Health at Columbia University's Mailman School of Public Health, delineates the relevant inaccuracies in each of the curricula.¹¹

The 4parents.gov website and *Parents, Speak Up!* also devote significant attention to the modes of transmission, symptoms, and treatment of a number of STIs, including HIV. Although the website and pamphlet include information about condom effectiveness for each disease discussed, Dr. Santelli has noted that the website (and, consequently, the nearly identical pamphlet) "uses language on the efficacy of condoms which is both limited and ignores information which is usually provided by CDC [Centers for Disease Control and Prevention] and the National Institutes of Health (NIH)."¹² Dr. King K. Holmes, Professor of Medicine, Adjunct Professor of Microbiology and Epidemiology, and Director of the Center for AIDS and STD at the University of Washington, has similarly concluded that the website (and therefore the pamphlet) contains "incomplete or inaccurate" information about STIs and condom effectiveness.¹³ Dr. Holmes concluded that for all six of the STIs discussed, the website provides information that inaccurately understates the effectiveness of condoms in preventing those

Aid, Inc., Final Report for SPRANS Grant #1H1DMC 00285-01 (July 21, 2005). In 2003 and 2004 alone, Teen-Aid spent \$288,289 and \$293,266, respectively, in federal funds on "[c]urriculum and educational texts, publications, supplies and shipping." *Id.*

⁹ KRIS FRAINIE, WHY KNOW ABSTINENCE EDUCATION PROGRAMS, CURRICULUM FOR SIXTH GRADE THROUGH HIGH SCHOOL, TEACHER'S MANUAL (Marcia Swearingen & Pam Sulser eds., 2002).

¹⁰ See ME, MY WORLD, MY FUTURE at 222-30, 243-59; SEXUALITY, COMMITMENT & FAMILY at 23-46, 241-49; WHY KNOW at 90-95.

¹¹ See Declaration and Curriculum Vitae of John S. Santelli, M.D., M.P.H. (attached hereto as Exhibit A)

¹² Letter from Dr. John Santelli to Rep. Henry Waxman, United States House of Representatives (May 1, 2005) (attached hereto as Exhibit E).

¹³ Letter from Dr. King K. Holmes to Rep. Henry Waxman, United States House of Representatives (May 27, 2005) (attached hereto as Exhibit E).

STIs.¹⁴ Dr. Holmes's attached correction of a chart on STIs included on the website (and in the pamphlet) details these inaccuracies.¹⁵

Whether by including medically inaccurate information on condom effectiveness for some STIs, or by failing to discuss condom effectiveness at all (and thereby omitting medically accurate information) for others, these materials violate § 247b-17(c)(2).

III. HHS Has Previously Been Informed of Medical Inaccuracies in Abstinence-Only Grantees' Educational Materials.

On numerous prior occasions, HHS has been alerted to inaccuracies and other insufficiencies in abstinence-only materials, and has failed to respond adequately. In September 2005, for example, Advocates and SIECUS filed a complaint pursuant to the Data Quality Act of 2000, 44 U.S.C. §§ 3504(d)(1), 3516, against HHS.¹⁶ The complaint sought to correct medical and scientific inaccuracies in abstinence-only materials used by recipients of Community Based Abstinence Education (CBAE) funds. Advocates and SIECUS discussed many such inaccuracies and demanded that HHS "immediately review all abstinence-only curricula and materials used by its grantees and purge or correct all inaccurate and false information included therein."¹⁷ They also requested that in the future HHS only provide CBAE funding to "those grantees that provide medically accurate and complete sexual health information."¹⁸ HHS refused to address the merits of these complaints, responding in January 2006 that the Data Quality Act does not apply to information produced by HHS grantees.¹⁹ Although the agency claimed that "[i]ncreased grantee awareness of the scientific and medical facts relative to their delivery of abstinence education has been, and continues to be, one area of focus for ACF [the Administration for Children and

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See* Complaint of Advocates for Youth and the Sexuality Information and Education Council of the United States Pursuant to the Data Quality Act of 2000 (Sept. 13, 2005), *available at* <http://aspe.hhs.gov/infoQuality/request&response/24a.pdf> (attached hereto as Exhibit D).

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ Letters from Harry Wilson, Associate Commissioner, Family and Youth Services Bureau, Administration on Children, Youth and Families, to James Wagoner, President, Advocates for Youth, and William Smith, Vice President, Sexuality Information and Education Council of the United States (Jan. 23, 2006), *available at* <http://aspe.hhs.gov/infoQuality/request&response/24b2.pdf> (attached hereto as Exhibit D).

