



September 18, 2020

Benjamin S. Carson, Sr., M.D.  
Secretary, United States Department of  
Housing and Urban Development  
C/o Regulations Division  
Office of General Counsel  
451 7<sup>th</sup> Street SW  
Washington, D.C. 20410-0500

Re: FR-6152-P-01 Making Admission or Placement Determinations Based on Sex in  
Facilities Under Community Planning and Development Housing Programs.

Dear Secretary Carson:

GLBTQ Legal Advocates & Defenders (GLAD) is a New England-wide public interest legal organization. Through strategic litigation, public policy advocacy, and education, GLAD works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation.

GLAD strongly opposes the above-referenced regulation (hereinafter, the “Proposed Regulation”) that would eliminate critical protections intended to ensure the availability of safe emergency shelter for transgender people.

Homelessness reflects acute inequities in our society and inflicts profound harm on the most vulnerable among us. Transgender people have long experienced alarmingly high rates of homelessness due to higher rates of poverty, unemployment and underemployment due to discrimination, family rejection, and housing discrimination.<sup>1</sup> Transgender individuals have also been subjected to pervasive discrimination in access to homeless shelters.

In 2016, the Department of Housing and Urban Development (HUD) issued a rule, known as the Equal Access Rule, to address the longstanding barriers faced by transgender

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<sup>1</sup> Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey 175* (2016) (hereinafter, the “2015 U.S. Transgender Survey”).

people seeking access to shelter.<sup>2</sup> The Equal Access Rule requires that operators of single-sex facilities using funds awarded through the Office of Community Planning and Development (CPD) provide all individuals, including individuals who do not identify with the sex they were assigned at birth, with access to programs, services, and accommodations in accordance with their gender identity without being subjected to intrusive questioning or asked to provide documentation.<sup>3</sup>

The Proposed Regulation eliminates the Equal Access Rule's requirement of placement and accommodations in emergency shelters consistent with an individual's gender identity. Instead, it permits placement based on an individual's "biological sex," which is not defined or explained, and grants the shelter operator the "flexibility" to "deny an individual seeking accommodation or access to the temporary emergency shelter[] when they have a good faith belief that [the] individual is not of the sex which the shelter's policy accommodates."<sup>4</sup> Where "such doubt" about a person's "biological sex" exists, the Proposed Regulation provides that the shelter may require a birth certificate, other identification, or medical records.<sup>5</sup> Finally, when a provider turns away a homeless transgender person seeking emergency shelter, the Proposed Regulation requires only that the individual be provided with a "transfer recommendation."<sup>6</sup>

Perhaps the most disturbing aspect of the removal of basic protections for transgender people is that HUD acknowledges the dire needs of transgender people for shelter access. The rule it proposes, however, ignores the reality of what it means to be transgender and will undoubtedly result in a devastating increase in homelessness, violence, and other profound harms. The Proposed Regulation states that:

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<sup>2</sup> See "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs," 81 Fed. Reg. 64763-64782; 24 C.F.R. § 5.106 (hereinafter, the "Equal Access Rule").

<sup>3</sup> The Rule requires: (1) Equal access to "CPD programs, shelters, other buildings and facilities, benefits, services and accommodations ... in accordance with an individual's gender identity"; (2) Placement, services and accommodations "in accordance with the gender identity of the individual"; and (3) that "[a]n individual ... not be subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity." 24 C.F.R. § 5.106(b)(2) and (3). It also requires that operators "take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants." *Id.* at (c)(2).

<sup>4</sup> Proposed Regulation, 85 Fed. Reg. at 44815.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

HUD *is aware* that transgender individuals experience poverty, housing instability, mental health issues, domestic violence, and homelessness at high rates. Given the rates of violence and mistreatment that homeless transgender persons experience, HUD recognizes that shelter access for transgender persons is critical.<sup>7</sup>

A “biological sex” criterion, however, will exclude transgender people from emergency shelters and likely deter many from seeking access in the first place. It will subject them either to a return to the streets or the risk of violence, harassment or sexual assault in the inappropriate and unsafe shelters they are forced into. The Proposed Regulation reveals either basic ignorance about what it means to be transgender, or deplorable disregard of the health and safety of transgender people.

The Proposed Regulation should be withdrawn because it: (1) inflicts profound harm on transgender people who are homeless; (2) creates confusion and misinformation about the rights of transgender people to nondiscrimination in access to emergency shelters at both the state and federal levels and, in fact, offers a governmental imprimatur for discrimination that is currently unlawful; and (3) is permeated with base stereotypes and unfounded fears about transgender people.

