



WHITMAN-WALKER HEALTH

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September 22, 2020

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

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

To whom it may concern:

Whitman-Walker Health, (herein Whitman-Walker or WWH) recommends that the Department of Housing and Urban Development (herein, Department or HUD) withdraw the proposed rule. Inviting sex-segregated emergency temporary shelters to restrict access to transgender people is likely to exacerbate existing health inequalities and decrease access to shelters for gender minority homeless people. To invite restrictions in access during COVID-19 pandemic increases the risk of transmission of COVID-19 among populations with the potential for high-risk complications.

We urge the Department to continue to adhere to the existing 2016 rule, which protects equal access to emergency shelters in accordance with a resident's gender identity. Whitman-Walker understands the critical importance of safe, equal, and dignified access to shelters for people and we have previously commended HUD for its efforts to ensure that federally-funded shelters recognize and respect vulnerable groups and protect both their safety and their equal access to shelters. Unfortunately, this rule invites arbitrary determinations of access to accommodations that are likely to result in discrimination and fear.

Interest and Expertise of Whitman-Walker Health

Whitman-Walker is a Federally Qualified Health Center operating in Washington, DC since 1973. Our mission is to be the highest quality, culturally-competent community health center serving greater Washington's diverse urban community, with a special focus on lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals and families, persons living with HIV and other individuals and families who face barriers to accessing care. We offer primary medical for all individuals, including those living with HIV; LGBTQ primary and specialty care, including transgender care; dental care; mental health care and addictions counseling and treatment; nurse care management; HIV education, prevention, and testing services; other community health services; and legal services. In calendar year 2019, we provided health services to more than 20,700 distinct individuals. Transgender and gender nonconforming individuals comprise a substantial and growing part of our patient base: approximately 16% of

our medical patients; 34% of persons receiving mental health services; 4.7% of those receiving substance abuse treatment services; and 10% of all those receiving any health services.

Whitman-Walker Health's Legal Services Program also has extensive experience serving the transgender community in a variety of ways, including the name and gender change clinic. We frequently assist transgender clients with discrimination or harassment claims in the workplace, at school, in housing, with government agencies, hospitals, and public accommodations and with public benefits navigation, consumer matters, estate planning, and immigration relief. Approximately 20% of our total legal clients identify as transgender or gender nonconforming: 537 individuals in 2019.

Transgender and gender-nonconforming persons are subjected to systemic discrimination and stigma in virtually every aspect of their lives. Discrimination and stigma undermine their physical and mental health directly and indirectly. It is particularly humiliating and harmful for individuals who are homeless to encounter discrimination by and within homeless shelters. Whitman-Walker serves substantial numbers of individuals who are homeless or at risk of homelessness. In 2019, 11% of our healthcare patients who provided information on their housing status stated that they were homeless or in unstable or temporary housing situations. In 2019, 7% of our Legal Services clients who identified their housing situation were homeless or in transitional housing, and another 17% were staying with a friend or family member.

The Proposed Rule Would Exacerbate the Mistreatment That Transgender People Already Experience at Homeless Shelters

WWH's transgender patients have reported negative experiences in homeless shelters; experiencing assault, harassment, degrading vandalism, verbal abuse, and hate speech by other residents. Our patients recount that complaints to the staff, police, and human rights enforcement officers are met with ineffective responses. The lack of physically and emotionally safety in and around the shelter drives transgender homeless persons back onto the streets and searching for other safe environments.

The proposed changes replace the existing, straightforward policy of allowing people to seek shelters based on their own gender identity and redefine gender identity as "actual or perceived gender-related characteristics" (85 Fed. Reg. at 44818). The existing, 2016, policy is easy to understand and protects the very people who routinely experience discrimination. The new policy invites shelter staff to create shelter-specific policies to determine a person's "biological sex" based on an undefined set of physical characteristics. Rather than rely on a person's self-identified gender identity, shelter staff are directed to ascertain a person's "biological sex" through stereotypes like the presence of facial hair or Adam's apple (85 Fed. Reg. at 44818). We urge the Department to continue with the previous definition of gender identity in 24 CFR § 5.100. Using a person's self-identified gender identity is a much clearer standard that invites fewer opportunities for discrimination, invasion of privacy, and humiliation.

