



School of Law
Clinical Law Center

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Ben S. Carson Sr.
Secretary, U.S. Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410

Via regulations.gov [<https://www.regulations.gov/comment?D=HUD-2020-0047-0001>]

Re: Opposition to Proposed Rule Change: HUD Docket No. FR-6152-P-01, RIN 2506-AC53

Dear Secretary Carson,

The Fair Housing Clinic at Howard University School of Law (the “Clinic”) writes to express opposition to the Department of Housing and Urban Development’s (“HUD”) Proposed Rule Change to the Equal Access Rule, HUD Docket No. FR-6152-P-01, RIN 2506-AC53, “Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs,” (hereinafter, the “Proposed Rule Change”).

Howard University School of Law (“Howard Law”) has long placed the defense of human rights, equality, and dignity at the heart of its educational practice. Established in 1869 to provide legal education for Americans historically excluded from the profession, Howard Law was the first law school in the nation to establish an admissions policy that did not discriminate on the basis of race or gender. Since our founding, we have graduated thousands of law students committed to the mission of building a more inclusive, just, and compassionate society. Howard Law alumni and affiliates are widely respected for securing landmark civil rights victories, including *Brown v. Bd. Of Education*, 347 U.S. 483 (1954).¹ Most notably, Justice Thurgood Marshall (‘33) was one of the lead attorneys for the plaintiffs in *Brown*, arguing before the U.S. Supreme Court. Accordingly, the fight for inclusion and against discrimination is central to Howard Law’s educational model and history. We draw upon that substantial legacy to inform our comments here – comments which focus on the injustices posed to transgender and gender nonconforming people by the Proposed Rule Change.

For the reasons discussed herein, we urge HUD to withdraw the Proposed Rule Change and instead commit to strengthening the 2016 Rule, “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs.”

¹ Okianer Christian Dark, *The Role of Howard University School of Law in Brown v. Board of Education*, 16 WASHINGTON HISTORY 83 (2004).

I. **The Proposed Rule Change Would Exacerbate the Barriers Transgender and Gender Nonconforming People Face Accessing Housing by Making it More Difficult to Access Emergency Shelter, Especially During the Ongoing Coronavirus Pandemic.**

Throughout the country, transgender and gender nonconforming people² face substantial barriers securing safe and affordable housing.³ Many have been evicted from their homes, denied access to college dormitories, and kicked out of their households as a result of discrimination based on gender identity.⁴ Once subjected to homelessness, transgender and gender nonconforming individuals have higher chances of criminalization and negative interactions with local law enforcement.⁵ The impact of discrimination is particularly acute for Black and Brown transgender and gender nonconforming individuals, who experience concurrent gender-based discrimination and racism.⁶ These are just a few of the many circumstances that contribute to the fast-growing epidemic of housing instability within the transgender and gender nonconforming community.⁷

To address these challenges, in 2016 HUD issued its rule “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs” to clarify that shelters must place individuals by their self-identified gender identity (the “2016 Equal Access Rule”). Yet today, instead of strengthening this important and potentially life-saving public policy, HUD’s Proposed Rule Change advances little else but stereotypes and stigmas. If adopted, the Proposed Rule Change would no doubt contribute to the skyrocketing rates of homelessness and displacement within the transgender and gender nonconforming community. Removing the safeguard put in place in 2016 would allow private shelters to discriminate on the basis of transgender identity or perceived gender nonconformity, and potentially deny life-saving emergency housing to those who need it.

Instead of housing transwomen with other women and transmen with other men, under the Proposed Rule Change, transgender people could be forced to stay in shelters of their birth-assigned gender or be faced with the prospect of no shelter at all. Gender nonconforming people could be similarly denied appropriate shelter. This is an impossible choice. Being placed in a shelter based on birth-assigned gender is traumatic for many transgender and gender nonconforming individuals and increases their

² “Transgender” is an adjective referring to an individual whose gender identity is different from the gender they were assigned at birth. “Gender nonconforming” is a term used to describe an individual whose gender presentation is different from stereotypical (and often pejorative) expectations or norms. See *Words Matter: Gender Justice Toolkit*, NATIONAL BLACK JUSTICE COALITION, <https://www.arcusfoundation.org/wp-content/uploads/2019/09/NBJC-Words-Matter-Gender-Bias-Toolkit-2019-vFINAL.pdf>.