### **I. The Proposed Regulation Will Inflict Profound Harm on Transgender People.**

Transgender people experience alarmingly high rates of homelessness. According to the 2015 U.S. Transgender Survey, nearly one-third of transgender people experience homelessness at some point in their life.<sup>8</sup> Transgender women of color have experienced especially high rates of homelessness (lifetime rates for certain groups listed in the survey include Indian (59%), Black (51%), multiracial (51%) and Middle Eastern (49%)).<sup>9</sup> This problem has not improved over time. The National Alliance to End Homelessness examined HUD’s own annual “Point-in-Time” count of homelessness in 2020 and concluded that “homelessness and unsheltered rates among transgender people are increasing at an astounding pace.”<sup>10</sup>

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<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> *See* 2015 U.S. Transgender Survey, at 176. Nearly one-quarter (23%) of respondents experienced some sort of housing discrimination in the past year, such as being evicted from their home or denied an apartment because of being transgender. *Id.* One in eight (12%) reported experiencing homelessness in the past year due to being transgender. *Id.*

<sup>9</sup> *Id.*, at 178.

<sup>10</sup> *See* Nat’l All. to End Homelessness, *Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tells Us* (2016) (hereinafter, the “Transgender Homeless Adults & Unsheltered Homelessness Study”), at 1. The data reveal that the number of transgender adults experiencing homelessness has increased 88% since 2016. *Id.*

The increasing rates of homelessness among transgender people reflect and are exacerbated by pervasive discrimination in access to shelters. Before the Equal Access Rule went into effect, a 2016 study by the Center for American Progress found that in testing of 100 homeless shelters across four states, 70% were not willing to house transgender women in women's shelters.<sup>11</sup> The study revealed a range of barriers resulting in exclusion. One shelter hung up the phone on a tester immediately after she revealed she was transgender. Another test caller was told that she would be isolated or given separate facilities at the shelter. A shelter employee made references to genitalia in discussing requirements for appropriate housing.<sup>12</sup> These findings are consistent with the 2015 U.S. Transgender Survey which determined that 70% of those who stayed in a shelter in the past year experienced some form of discrimination, such as verbal harassment, physical or sexual assault, and eviction because the shelter found out they were transgender.<sup>13</sup> The 2015 survey also found that over 26% of homeless transgender people did not seek shelter at all due to fears of mistreatment.<sup>14</sup>

It is beyond cavil that a regulation requiring that transgender people be placed not based on gender identity, but on some notion of "biological sex," will be wholly ineffective in addressing the critical problem of lack of access to emergency shelters. As a threshold matter, the only alternative HUD provides when a transgender person is turned away from a shelter is a "recommendation" for a transfer to a shelter designated for the person's "biological sex." There is not any an indication of how an effective and timely transfer is supposed to happen on such an immediate basis in a world of limited shelter resources.

But that is only the starting point. The rule sharply increases life-threatening risks for transgender people. A transgender woman, for example, who is forced into a shelter designated for men will face the risk of violence, sexual harassment and assault, and severe physical and mental health harms.<sup>15</sup> A basic understanding of what it means to be transgender demonstrates not only that placement in a facility consistent with one's gender identity is the only safe and appropriate placement, but also that being denied such a placement will inflict additional harm by undermining a transgender person's mental health. As one authoritative expert explained:

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<sup>11</sup> Center for American Progress, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters* (2016), at 2.

<sup>12</sup> *Id.*, at 3.

<sup>13</sup> 2015 U.S. Transgender Survey, at 176.

<sup>14</sup> *Id.*, at 180.

<sup>15</sup> See Lisa Mottet & John M. Ohle, *Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People* (2003) (hereinafter, "Transitioning Our Shelters").

A key component of medical treatment for gender dysphoric individuals is to live, function in society, and be regarded by others consistent with gender identity. If any aspect of this social role transition is impeded, it will undermine an individual's core identity and psychological health ... The failure to treat a woman with Gender Dysphoria as a woman in an institutional setting will intensify Gender Dysphoria and psychological distress and precipitate psychiatric disorders.<sup>16</sup>

The increased homelessness resulting from the Proposed Regulation will exacerbate vulnerabilities faced by homeless transgender people. For example, an analysis of HUD data from 2020 found that unsheltered homeless transgender people avoid medical care at a rate of 42% compared to 2% for sheltered individuals, and engaged in risky behavior at a rate of 98% as compared to 18% for sheltered individuals.<sup>17</sup> As these statistics reveal, shelters are often access points to programs that provide vital medical and social services including transition to safe individual housing, a need that is even more important in the midst of a pandemic in which shared living spaces bring significant health risks.

The need for emergency shelter for the at-risk transgender population will only grow during the current economic downturn in which eviction and foreclosure moratoriums will eventually end. HUD should forego the Proposed Regulation and the repeal of the Equal Access Rule because it will have calamitous consequences for transgender people.

