



LEGAL SERVICES TO END HOMELESSNESS

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September 22, 2020

Office of General Counsel - Regulations Division
Department of Housing and Urban Development
415 7th Street SW, Room 10276
Washington, DC 20410 – 0500

Re: Comments in Opposition to HUD's Proposed Rule Making Admission or Placement Determination Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 FR 44811

Dear General Counsel:

The Homeless Advocacy Project (HAP) submits these comments in opposition to the U.S. Department of Housing and Urban Development's (HUD) proposed rule that discriminates against transgender persons experiencing homelessness. The proposal, which makes homeless shelter placement determinations dependent upon biological sex rather than gender identity, unlawfully restricts shelter access by transgender persons. We urge HUD to withdraw the proposed rule in its entirety.

As a legal services program dedicated to the elimination of homelessness, we are compelled to oppose the proposed action which is without justification, discriminatory and will undoubtedly lead to an increase in the number of transgender individuals, especially youth, living without shelter and suffering the known harms associated with street homelessness.

HAP is a free civil legal services program for individuals and families experiencing homelessness in Philadelphia or at imminent risk of becoming homeless. HAP's clients experience extreme poverty and reside in homeless shelters and abandoned buildings, sleep on couches and floors, and spend their nights on the street. They frequently suffer from the debilitating effects of physical and emotional trauma that, along with their living circumstances and lack of support, hamper their ability to navigate the myriad systems under which they are eligible for assistance and services. Since homeless individuals have historically been unable to access traditional legal services programs, HAP focuses intake where people experiencing homelessness eat, sleep, receive mail, or access social services.

With a 30 year history serving adults and youth experiencing homelessness, HAP is aware of the numerous barriers faced by transgender people when they try to access critical services. Transgender individuals confront overt acts of discrimination and exclusion, as well as a lack of cultural competence. Along with the Administration's other unlawful efforts directly targeting LGBTQ individuals, HUD's proposal will increase suffering and the risk of harm and violence facing a marginalized community for which HUD should be expanding shelter access. As a nonprofit agency focused on serving vulnerable populations enduring homelessness, we reject any effort that raises barriers to shelter access, especially one such as that proposed by HUD which serves no valid purpose.

HUD's Equal Access Rule Must Continue to Provide Discrimination Protection By Which Gender Identity –Not Biological Sex – Is Relevant to Shelter Placement

In 2012, recognizing that the LGBTQ community required increased protection from discrimination in housing, HUD promulgated its Equal Access Rule.¹ This rule ensured that HUD-assisted and HUD-insured programs were open to all eligible households regardless of sexual orientation, gender identity, or marital status.

HUD deemed further clarification warranted to ensure safe and equal access to shelter by transgender homeless persons. In 2016, HUD issued a rule titled "Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs."² This rule clarified that nondiscrimination based on gender identity included equal access to sex-segregated shelters, a critical protection for homeless and unstably housed transgender individuals in need of safe emergency shelter. Placements and accommodations in single-sex shelters must be made in accordance with the person's gender identity.

As HUD itself recognized, transgender individuals, in particular, are impacted by violence and discrimination in ways that contribute to their becoming homeless and that keep them from accessing necessary shelter and services. Moreover,

[e]ven when seeking shelter, transgender individuals are at significant risk of harassment and sexual assault. Nearly 30% of homeless transgender individuals report being turned away from a shelter due to their transgender status and 22% report experiencing sexual assault perpetrated by staff or other shelter residents.³

¹ U.S. Department of Housing and Urban Development, "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity; Final Rule," Federal Register 77 (23)(2012): 5661-5676.

² U.S. Department of Housing and Urban Development, the "Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs," Federal Register 85 (143)(2020): 44811-44818.

