

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Submitted via www.regulations.gov

Regulations Division, Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

September 2, 2020

Re: **HUD Docket No. FR-6152-P-01, RIN 2506-AC53**: Comments in Response to Proposed Rulemaking: Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs

Dear Office of General Counsel:

Justice in Aging submits these comments in response to the Department of Housing and Urban Development's (HUD) proposed rule change published in the Federal Register on July 24, 2020 (RIN 2506-AC53; HUD Docket No. FR-6152-P-01) entitled, "Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs." We urge that this proposed rule change, which denies protections for transgender people that were granted under the Equal Access Rule, leaving them vulnerable to being denied shelter and forced out onto the streets, be withdrawn in its entirety.

Justice in Aging is a national legal organization whose mission is to improve the lives of low-income older adults. We fight senior poverty through law by securing access to affordable health care, economic security, housing, and the courts for older adults with limited resources. We focus our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency.

The Equal Access Rule protects LGBTQ people from discrimination in HUD-funded services, and a 2016 update explicitly protects transgender people from discrimination in homeless shelters. Before these protections went into effect, a [study](#) conducted by the Center for American Progress and the Equal Rights Center found that only 30 percent of shelters tested were willing to appropriately house transgender people, and 1 in 5 outright refused to provide them with any shelter.

The proposed rule targets transgender people for discrimination. It grants to shelter providers a license to discriminate against transgender people, putting their safety at risk. This would be wrong at any time, but to do so in the midst of a pandemic, various natural disasters sweeping the country and an economic crisis that increases the likelihood of becoming unhoused, demonstrates a callous disregard for the dignity and lives of transgender people.

Under the proposed rule, the ability of unhoused transgender and gender nonconforming people to obtain lifesaving housing services will be up to the whims and potential biases of individual providers. It allows federally funded shelters to deny people admission on personal or religious grounds, and to leave transgender women with two, equally unacceptable and dangerous choices; either share bathrooms and sleeping quarters with men, or remain unhoused on the streets.

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With LGBT elders at increased risk due to the COVID-19 pandemic, discrimination against trans elders in need of shelter is especially harmful at this time.

The number of older adults experiencing homelessness is growing exponentially, with a projected tripling of the homeless population age 65 and older by 2030.¹ HUD is well aware of this disturbing trend of increased risk of homelessness for aging adults, as it noted in its recent report, *Worst Case Housing Needs: 2019 Report to Congress*. Of all the different household compositions, “only among elderly households did worst case housing needs increase during 2015-2107.”² There are more than 2.7 million LGBT adults who are 50 years or older living in across the country.³ LGBT older adults have been victims of frequent and longstanding discrimination because of their sexual orientation, their gender identity, their age, and other factors like race.⁴

While being unhoused puts anyone at risk, it is particularly dangerous for older adults, and even more so for older transgender individuals, often subjected to physical harassment and violence. Many older adults have physical disabilities and compromising health conditions that make being unhoused much more dangerous. Now more than ever, older transgender individuals need access to safe, life-saving shelter as they face a heightened risk of serious illness and death if they are exposed to the coronavirus.⁵

The Proposed Rule Permits Shelter Providers to Rely on Stereotypes and Bias to Deny Access to Federally Funded Shelters, Cloaking Discrimination in a Provider’s “Good Faith Belief.”

The proposed rule would allow temporary, emergency single-sex shelter providers to ask an applicant to provide evidence of their biological sex “based on a good faith belief” that the person seeking shelter is not of the biological sex that the shelter serves. 85 Fed. Reg. 44818. Adopting this “good faith belief” approach, as opposed to simply accepting someone’s assertion of their own gender identity, invites sex stereotyping and invasive questioning by program staff. Under the proposed rule, shelter providers are instructed to use a visual appraisal of a woman’s appearance to determine whether a homeless individual may access safe shelter. The rule provides guidance on how to try to identify transwomen based on a gender surveillance checklist, offering as examples a person’s height, the presence (but not the absence) of facial hair, and the size of their Adam’s apples. 85 Fed. Reg. 44816 (preamble to proposed rule), July 24, 2020. This rule not only embodies stereotypes about who is male or female, it also puts at risk many cisgender women who may have features that appear as stereotypically male.

¹ Dennis Culhane, et al., “The Emerging Crisis of Aged Homelessness: Could Housing Solutions be Funded by Avoidance of Excess Shelter, Hospital and Nursing Home Costs?” Available at: https://www.bcsd.ca.gov/hcfc/documents/white_papers/dennis_culhane-the_emerging_crisis.pdf

² U.S. Department of Housing and Urban Development, Office of Policy Development and Research, “*Worst Case Housing Needs: 2019 Report to Congress*.”, at p.11. June, 2020.