## **II. The Proposed Regulation Will Result in Confusion and Misinformation About Legal Protections for Transgender People and Sanction Discrimination That is Currently Unlawful.**

In absurdist reasoning, the Proposed Regulation disavows discrimination against transgender individuals with its baffling statement that “a shelter may place an individual based on his or her biological sex but may not discriminate against an individual because the person is or is perceived as transgender”.<sup>18</sup> But the exclusion of a transgender person because of their “biological sex” is core to discrimination based on transgender status.<sup>19</sup> A transgender person is

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<sup>16</sup> *Doe v. Mass. Dep't of Corr.*, D. Mass., No. 17-12255-RGS, Affidavit of Randi Ettner (2018) (hereinafter “Affidavit of Randi Ettner”), at ¶ 19-20. Available at <https://www.glad.org/wp-content/uploads/2018/02/2018.02.02-35-2-Affidavit-of-Randi-Ettner-Ph.D..pdf>

<sup>17</sup> Transgender Homeless Adults & Unsheltered Homelessness Study, at 2.

<sup>18</sup> Proposed Regulation, 85 Fed. Reg., at 44812; *id.*, at 44815 (“Denial of accommodation solely because a person's gender identity that differs from biological sex is not permitted.”).

<sup>19</sup> Although the Proposed Regulation does not define its term “biological sex,” it presumably refers to a person's sex designated at birth.

someone who lives and identifies with a sex different than the one assigned at birth.<sup>20</sup> It is therefore patent that a rule that excludes transgender people based on “biological sex” discriminates on the basis that the person is transgender.<sup>21</sup>

In any event, the Proposed Regulation encourages and sanctions overt discrimination against transgender people in three ways. First, 23 states and numerous municipalities have laws that prohibit discrimination on the basis of gender identity and transgender status in access to places of public accommodation, which include shelters. These state laws preclude exclusion due to a transgender person’s “biological sex.” Although the Proposed Regulation claims to require adherence to state and local laws, the federal government speaks with a powerful and far reaching voice. HUD’s endorsement of discrimination against transgender people in shelters based on myths, fears and unfounded beliefs (*see* § III, *infra*) will lead to confusion and misinformation about the existence and legitimacy of state laws. Shelter providers may now believe that it is legal and legitimate to discriminate; by the same token, given the history of pervasive discrimination, transgender people will be more likely to avoid shelters due to fears of exclusion and stigmatization.

Second, states that do not prohibit discrimination on the basis of gender identity usually do prohibit discrimination in access to places of accommodation based on sex. The Supreme Court recently affirmed, in the context of employment discrimination claims under Title VII, nearly two decades of legal precedent that discrimination against a person because they are transgender is sex discrimination.<sup>22</sup> States will typically follow Supreme Court guidance in determining the meaning of their own antidiscrimination provisions.<sup>23</sup> The Proposed Regulation cannot change state law or immunize shelters from liability for otherwise discriminatory practices. Given the existence of state statutes prohibiting sex discrimination in places of public accommodation, the Proposed Regulation has no purpose other than to confuse and encourage the unlawful exclusion of transgender people from shelters.

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<sup>20</sup> *See* Am. Psychological Ass’n., *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 *Am. Psychologist* 832, 832 (2015).

<sup>21</sup> *See, e.g., Bostock v. Clayton Cty., Ga.*, No. 17–1618, slip op. at 3 (U.S. June 15, 2020) (hereinafter, “*Bostock*”) (“By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today.”).

<sup>22</sup> *See Bostock*, at 9 (“[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.”).

<sup>23</sup> *See, e.g.,* Henry Cordes, *State agency applies U.S. Supreme Court ruling on LGBT job rights to housing cases*, *Omaha World-Herald* (August 12, 2020), [https://omaha.com/news/local/govt-and-politics/state-agency-applies-u-s-supreme-court-ruling-on-lgbt-job-rights-to-housing-cases/article\\_2d42d906-1aca-5938-8b8e-d954d2b757c2.html](https://omaha.com/news/local/govt-and-politics/state-agency-applies-u-s-supreme-court-ruling-on-lgbt-job-rights-to-housing-cases/article_2d42d906-1aca-5938-8b8e-d954d2b757c2.html) (following *Bostock* Nebraska Equal Opportunity Commission announces that it will investigate and resolve cases of discrimination on the basis of gender identity under its existing sex discrimination statutes).

Third, HUD ignores the legal precedent that many homeless shelters funded by CPD programs are, in fact, covered by the prohibition on sex discrimination in the Fair Housing Act (“FHA”). The FHA’s prohibition on sex discrimination, 42 U.S.C. § 3604(b), applies to a “dwelling” (defined at 42 U.S.C. § 3602(b) as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence ...”). The FHA is not “categorically inapplicable” to shelters “based on its definition of the word ‘dwelling.’”<sup>24</sup> Numerous courts have held that particular shelters can satisfy the definition of dwelling in the FHA.<sup>25</sup>

The reasoning of the Supreme Court’s ruling in *Bostock* that discrimination against transgender people is sex discrimination under Title VII also applies to other similarly worded federal antidiscrimination statutes, including in the context of access to sex-segregated facilities.<sup>26</sup> There is little doubt that the reasoning of *Bostock* will also preclude discrimination against transgender people under the FHA. The Proposed Regulation runs afoul of the clear reasoning of controlling Supreme Court precedent.