³ JAMIE M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY*, 2–4 (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), (stating that, while discrimination was present throughout the population sample surveyed, the combination of anti-transgender bias and simultaneous structural racism was especially daunting: “people of color in general fare worse than white participants across the board, with African American transgender respondents faring worse than all others in many areas examined.”).

⁴ *Id.* at 106.

⁵ *Id.* at 6.

⁶ *Id.*

⁷ ADAM P. ROMERO ET AL., *LGBT People and Housing Affordability, Discrimination, and Homelessness* 14, THE WILLIAMS INSTITUTE, (2020).

likelihood of experiencing physical or sexual violence.⁸ The Proposed Rule Change permits discriminatory practices and subjects members of an already vulnerable community to even greater violence and insecurity.

The negative consequences of the Proposed Rule Change are heightened by the fact that it would be implemented during a public health crisis, one already disproportionately affecting Black communities.⁹ Black transgender and gender nonconforming people experiencing homelessness are exponentially more at risk for the virus because they are more susceptible to complications from contracting the coronavirus due to a number of factors, including severe levels of stress, discrimination in healthcare, exposure to contaminants, lack of adequate sleep, and poor nutrition.¹⁰ The Proposed Rule Change would prohibit many transgender and gender nonconforming people from accessing single-sex shelters, which would leave them with few options but the streets. This lack of shelter will increase the chance transgender and gender nonconforming individuals experiencing homelessness will be exposed to the coronavirus, at a time when communities across the nation are struggling to reduce transmission rates. The Proposed Rule Change lacks the precautions needed during a global pandemic, when the health and safety of every person should be a top priority. The Proposed Rule Change cites safety concerns as justification for rolling back the equal access rule, however this rationalization disregards the safety of the transgender and gender nonconforming people who will be more susceptible to coronavirus exposure due to lack of adequate shelter.

II. By Permitting Shelters to Consider Stereotypical Physical Characteristics or Birth-Assigned Gender in Placement and Accommodation Decisions in Single-Sex Facilities, the Proposed Rule Change Runs Afoul of Supreme Court Precedent Addressing Discrimination Against Transgender and Gender Nonconforming Individuals.

The Proposed Rule Change significantly weakens the 2016 Equal Access Rule by allowing single-sex shelters to establish policies that place individuals on the basis of stereotypical physical characteristics and birth-assigned gender as opposed to gender identity.¹¹ Using internally inconsistent logic, the Proposed Rule Change claims to prohibit discrimination because a person is transgender, gender nonconforming or perceived to be either transgender or gender nonconforming, but nonetheless allows shelters to place an individual based on a shelter provider's subjective perception of physical characteristics rather than an individual's actual gender identity.¹² This is textbook discrimination: there is simply no way to place a transgender or gender nonconforming individual in a shelter that is not in

⁸ Romero, *supra* at 18, (data has shown transgender people have been physically or sexual abuse when placed in same sex shelters that are not consistent with their gender identity).

⁹ Richard A. Oppel Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look at the Racial Inequality of Coronavirus Yet*, N.Y. TIMES (July 5, 2020) <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

¹⁰ Emily Shapira, *Coronavirus and the Homeless: Why They're Especially at Risk, Ways to stop a Spread like Wildfire*, ABC NEWS (Mar. 11, 2020) <https://abcnews.go.com/Health/coronavirus-homeless-risk-ways-stop-spread-wildfire/story?id=69505076>.

¹¹ U.S. Dep't of Housing and Urban Development, Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 24 CFR Part 5, (FR 6152), 6 (July 1, 2020).

¹² *Id.* at 7.

accordance with their gender identity without discriminating against that individual. Not only is the Proposed Rule Change internally contradictory, its reasoning contradicts contemporary jurisprudence on discrimination against transgender individual's identity (or perception thereof).

The United States Supreme Court recently considered the issue of discrimination against transgender individuals in *Bostock v. Clayton County*,¹³ in which the Court held that discrimination against an individual for being transgender is prohibited sex discrimination within the context of Title VII. In *Bostock*, the Court held that if an employer fires a transgender employee, yet retains an otherwise identical employee who identifies with the gender they were assigned at birth, the employer is unlawfully discriminating based on sex.¹⁴ Similarly, by permitting shelters to place individuals based on subjective assessments of physical characteristics or their birth-assigned gender while disregarding the individual's gender identity, the Proposed Rule Change would directly discriminate against these individuals on the basis of their sex. While the *Bostock* holding does not apply directly to the FHA, courts have long recognized a commonality in the structure and purpose of Title VII and the FHA, in that each "aims to eradicate sex discrimination from a sector or society."¹⁵ If discriminating against someone on the basis of gender stereotypes or transgender identity is considered prohibited sex discrimination under Title VII, it is likely to be considered prohibited sex discrimination under the Fair Housing Act.