³ Karen I. Fredriksen-Goldsen, “The Future of LGBT+ Aging: A Blueprint for Action in Services, Policies, and Research,” *Generations: Journal of the American Society on Aging* 40, no. 2 (2016).

⁴ National Alliance to End Homelessness, *Racial Inequality in Homelessness, by the Numbers*. June 1, 2020. Available at: https://endhomelessness.org/resource/racial-inequalities-homelessness-numbers/?gclid=Cj0KCQjwv7L6BRDxARIsAGj-34rjs0S4wc1mSTifNbDOOIbTCJqDNV8zKMijwMBIDNFQIBdXhUXfaQ4aArkHEALw_wcB

⁵ Centers for Disease Control and Prevention (CDC): *People at Increased Risk: Older Adults*. Last Updated August 16, 2020. Available at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

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The rule elevates the non-evidence-based concerns or “discomfort” of the federally funded shelter provider above the legitimate safety concerns of the trans women seeking shelter. Consigning a transgender person who has a female gender identity to a male shelter exposes her to a high likelihood of sexual assault and/or violence. Leaving her no option but to live on the street poses the same risk.

Protecting unhoused transgender people’s access to women’s shelters does not threaten the safety or privacy of other women residents, but refusing transgender people’s access to safe shelter threatens their safety.

The proposed rule rests on an assumption, lacking any evidentiary support, that transgender people are likely to pose a threat to safety or privacy concerns of other women residing in a female-only shelter.⁶ HUD acknowledges that “they are unaware of any data suggesting that transgender individuals pose an inherent risk to biological women,” yet nonetheless puts forward this dangerous rule in order to accommodate “anecdotal evidence that some women may fear” a non-transgender, biological man may exploit this process.

Numerous studies have concluded that this is a false assumption; rather, the opposite is true.⁷ In 2016 over 300 domestic violence and sexual violence organizations across the county signed a National Consensus Statement opposing anti-transgender initiatives such as the rule proposed here, stating these rules “utilize and perpetuate the myth that protecting transgender people’s access to restrooms and locker rooms endangers the safety and privacy of others...we speak from experience and expertise when we say that these claims are false.”⁸

Counter to those false, unsubstantiated fears, there is a wealth of evidence that transgender individuals and communities experience disproportionately high amounts of violence and discrimination. According to the 2016 U.S. Transgender Survey:⁹

- Forty-eight percent (48%) of respondents said that they were denied equal treatment or service, verbally harassed, and/or physically attacked in the past year because of being transgender.
- Nearly one in ten respondents to a survey were physically attacked in the past year because of being transgender

⁶ 85 Federal Register 44815, July 24, 2020.

⁷ In 2013, 72 percent of the victims of LGBT hate-violence homicides nationwide were transgender women. Osman Ahmed & Chai Jindasurat, Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013, National Coalition of Anti-Violence Programs at 8 (2014). In 2014, while overall violence against LGBT individuals decreased by 32 percent, crimes against transgender people increased by 13 percent. Hayley Miller, Violence Against Transgender Community Continues to Increase, Human Rights Campaign (Jun. 9, 2015) (citing the National Coalition of Anti-Violence Programs 2014 Report). The National Coalition of Anti-Violence Programs (NCAVP) reported that people of color and transgender or gender nonconforming (TGNC) people were most often victims of hate violence homicides (71% of victims were people of color, 52% were TGNC, 40% were transgender women of color.) This data marks a five year steady rise in recorded homicides of transgender women of color. NCAVP Report, Lesbian, Gay, Bisexual, Transgender, Queer and HIV-affected Hate and Intimate Partner Violence in 2017, available at: <http://avp.org/wp-content/uploads/2019/01/NCAVP-HV-IPV-2017-report.pdf>

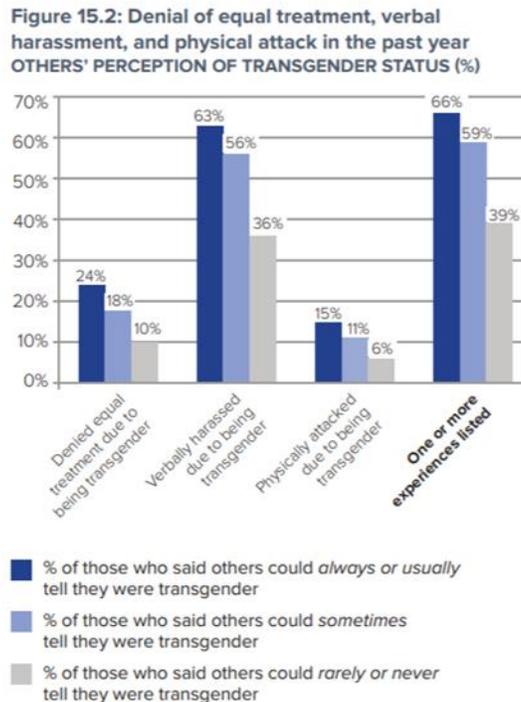
⁸ National Consensus Statement of Anti-sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community, 2016, available at: <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community>.