³ U.S. Department of Housing and Urban Development, "Equal Access for Transgender People: Supporting Inclusive Housing and Shelters," (September 2015)

<https://www.transequality.org/sites/default/files/docs/resources/Equal-Access-for-Transgender-People-Supporting-Inclusive-Housing-and-Shelters.pdf>

Against this backdrop – and without any assertion that the number of transgender people experiencing homelessness has been reduced (to the contrary) or that incidents of violence perpetrated against transgender homeless individuals has decreased (they have not) – HUD is now proposing to remove the explicit discrimination protections for transgender people seeking shelter that are currently in place.⁴ That is, HUD wants shelter placement to be determined by an individual’s biological sex rather than their gender identity. This proposal transports us back in time to when transgender homeless individuals seeking safe shelter experienced overwhelming anxiety and justifiable fear for their very safety. They felt no choice but to sleep on the street then and will feel compelled to do so again if this proposal goes into effect. Without the Equal Access Rule’s protections that were clearly and explicitly set out in 2016, transgender homeless people will be left without safe shelter.

One of the most troubling and degrading aspects of the proposed rule, presented as a means to *avoid* discrimination, empowers the shelter provider staff to reject an individual seeking shelter based on a “good faith belief” that an individual seeking shelter is “not of the sex” which the facility accommodates. HUD claims that it would consider this good faith belief decision-making process sufficient to show the lack of discrimination. In other words, sex stereotyping is encouraged to prove an absence of discrimination.

In order to develop a “good faith belief,” the proposed rule’s preamble explains,

HUD believes that reasonable considerations may include, but are not limited to a combination of factors such as height, the presence (but not the absence) of facial hair, the presence of an Adam’s apple, and other physical characteristics which, when considered together, are indicative of a person’s biological sex.

But that is not all. Shelter staff “may request evidence of the individual’s biological sex” provided the evidence requested “not be unduly intrusive of privacy, such as private physical anatomical evidence.” This discussion by the United States governmental department charged with housing many of our most desperate and vulnerable citizens shocks the conscience. When considered in an historical context – times when physical characteristics were scrutinized as a means to justify enslavement and annihilation of entire communities – the fact that any of this is included in the proposed rule in and of itself warrants its outright rejection. It is dehumanizing.

What is more, HUD’s proposal ignores the legal landscape implicated by the proposed removal of current anti-discrimination protections. If emergency housing providers comply with the proposed rule – relying upon it to refuse shelter placement based upon gender identity – they may well be in jeopardy of violating a panoply of statutes with which the proposal is in conflict, including the Fair Housing Act and the Violence Against Women Reauthorization Act of 2013 (VAWA), as well as state and local laws throughout the

⁴ HUD’s current proposal is part of a widespread and unsubtle effort to exclude the LGBTQ community from essential protections. In its 2019 Continuum of Care Program Notice of Funding Availability, for example, HUD removed all mention of the LGBTQ homeless community. HUD also eliminated the additional points that had been previously been awarded to communities for partnering with LGBTQ service providers and conducting anti-discrimination trainings.

country. HUD's myopic focus is most apparent in its failure to acknowledge the U.S. Supreme Court decision in Bostock v. Clayton County, Georgia, No. 17-1618 (June 15, 2020).⁵

Given Growing Need for Discrimination Protection to Access Shelter, HUD's Proposed Rule Lacks Justification

Homelessness among gender minorities is increasing at a staggering pace, especially among youth between 18 to 24 years of age. The increase in homelessness within the transgender community is overwhelming. Since 2016, homelessness of transgender individuals increased 88%. Furthermore, 63% of the transgender homeless population is unsheltered.⁶ The National Alliance to End Homelessness reports that *unsheltered* homelessness in this community increased 113% during that same period.⁷

While homeless transgender individuals struggle with the same trauma of homelessness as their cisgender peers, they have the added burden of facing discrimination when they try to access shelter, housing and services in many places. In its toolkit titled "Equal Access for Transgender People: Supporting Inclusive Housing and Shelters," HUD acknowledged the many studies showing that transgender individuals are at a higher risk than other members of the homeless community to be the subject of harassment and assault.⁸

The risks of harm associated with being transgender and also unsheltered are magnified. Unsheltered transgender people are at greater risk than their sheltered peers across nearly all measures. They face greater challenges in most areas of living (such as education and health care access), are extremely vulnerable, and are in need of greater assistance. This community is highly vulnerable to hate crime victimization. Living on the street and being forced to engage in risky survival behaviors elevates the risk of violence and victimization among this extraordinarily vulnerable group. The need for safe shelter is critical for this increasing homeless population.