III. HUD's Justifications for the Proposed Rule Change are not in Alignment with Supreme Court Jurisprudence on Religious Liberty Under the First Amendment's Free Exercise Clause.

The third justification in the Proposed Rule Change states that the 2016 Equal Access Rule "burdened" shelters with "deeply held religious convictions" and it cites to the Supreme Court's holding in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* to support its proposition that prohibiting discrimination against transgender and gender nonconforming individuals would infringe on the constitutional rights of shelters.¹⁶ Contrary to the interpretation in the Proposed Rule Change, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, the Supreme Court held that "while religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."¹⁷ According to the Court, faith-based providers of public accommodations are free to hold and exercise their religious

¹³ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020).

¹⁴ *Id.* at 1741-42.

¹⁵ *Wetzel v. Glen St. Andrew Living Cmty., LLC*, No. 16 C 7598, 2017 WL 201376, at *1 (N.D. Ill. 2017); *see generally* Maysa Daoud, *Title VII and the Fair Housing Act: The Seventh Circuit Creates a New Cause of Action*, 25 ST. LOUIS U. L.J. ONLINE, 3 (2018); *see also* *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (holding that analogous to the FHA context and Title VII, student-student sexual harassment can support a private suit under Title IX using the same rationale that each Amendment aims to eradicate sex-based discrimination); *see also* *Pricewaterhouse v. Hopkins* (1989), 490 U.S. 228 (holding that an employer who sex stereotyped an employee with gender non-conforming traits engaged in unlawful discrimination based on sex).

¹⁶ U.S. Dep't of Housing and Urban Development, *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, 24 CFR Part 5, (FR 6152), 6 (July 1, 2020).

¹⁷ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

convictions only to the extent that they do not deny protected individuals equal access to their services.¹⁸ The *Masterpiece Cakeshop* case was a narrow holding in which the Court cautioned that religious liberty claims must not be met with reflexive hostility, but it did not hold that the provisions of antidiscrimination laws do not apply whenever a religious organization feels “burdened.” The Proposed Rule Change misconstrues the legal precedent regarding the religious freedom of public accommodation providers and creates more opportunities for discrimination under the guise of the First Amendment.

IV. HUD’s Justifications for the Proposed Rule Change Unjustly Prioritize the Perceived Privacy Concerns of Cisgender Women over the Civil and Human Rights of Transgender and Gender Nonconforming Individuals.

The fourth justification for the Proposed Rule Change notes that “a shelter may want to reduce unwelcome or accidental exposure to, or by persons of the opposite biological sex where either party may be in a state of undress.”¹⁹ The Proposed Rule Change purports to protect cisgender women’s privacy interests by claiming, with no evidence, that permitting transgender women to access shelters according to their gender identity threatens the privacy interests and security of other shelter seekers. This dangerous narrative not only perpetuates the myth that transgender women are inherently predatory—in fact, transgender women are victimized by sexual violence at unacceptably high rates²⁰—it also suggests that cisgender women’s personal comfort should be prioritized above the basic civil and human rights of transgender women. Tellingly, HUD does not extend its privacy argument to single-sex men’s shelters, despite the fact that experts estimate one in six men have been the victim of sexual abuse or assault in their lifetimes.²¹ Thus, HUD’s safety-from-victimization logic does not appear designed to stand up to even the weakest analysis, but seems, instead, designed to provide a fig leaf to transmisogyny. Finally, this problematic narrative misrepresents the actual advocacy of sexual violence survivors, who largely support transgender individual’s access to single-gender shelters based on gender identity.²²

The fourth justification for the Proposed Rule Change also inconsistently applies the privacy interests of persons seeking shelter based on birth-assigned gender and sets no procedural regularity to enforce the privacy interests for transgender, nonbinary, or gender nonconforming individuals. The Proposed Rule Change would infringe on personal privacy by allowing a shelter provider to require any individual the shelter provider perceives as transgender to present personal documentation such as medical records or a birth certificate to verify their birth-assigned gender. Anyone perceived as a transgender or gender nonconforming may be required to provide birth certificates, other identification,

¹⁸ See *Fulton v. City of Philadelphia*, 922 F.3d 140 (3rd. Cir. 2020), *cert. granted*, 2020 U.S. LEXIS 961 (U.S. Feb. 24, 2020) (No. 19-123).