For those persons who are denied admission based on the arbitrary determination of shelter staff, the ability to find alternative shelter is fraught. The proposed rule states that shelter staff must make a recommendation for an alternative shelter but provide no assurances of the accessibility and acceptability of the alternative placement. (84 Fed. Reg. at 44818) However, this is window dressing without substance. A survey of more than 1,500 LGBTQ-identified individuals in January 2020, found:

Eighty-seven percent of respondents who identify as transgender, nonbinary, agender, genderqueer, or gender nonconforming (GNC) said that it would be somewhat difficult (31 percent), very difficult (40 percent), or impossible (16 percent) for them to find an alternative homeless shelter if they were refused. Among respondents who specifically identify as nonbinary, GNC, genderqueer, or agender, 91 percent said that it would be somewhat difficult (50 percent), very difficult (38 percent), or impossible (3 percent) to find an alternative shelter option.¹

The results were even worse for transgender and gender nonconforming people of color.² A 2017 analysis of a nationally representative survey found that trans people have difficulty finding new accommodations, 64.2% of trans respondents said it would be somewhat difficult, very difficult, or not be possible to find alternative shelter.³ Earlier telephone testing of 100 homeless shelters in four states, by the Center for American Progress, found that transgender women are given appropriate shelter only 30% of the time.⁴ Previous reports also documented the widespread discrimination faced by homeless transgender and gender nonconforming people nationally.⁵ A study released in late 2015 by transgender persons in the Washington, DC metropolitan area found that 20% of those surveyed were homeless at the time of the survey. Of those individuals, 27% had been denied access to a shelter because of their gender identity, and 41% had been physically or sexually assaulted by other shelter residents or staff based on their gender identity.⁶

¹ Theo Santos, Lindsay Mahowald, and Sharita Gruberg, *The Trump Administration's Latest Attack on Transgender People Facing Homelessness* (Sept. 3, 2020), pages 2-3. Retrieved Sept. 22, 2020, from https://cdn.americanprogress.org/content/uploads/2020/09/02125223/HUD-Shelter-Ruling.pdf?_ga=2.151388348.404499116.1600716331-1852806440.1600716331.

² *Id.*, page 3.

³ New analysis of data from a 2017 nationally representative CAP survey show how difficult it is for LGBTQ people to find alternative shelter if they are refused. Among all LGBTQ-identified respondents, 61.5 percent said it would be somewhat difficult (24.9 percent), very difficult (22.3 percent), or not possible (14.3 percent) to find an alternative homeless shelter if turned away. Among transgender respondents, 26.1 percent said it would be somewhat difficult to find an alternative, 17.4 percent said that it would be very difficult, and 20.7 percent said that it would not be possible to find an alternative if refused service. See Center For American Progress, *The Dire Consequences of the Trump Administration's Attack on Transgender People's Access to Shelters* (2019) Retrieved 20 September 2020, from <https://www.americanprogress.org/issues/lgbtq-rights/news/2019/07/31/472988/dire-consequences-trump-administrations-attack-transgender-peoples-access-shelters/>.

⁴ Caitlin Rooney, Laura E. Durso, and Sharita Gruberg, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters*, (2016). Retrieved Sept. 20, 2020, from <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/>

⁵ Nat'l LGBTQ Task Force & Nat'l Ctr. for Transgender Equality, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 116-18 (2011), http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf.

⁶ DC Trans Coalition, *Access Denied: Washington, DC Trans Needs Assessment Report* (November 2015), Section VIII, <https://dctranscoalition.files.wordpress.com/2015/11/dctc-access-denied-final.pdf>.

The Proposed Rule is Especially Dangerous During the Coronavirus Pandemic Emergency

During the current COVID-19 emergency, this HUD rule change is likely to take up valuable time and energy during a global pandemic and national crisis. This proposed rule deprives access to a population at most need of the housing.^{7,8} The proposed rule increases barriers to housing, which is especially harmful during this public health crisis.^{9,10}

We encourage the Department to act concordant with Acting OMB Director Vought in his recent memo to heads of departments and agencies, departments should “prioritize all resources to slow the transmission of COVID-19.”¹¹ Unfortunately, HUD’s attempt to increase security of shelters for survivors of gender-based violence actually increases the risks of transmission of a group already among the most vulnerable to contracting and becoming seriously ill from COVID-19 and will be most impacted by this rule change.