⁹ National Center for Transgender Equality, 2016 U.S. Transgender Survey, available at: <https://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

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- Nearly half of respondents have been sexually assaulted in their lifetime
- People of color were more likely to have experienced unequal treatment or service

Reported crimes against transgender people, including sexual assault and other sex crimes, are on the rise.¹⁰ In the first 7 months of 2020, more transgender people were murdered than in all of 2019. Further, 23 of the 28 victims were transgender women, with a disproportionate number Black and Latina trans wmen.¹¹ Failing to house transgender people according to their authentic gender identity puts transgender people in danger. The results of the National Transgender Survey confirm that the denial of equal treatment, harassment and other physical attack perpetrated upon transgender individuals is pervasive:



Transgender people, particularly survivors of sexual assault, experience stress upon being forced to use restrooms, locker rooms and other facilities that do not correspond with their gender identity—places where they know they are at increased risk of harassment and violence. Transgender survivors are equally deserving of protection from this increased fear and anxiety, sexual assault, and other violent crimes.

As one victim explained, “When people have tried to grope me in the street or have verbally harassed me, it’s usually either because they see me as a sexual target or because they can’t figure out whether I am a ‘man’ or a ‘woman’ and they think they have the right to demand an explanation.” The proposed rule would condone this type of targeting, harassment and discrimination under the guise of “local

¹¹ National Center for Transgender Equality, “Murders of Transgender People in 2020 Surpasses Total for Last Year in Just Seven Months.” August 7, 2020. Available at: <https://transequality.org/blog/murders-of-transgender-people-in-2020-surpasses-total-for-last-year-in-just-seven-months>.

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control.” Because the proposed rule would embed discrimination into our nation’s federally funded temporary housing of last resort, it should be rejected.

The Proposed Rule Fails to Align with Recent Supreme Court Precedent declaring that Prohibited Sex Discrimination Includes Discrimination based on Sexual Orientation and Gender Identity.

The recent U.S. Supreme Court decision in *Bostock v. Clayton County* held that under Title VII of the Civil Rights Act of 1964, the protections afforded to persons discriminated against on the basis of “sex” included sexual preference and *gender identity*.¹² Looking to the plain meaning of the word “sex,” a 6-3 majority held that an employer who fires a person for being gay or transgender fires that person for traits or actions that would not have been questioned in members of a different sex; therefore sex plays a necessary and undisguisable rule in the decision, exactly what Title VII forbids. *Id.* at 1737.

The Federal Fair Housing Act (Title VIII of the Civil Rights Act) was enacted at the same time as Title VII, and was part of a comprehensive set of federal protections against unlawful discriminatory acts in all aspects of public life. Like Title VII covering employment, Title VIII covering housing (the Fair Housing Act) was enacted to provide fair housing throughout the nation and to outlaw the refusal to sell, rent or make available a dwelling to any person because of race, color, disability, religion, sex, familial status, or national origin. There is no reason to interpret the word “sex” as used in the Fair Housing Act in any other way than the Court’s interpretation of Title VII in *Bostock*.¹³

Courts in several jurisdictions have held that the Fair Housing Act (FHA) applies to temporary shelter. For example, in *Hunter on behalf of A.H. v. District of Columbia*, (USDC, DC) 464 F. Supp 3d 158 (2014), a shelter for homeless families was found to be a “dwelling” within the meaning of the FHA, notwithstanding that the facility was not designed to be a place of permanent residence, considering that shelter residents were not mere transients such as hotel or motel guests, and had nowhere else to “return to.” Civil Rights Act of 1968, § 802(b), as amended. And, if the shelter receives federal funding, that is enough to invoke that portion of the FHA that prohibits discrimination in the “sale or rental” of a dwelling; the statute does not require that consideration be provided by the occupant. Civil Rights Act of 1968, § 804(b), (c), as amended, 42 U.S.C.A. § 3604(b), (c).

This proposed rule should be rescinded in its entirety because it will be successfully challenged as violating the prohibition on sex discrimination contained in the Fair Housing Act. This will allow HUD to further the goal of every unhoused person having access to safe shelter, and housing, free of discrimination.

Respectfully,



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Justice in Aging

¹² *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, June 15, 2020

¹³ Federal Fair Housing Act, 42 U.S.C.A. § 3601 *et seq.*