¹⁹ U.S. Dep’t of Housing and Urban Development, Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 24 CFR Part 5, (FR 6152), 14 (July 1, 2020).

²⁰ Emily Walters, et al., National Coalition of Antiviolence Programs (NCAVP), *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2016*, (2017).

²¹ Roni Caryn Rabin, *Men Struggle for Rape Awareness*, N.Y. TIMES (Jan. 23, 2012), <https://www.nytimes.com/2012/01/24/health/as-victims-men-struggle-for-rape-awareness.html>.

²² *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, National Task Force to End Sexual and Domestic Violence, <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>.

medical records, transition statuses, active hormone therapy statuses, or state-recognized gender statuses while those perceived as conforming with sex stereotypes are not required to present any such documentation. This will impose an enormous burden on transgender individuals seeking shelter as those facing homelessness often do not have access to healthcare records and other documentation. This problem is further intensified by the current global pandemic. It is absurd to think that someone in need of immediate shelter during a pandemic would be able to secure medical records and other documentation to prove their current gender aligns with their birth-assigned gender. The criteria to provide documentation if asked by the shelter's staff not only would create an unrealistic hurdle for many, but also disregards the privacy of shelter seekers.

V. HUD Proposed Rule Change Encourages Discrimination.

The Proposed Rule Change would wrongly empower homeless shelters to discriminate based on the “good faith” clause under section 5.106(c). This clause would give homeless shelters the power to turn people away solely based on gender stereotypes. The standard for making a “good faith” determination, according to the Proposed Rule Change, would incorrectly be constructed on superficial physical characteristics such as the presence of an Adam's apple and facial hair. Shelters who use these features as a guide to determine whether someone can gain access, are inherently discriminating against people who possess any gender nonconforming features, regardless of birth-assigned gender. The Proposed Rule Change could allow discrimination against anyone who does not meet an individual shelter provider's stereotypical notion of masculinity and femininity, allowing, for example a shelter provider to turn away a cisgender woman or a transgender woman who is perceived as “too masculine.” No one should be forced to fit a stereotypical and sexist mold in order to gain access to a homeless shelter. Cultural, medical and personal reasons can all play a role in people's physical makeup, but this should not give homeless shelter staff the unchecked power to decide who “looks the part” and who does not.

According to a study by the Center for American Progress and the Equal Rights Center, only 30% of shelters in four states said they would house transgender women with other women.²³ This statistic shows that without the 2016 Equal Access Rule, shelters would have free range to discriminate against transgender and gender nonconforming people based on nothing more than the shelters' own biases. Transgender people continually battle with housing discrimination, with one in five transgender individuals discriminated against when seeking housing and one in ten evicted from their housing due to their gender identity.²⁴ Additionally, The “good faith” standard would furthermore disproportionately target Black transgender and gender nonconforming people, since they systematically face higher rates of discrimination than other groups.²⁵ The “good faith” clause can and will be used to further marginalize transgender people of color and limit them from obtaining the basic need of shelter.

²³ Viet Tran, *HUD Proposal to Gut Equal Access Rule Puts Transgender Lives at Risk Human*, CIVIL RIGHTS CAMPAIGN (July 23, 2020). <https://www.hrc.org/news/hud-proposal-to-gut-equal-access-rule-puts-transgender-lives-at-risk>

²⁴ *Housing and Homelessness*, NATIONAL CENTER FOR GENDER EQUALITY, <https://transequality.org/issues/housing-homelessness>.

²⁵ *New Analysis Shows Startling Levels of Discrimination Against Black Transgender People*, NATIONAL LGTBQ TASK FORCE, <https://www.thetaskforce.org/new-analysis-shows-startling-levels-of-discrimination-against-black-transgender-people>.