The Proposed Rule Lacks Any Evidentiary Basis

The reasons offered by HUD for this dangerous, discriminatory rule are insubstantial and grossly inadequate. The Department’s argument that states and localities should be able to develop their own rules, rather than follow a uniform federal rule (85 Fed. Reg. at 44813), is misplaced. Understanding and acceptance of transgender people varies substantially across the country. The federal government cannot and should not abandon its responsibility to ensure uniform safeguards for a heavily stigmatized and marginalized minority. States and localities can be free to adopt more protective standards for homeless transgender persons, but not less protective safeguards.

⁷ Lesbian, gay, bisexual, trans and intersex and queer (LGBTIQ) people are vulnerable to disruptions in their healthcare, job loss, food and shelter insecurity, and increasing risk of domestic and familial abuse amid the global pandemic. See Kmills, *Vulnerability Amplified: The Impact of the COVID-19 Pandemic on LGBTIQ People* Global LGBT Human Rights (2020), <https://outrightinternational.org/content/vulnerability-amplified-impact-covid-19-pandemic-lgbtqi-people> (last visited May 12, 2020).

⁸ Vulnerability to the pandemic for LGBTQ+ individuals residing in the US was examined by the Human Rights Campaign in a brief on COVID-19. Their findings indicate LGBTQ+ communities are at a greater risk of negative economic and health outcomes compared to non-LGBTQ+ populations because of the high health and economic disparities before the pandemic outbreak. See Human Rights Campaign, *The LGBTQ Community is at Risk Amidst COVID-19 Crisis* Human Rights Campaign, <https://www.hrc.org/resources/the-lives-and-livelihoods-of-many-in-the-lgbtq-community-are-at-risk-amidst> (last visited May 12, 2020).

⁹ For transgender people, increasing barriers to housing is especially harmful during this public health crisis. Over 300,000 of the nearly 2 million transgender individuals in the US have one or more of the following chronic conditions: diabetes, asthma, heart disease and HIV; conditions of which are fatally vulnerable to COVID-19. See Williams Institute, *Vulnerabilities to COVID-19 Among Transgender Adults in the U.S.* (2020), <https://williamsinstitute.law.ucla.edu/publications/transgender-covid-19-risk> (last visited May 12, 2020).

¹⁰ Lesbian, gay, bisexual, trans and intersex (LGBTI) people may be particularly vulnerable during the COVID-19 pandemic. People living with compromised immune systems, including some persons living with HIV/AIDS, face a greater risk from COVID-19. Homeless persons, a population that includes many LGBTI people, are less able to protect themselves through physical distancing and safe hygiene practices, increasing their exposure to contagion. See UN’s Office of The High Commissioner. (2020). Retrieved 12 May 2020, from <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>.

¹¹ Memorandum for the Heads of Departments and Agencies from Russell T. Vought, Acting Director, Office of Management and Budget, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19* (Mar. 17, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>.

HUD also argues that the 2016 rule violated the religious beliefs of some shelters (85 Fed. Reg. at 44814). However, the proposed rule seems to open the door to arbitrary and widespread discriminatory actions by shelter staff based on their personal beliefs and prejudices – not just accommodating a particular religious institution with a clearly articulated belief system. In any event, it should not be permissible to accept federal money and then discriminate against homeless individuals who desperately need shelter, regardless of the grantee’s religious beliefs.

The Department speculates that some entities providing homeless services may have declined to accept federal monies in order to avoid being subject to the obligation not to discriminate against transgender homeless people, and that this has led to fewer shelter beds (85 Fed. Reg. at 44816). There is no evidentiary basis for this speculation. In addition, it is obviously no help to stigmatized, marginalized communities to relax nondiscrimination rules in order to increase the number of shelter beds that are not available to them.

HUD’s claim that the proposed rule is justified because it eases regulatory burdens (85 Fed. Reg. at 44186) is a flagrant abandonment of its obligation to ensure that Federal Community Planning and Development funds are used to serve the entire community, not to exclude stigmatized and marginalized groups or to single them out for disparate, discriminatory treatment.