### **III. The Proposed Regulation is Based on Myths, Fears and Unscientific Beliefs About Transgender People.**

Although the Proposed Regulation lists a number of justifications (e.g., deferring to local control), its primary rationale focuses on the fears and concerns of non-transgender women in women’s shelters. The Proposed Regulation, however, is based on the false premise that transgender women are men.<sup>27</sup> This mischaracterization of transgender women is based on

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<sup>24</sup> *Boykin v. Gray*, 895 F.Supp.2d 199, 207 (D.D.C. 2012) (also noting that “the FHA should be broadly construed to effectuate its remedial purpose,” quoting *Nat’l Fair Hous. Alliance, Inc. v. Prudential Ins. Co.*, 208 F. Supp.2d 46, 55 (D.D.C. 2002)).

<sup>25</sup> See, e.g., *White v. Bethesda Project Inc.*, 672 F. App’x. 218, 219 (3<sup>rd</sup> Cir. 2017) (noting that “courts have found a variety of shelters to be FHA-covered ‘dwellings’” and citing cases and concluding that “inquiry under [the] *Lakeside* [test] is guided by the specific facts of each case”); *Lakeside Resort Enterprises, LP v. Board of Supervisors*, 455 F.3d 154, 160 (3<sup>rd</sup> Cir. 2006); *Stowell v. Open Door Mission*, No. 8:17CV75, 2017 U.S. Dist. LEXIS 58338 (D. Neb. Apr. 17, 2017), at \*4 (“Several courts have concluded that temporary homeless shelters are ‘dwellings’ under the FHA”); *Hunter on behalf of A.H. v. D.C.*, 64 F.Supp. 3d 158, 174 (D.D.C. 2014); *Defiore v. City Rescue Mission of New Castle*, 995 F.Supp. 2d 413, 419 (W.D.Pa. 2013); *Jenkins v. New York City Dep’t of Homeless Servs.*, 643 F.Supp. 2d 507, 519 (S.D.N.Y. 2009).

<sup>26</sup> See, e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 2020 U.S. App. Ct. LEXIS 27234 (4th Cir. August 26, 2020) at \*65 (“After the Supreme Court’s recent decision in *Bostock* [], we have little difficulty holding that [under Title IX] a bathroom policy precluding Grimm from using the boys restrooms discriminated against him ‘on the basis of sex’”).

<sup>27</sup> See, e.g., Proposed Regulation at 44815 (stating that HUD will not adopt a policy that forces “homeless women to sleep alongside and interact with men”).

longstanding myths, fears, and stereotypes and is out of step with the prevailing view that transgender women must be recognized as women.<sup>28</sup>

In fact, while the Proposed Regulation raises the specter of fears regarding the privacy and safety of non-transgender women, it is entirely devoid of any objective evidence. The language of the Proposed Regulation reveals its foundation in conjecture and speculation.<sup>29</sup> Courts in other contexts addressing access to sex-segregated facilities for transgender people have properly rejected conjecture as a justification for the exclusion and denigration of a class.<sup>30</sup>

In conclusion, the Proposed Regulation guts significant protections for transgender people in access to emergency shelters, will increase homelessness, subject transgender people to violence and a host of life-threatening harms, and permits blatant discrimination that is unlawful under current law.

GLAD urges HUD to withdraw the Proposed Regulation and leave in place the Equal Access Rule.

Respectfully submitted,

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<sup>28</sup> See, e.g., Affidavit of Randi Ettner, *supra*, note 16; see also Nat'l Task Force to End Sexual and Domestic Violence Against Women, National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations In Support Of Full And Equal Access For The Transgender Community (February 2, 2016), at ¶ 1 (“[W]e favor laws and policies that protect transgender people from discrimination, including in accessing facilities that match the gender they live every day.”).

<sup>29</sup> Proposed Regulation, at 44815 (stating that “some homeless women *would be expected to distrust* and feel unsafe” around transgender women) (emphasis added).

<sup>30</sup> See, e.g., *Grimm*, at \*34 (“The district court found that the Board’s privacy argument was ‘based upon sheer conjecture and abstraction’”) (quoting *Whitaker ex rel. v. Whitaker v. Kenosha United Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1052 (7<sup>th</sup> Cir. 2017)); *Bd. Of Educ. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 875 (E.D. Ohio 2016) (school’s purported justification for policy of excluding transgender girl from girl’s restroom is “merely speculative” and “lacks any factual underpinning”).