Under these circumstances, where the potential risks to transgender homeless people living on the street are well known, HUD should, at a minimum, be expected to put forth evidence demonstrating the critical need for its proposed rule. It presents none. Instead, HUD's rationale rests upon two specious narratives: faith-based shelters oppose nondiscrimination protections for transgender homeless people and transgender women pose a threat to cisgender women in shelter.

⁵ Available at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

⁶ National Alliance to End Homelessness, "Changes to HUD's Equal Access Rule Could Exclude More Transgender People from Shelter," Jackie Janosko (July 29, 2020), available at <https://endhomelessness.org/changes-to-huds-equal-access-rule-could-exclude-more-transgender-people-from-shelter/>.

⁷ National Alliance to End Homelessness, "Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us," (July 24, 2020), available at <https://endhomelessness.org/resource/transgender-homeless-adults-unsheltered-homelessness-what-the-data-tell-us/>

⁸ <https://www.transequality.org/sites/default/files/docs/resources/Equal-Access-for-Transgender-People-Supporting-Inclusive-Housing-and-Shelters.pdf>

Both the 2012 and 2016 iterations of HUD’s Equal Access Rule already provide a mechanism by which faith-based shelter providers can request waivers or religious accommodations. Yet no such waivers or religious accommodations have been sought.⁹ Consequently, the only example HUD provides is a complaint was that raised by a faith-based shelter in Alaska which actually objected to a local ordinance – not to HUD’s Equal Access Rule. To be sure, denying shelter access to a homeless individual, due to sexual identity or another reason, is contrary to the underpinnings of how faith-based shelters operate. HAP has partnered with faith-based shelters for the past 30 years and they have been, without exception, inclusive and welcoming to their “guests.”

HUD’s other justification for refusing to provide shelter placement based on gender identity similarly rings hollow and misdirects its focus on victimization. There is no evidence to support a claim that transgender women in shelter pose a threat to cisgender women. As the Center for American Progress aptly noted, VAWA-funded programs have been required to shelter both transgender women and cisgender women jointly for years.¹⁰ Inclusivity is not synonymous with risk.

It is worth reiterating that transgender homeless individuals are at significant risk of trauma and victimization by violence, and that risk is amplified when the individual is unsheltered. Unsheltered transwomen are not the perpetrators of violence, they are the victims. In the proposed rule’s preamble, HUD acknowledges that shelter for this community is essential. Under “justification,” HUD notes that “[g]iven the rates of violence and mistreatment that homeless transgender persons experience, HUD recognizes that shelter access for transgender persons is critical.”¹¹ What HUD fails to take into account, however, is that when a transgender person experiencing homelessness is turned away from a shelter that comports with their gender identity – where they may feel safer, less threatened – there is generally no place left to go but back to the street. This is the very outcome that HUD-funded shelters are designed to avoid.

Conclusion

HUD’s proposed rule eliminates explicit nondiscrimination protections based on sex, including gender identity, and promotes sex stereotyping and disrespect. We should be expanding access to shelter, particularly for transgender individuals who are at significant risk when unsheltered. By imposing a barrier to accessing shelter based on gender identity, implementation of HUD’s proposed rule endangers the safety and lives in the transgender community experiencing homelessness.

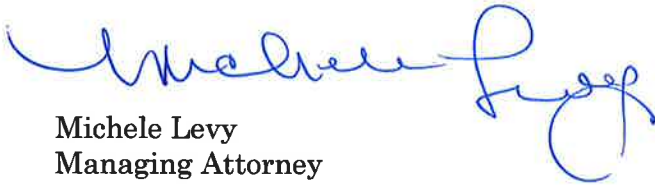
⁹ Center for American Progress, “The Trump Administration’s Latest Attack on Transgender People Facing Homelessness,” (September 3, 2020), available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/09/03/490004/trump-administrations-latest-attack-transgender-people-facing-homelessness/>

¹⁰ Id.

¹¹ 85 FR 44811, 44815

HAP cannot support the U.S. Department of Housing and Urban Development's harmful and unjustified proposed rule. We urge HUD to withdraw the proposed rule in its entirety.

Submitted by,

A handwritten signature in blue ink, appearing to read "Michele Levy". The signature is fluid and cursive, with a large loop at the end of the last name.

Michele Levy
Managing Attorney