Families],” the response did not provide any concrete examples of how HHS or its sub-agencies ensure that grantees’ materials are medically accurate.²⁰

A December 2004 government report also alerted HHS to inaccuracies in CBAE grantees’ educational materials.²¹ The report discusses “major errors and distortions” in eleven of the thirteen curricula most commonly used by CBAE grantees, including Teen-Aid’s *Me, My World, My Future* and *Why kNOW*.²² To our knowledge, HHS took no action to remedy the inaccuracies detailed in the report. On the contrary, the Deputy Assistant Secretary for Population Affairs issued a brief statement asserting that “[t]his report misses the boat,” without noting any scientific evidence to dispute the report’s findings.²³

In addition, an October 2006 report by the Government Accountability Office (GAO) on abstinence-only-until-marriage programs and materials raised red flags about the accuracy of grantees’ materials.²⁴ The GAO found that ACF does not review the materials of CBAE and Section 510²⁵ grantees for medical accuracy, notwithstanding various indications of inaccuracies.²⁶ As discussed in Part IV, *infra*, ACF appears to have responded to this report by making some changes to the CBAE program.

Finally, with respect to the www.4parents.gov website (and consequently, in the nearly identical *Parents, Speak Up!* pamphlet), HHS has received a host of complaints and yet taken no action. First, in March 2005, a diverse group of public health, community, and advocacy organizations – including the ACLU, Advocates, and SIECUS – sent a letter alerting HHS to biases, errors, and omissions of important information on the website.²⁷ The letter specifically noted

²⁰ *Id.*

²¹ See generally U.S. HOUSE OF REPS., COMM. ON GOV’T REFORM—MINORITY STAFF, *supra* note 5.

²² *Id.* at 7.

²³ Press Release, Dep’t of Health & Human Servs., Statement of Alma Golden, M.D., Deputy Assistant Secretary for Population Affairs, Office of Public Health and Science Regarding Abstinence Education Report of the House Committee on Government Reform (Dec. 1, 2004), available at <http://www.hhs.gov/news/press/2004pres/20041201.html> (attached hereto as Exhibit H)

²⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, ABSTINENCE EDUCATION: EFFORTS TO ASSESS THE ACCURACY AND EFFECTIVENESS OF FEDERALLY FUNDED PROGRAMS (Oct. 2006) [hereinafter GAO Report] (attached hereto as Exhibit C).

²⁵ Like CBAE, Section 510 provides a funding stream for abstinence-only-until-marriage programs.

²⁶ GAO Report, *supra* note 24, at 14-16.

²⁷ See Letter from 9 to 5 Nat’l Ass’n of Working Women et al to Michael O. Leavitt, Sec’y of Health & Human Servs. (March 31, 2005) (attached hereto as Exhibit F).

that “the website contains inaccurate information regarding the effectiveness of condoms”²⁸ To date, the agency has not responded to this letter.

Representative Henry Waxman, then the ranking minority member of the House Committee on Government Reform, sent a similar letter to HHS in July 2005.²⁹ In support of his letter, Representative Waxman included Dr. Santelli’s and Dr. Holmes’s reviews of the website, as well as reviews by two other national experts in the fields of adolescent development and adolescent sexuality.³⁰ In response to Representative Waxman’s evaluation the Senate Appropriations Committee directed HHS in July 2005 to review the website and correct any scientific inaccuracies.³¹ The following month a presidential domestic policy advisor announced that inaccuracies on www.4parents.gov had been fixed. However, this statement was incorrect. In October 2005, Representative Waxman sent the presidential advisor a letter requesting that he “ensure that [HHS] responds promptly” to the website’s medical accuracy problems.³² To our knowledge, HHS has still not responded to Representative Waxman’s initial letter. And the information about condoms and STIs presented on 4parents.gov is the same now as it was in July 2005.

IV. Recent Changes Regarding Medical Accuracy in the Community-Based Abstinence Education Program Announcement Fail to Remedy Violations of § 247b-17(c)(2).

Presumably in response to the GAO’s October 2006 letter and report,³³ ACF has revised requirements for CBAE program applicants in Fiscal Year 2007 (FY07). The new CBAE grant announcement requires that applicants assure that medical information in their curricula is medically accurate, and also states that during a “pre-award negotiation period,” ACF will review applicants’ curricula for medical accuracy.³⁴ Additionally, the announcement states that although grantees need

²⁸ *Id.*

²⁹ See Letter, Rep. Henry A. Waxman to Michael O. Leavitt, Sec’y of HHS (July 13, 2005) (attached hereto as Exhibit E).