Most outrageous is HUD’s claim that providing transgender homeless persons with access to facilities and services consistent with their gender identity would violate the privacy of other shelter residents, and that cisgender women might be threatened by the presence of transgender women who are “biological males” (85 Fed. Reg. at 44815). There is no evidence to suggest that the fear the Department anecdotally cites as a problem– and that this policy is designed to prevent, cannot be prevented through other means that protect the health of vulnerable minorities. It is distressing that HUD would give any credence to the myth that transgender women are a threat to cisgender women. Our transgender patients report that positive experiences in housing programs that accept and affirm their gender identity give them access to life-saving medical treatments, and that to be deprived of access to housing programs would have a devastating effect on their health. Forcing transgender women out of women’s shelters, into male shelters or onto the street, would certainly subject them to the threat of violence. Moreover, the Department’s position is incoherent: if shelters are allowed to place homeless transgender people in facilities that correspond to their “biological sex” – their sex assigned at birth – then the proposed rule will mean that transgender men will be forced to seek shelter in sex-segregated women’s shelters.

The Proposed Rule Conflicts with *Bostock*.

The Department’s argument that the 2016 rule is legally defective because homeless shelters are not subject to the Fair Housing Act, which prohibits sex discrimination (85 Fed. Reg. at 44812-13), is insubstantial. HUD’s clear policy and obligation is to prohibit recipients of HUD funding for housing and community development from discriminating against otherwise eligible persons on any basis prohibited by federal law, including sex.¹² Thus, whether or not

¹² HUD, Non-Discrimination in Housing and Community Development Programs, Fact Sheet, Accessed September 22, 2020

homeless shelters are subject to the Fair Housing Act, HUD cannot permit, much less encourage, sex discrimination by recipients of Community Planning and Development Housing funds.

Permitting – indeed, encouraging, sex discrimination is exactly what HUD has done in this proposed rule. On June 15th, 2020, the Supreme Court held in *Bostock v. Clayton County, Georgia* that under Title VII of the 1964 Civil Rights Act: “It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹³ This holding applies not only to employment-related transgender discrimination – the specific issue in *Bostock* – but equally to discrimination in sex-specific and sex-segregated shelters. Both the Fourth Circuit and the Eleventh Circuit recently held that school systems that restricted transgender students’ access to bathrooms consistent with their gender identity were inconsistent with *Bostock*, because those policies denied access to boys’ bathrooms to transgender boys because of their sex assigned at birth or “biological” sex.¹⁴ The logic is the same for sex-specific and sex-segregated homeless shelters.

Conclusion

This proposed rule, based on no evidence and inconsistent with *Bostock*, severely disadvantages transgender people in sex-segregated temporary emergency homeless shelters and invites the proliferation of shelters that exclude transgender people. Beyond the exclusion, the rule promulgates a culture of fear and the stigmatizing effects of a government imprimatur of segregation. The proposed rule’s changes undermine the health of transgender people and promotes needless confusion and fear as transgender people are entitled to seek nondiscriminatory services at the majority of shelters throughout the United States. This proposed rule will lead to discrimination by shelter staff and fear among transgender people who are experiencing homelessness and seeking services from federally funded homeless shelters. By contrast, the 2016 rule prohibiting discrimination in sex-segregated shelters creates clarity. Clarity promotes the use of services and is beneficial to residents and clients who are able to access homeless shelters without fear of discrimination.

The proposed rule should be withdrawn. We urge HUD to recognize that inquiries that are used to limit the provision of housing, to harass an individual, or in any other discriminatory fashion should be prohibited. Any policies which facilitate or encourage discrimination against transgender people in access to emergency shelters will exacerbate the existing stigmas and inequalities experienced by this marginalized and stigmatized population.

(https://www.hud.gov/program_offices/fair_housing_equal_opp/non_discrimination_housing_and_community_development_0).

¹³ *Bostock v. Clayton Cty., Georgia*, __ U.S. __, 140 S. Ct. 1731 (June 15, 2020).

¹⁴ *Grimm v. Gloucester County School Board*, No. 19-1952, 2020 U.S. App. LEXIS 27234, **65-66 (4th Cir. Aug. 26, 2020); *Adams v. School Board*, 968 F.3d 1286, 2020 U.S. App. LEXIS 24968, **47-50 (11th Cir. 2020).

Thank you for your consideration. Please feel free to contact us if Whitman-Walker can provide any additional information.

Respectfully submitted

A handwritten signature in cursive script that reads "Daniel Bruner".

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