³⁰ See Exhibit E.

³¹ S. Rep. No. 109-103, at 220 (2005) (attached hereto as Exhibit G).

³² Letter from Rep. Henry A. Waxman to Mr. Claude Allen, Assistant to the President for Domestic Policy (Oct. 12, 2005) (attached hereto as Exhibit).

³³ See GAO Letter, *supra* note 3; GAO Report, *supra* note 24.

³⁴ See Dep’t of Health & Human Servs., Admin. for Children & Families, Community-Based Abstinence Education Program, Funding Opportunity Number HHS-2007-ACF-ACYF-AE-0099 at 3, 6, 31-32, 34 (Mar. 2007) [hereinafter FY07 CBAE Funding Opportunity] (attached hereto as Exhibit I).

not include information on contraception unless required to do so under § 247b-17(c)(2), any information on contraception that grantees choose to include must be medically accurate and “should include information on the effectiveness or lack of effectiveness of the type of contraception discussed in the curriculum.”³⁵ Finally, directly addressing § 247b-17(c)(2) for the first time, the announcement provides,

Mass produced materials that as their primary purpose are specifically about STDs, including human papillomavirus, are required by Section 317P(c)(2) [42 U.S.C. § 247b-17(c)(2)] of the Public Health Service Act to contain medically accurate information regarding the effectiveness or lack of effectiveness of condoms in preventing the sexually transmitted disease the materials are designed to address. Mass produced materials are considered to be specifically designed to address STDs if more than 50 percent of the content is related to STDs.³⁶

Although these changes are a step in the right direction, they are insufficient to address the concerns raised by this letter. First, they apply neither to current recipients of CBAE and Section 510 funding, nor even to future recipients of Section 510 funding. Indeed, to our knowledge, these changes have no impact on the materials described herein. Second, the changes appear to improperly interpret the scope of § 247b-17(c)(2). Nothing in the law states that “50 percent of the content” of educational materials must address STDs before the requirement of medical accuracy applies, and the GAO has properly rejected HHS’s similar argument that § 247b-17(c)(2) applies only where materials are “primarily,” as opposed to “specifically,” designed to address STIs.³⁷ The law states only that it applies to materials that are “specifically designed to address STDs.” § 247b-17(c)(2). It is no surprise that abstinence-only materials often meet that requirement: Under the statutory definition of “abstinence education,” abstinence-only grantees must “[t]each[] that abstinence from sexual activity is the only certain way to avoid . . . sexually transmitted diseases, and other associated health problems.”³⁸ In the same vein, past and current CBAE funding announcements have required grantees to teach “the harmful physical effects of

³⁵ *Id.* at 3.

³⁶ *Id.*

³⁷ See GAO Letter, *supra* note 3, at 5-6.

³⁸ 42 U.S.C. § 710(b)(2)(C).

infection by STDs that may result from sexual activity outside of the context of faithful marriage.”³⁹

The new CBAE announcement also leaves open the possibility that ACF will continue its previously articulated position that § 247b-17(c)(2) applies only to materials created for the general public at large, rather than for subsets of the population, such as adolescents.⁴⁰ The statute does not support that interpretation, and the GAO has rightly rejected it as well.⁴¹

For these reasons, among others, the new CBAE announcement alone is insufficient to address our concerns about HHS’s application of § 247b-17(c)(2).

VI. Conclusion

As illustrated above and in the attached exhibits and other supporting materials that accompany this letter, abstinence-only materials subject to § 247b-17(c)(2) omit vital information about condom effectiveness and contain inaccuracies that violate the statute. We ask that HHS immediately remedy the violations of § 247b-17(c)(2) delineated in Part II above; if it fails to take sufficient measures to do so within 30 days, the ACLU intends to bring legal action. We also ask that HHS take this opportunity to examine all educational materials currently used by recipients of federal abstinence-only funding to ensure that they comply with § 247b-17(c)(2).

³⁹ FY07 CBAE Funding Opportunity, *supra* note 34, at 7; Dep’t of Health & Human Servs., Admin. for Children & Families, Community-Based Abstinence Education Program, Funding Opportunity Number HHS-2006-ACF-ACYF-AE-0099, at 8 (Feb. 2006); *see also* GAO Letter, *supra* note 3, at 5-6.

⁴⁰ *See* GAO Letter, *supra* note 3, at 5-6 (explaining ACF’s view that statute only applies to materials mass produced for the general public, and not to materials produced for subsets of the public).

⁴¹ *Id.* at 6.

Please do not hesitate to contact us if you would like to discuss this matter.

Sincerely,



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