VI. The Change to Record Keeping Serves no Beneficial Purpose to the Public Interest.

An accurate assessment of the effectiveness or ineffectiveness of any new policy depends on reliable record keeping. Data is the primary source used to identify problem areas for improvement in order to effectively serve the public. Collecting information to measure the prevalence of homelessness among transgender and gender nonconforming people is inherently a difficult task because housing instability and lack of access to shelters complicates the record keeping process.²⁶ The stories of transgender people, particularly Black and Brown transgender women, are too often silenced. The removal of record keeping will exacerbate the already existing issue of tracking the intersections between homelessness and transgender community. Furthermore, the removal of record keeping will create a substantial burden for pursuing discrimination lawsuits. This change serves no beneficial purpose to civil and human rights advocacy, public policy, or the public's interest in policy-making supported by statistical data.

VII. The Proposed Rule Change Claims that HUD did not have the Authority to Rely on the Secretary's Plenary Authority to Issue Regulations Because HUD Should not Reach Beyond the Authority Granted to HUD by Congress.

Despite Congress's silence on the issue of transgender discrimination in single-sex shelter accommodations, HUD was well within its capacity to furnish the 2016 Equal Access Rule. In the Proposed Rule Change, HUD claims that the 2016 Equal Access Rule violated the Administrative Procedure Act of 1964 ("APA")²⁷ "by acting under plenary authority instead of a more specific affirmative grant of authority from Congress."²⁸ Further, the Proposed Rule Change relies on the principle of administrative law claiming that agencies must implement statutes according to the text and apply the law no further than the text may permit.²⁹ HUD's general authority to issue regulations is derived from the Department of Housing and Urban Development Act, Section 7(d).³⁰ However, Congress may delegate legislative powers to administrative agencies if given an intelligible principle to follow and agencies are then able to enact legislation through an informal process known as "notice-comment" rulemaking. HUD's intelligible principle is stated clearly under the Department of Housing and Urban Development Act, Section 7(d) stating, "The Secretary may delegate any of his functions, powers, and duties to such officers and employees of the Department as he may designate, may authorize such successive re-delegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers, and duties."³¹ Hence, HUD was within its designated authority to furnish the 2016 Equal Access Rule.

²⁶ Romero, *supra* at 14.

²⁷ 5 U.S.C.A § 701.

²⁸ U.S. Dep't of Housing and Urban Development, Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 24 CFR Part 5, (FR 6152), 9 (July 1, 2020).

²⁹ *Id.*

³⁰ 42 U.S.C. 3535 7(d).

³¹ *Id.*

VIII. For the Reasons Discussed Above, HUD Should Withdraw the Proposed Rule Change and Instead Focus on Strengthening the 2016 Equal Access Rule.

HUD's approach to shelter access has clearly failed the transgender community. Currently, there is a lack of transgender-friendly facilities. The 2016 Equal Access Rule includes protections for entry into same sex shelters but provides no guidance for enforcing the Rule or training procedures to properly educate staff on how to address transgender and gender nonconforming related issues. Consequently, transgender people seeking shelter are experiencing harassment from cisgender and heterosexual people including the staff.³² There have been reports of staff members refusing to accommodate or acknowledge the mistreatment of transgender people.³³ Additionally, there are instances where shelters are forcing transgender people to live as the wrong gender by changing their physical appearance.³⁴ Due to this harsh reality, many members of the transgender community reluctantly avoid shelters.

Rather than weakening the 2016 Equal Access Rule, HUD must strengthen and include more protections for transgender and gender nonconforming people experiencing homelessness. First, HUD should require staff members to attend trainings that destigmatize the transgender and gender nonconforming community. Second, HUD should implement a zero-tolerance policy for harassment and violence against transgender and gender nonconforming people. Third, HUD should make improvements to §5.100 definition of gender identity to include language prioritizing the choice of the individual rather than subjective standards of a third party's perception. Fourth, HUD should designate at least one gender neutral bathroom in all shelters in order to provide privacy and safety. Lastly, HUD should develop more transgender and gender nonconforming affirmative homeless shelters to serve as a safe haven providing essential health and counseling services. The addition of these recommendations will allow transgender and gender nonconforming people to access homeless shelters on equal footing to cisgender people, decrease experiences of violence, and eventually reduce transgender and gender nonconforming people having no source for shelter.

IX. Conclusion

For these reasons, the Fair Housing Clinic at the Howard University School of Law strongly recommends HUD abandon the Proposed Rule Change and, instead, focus on expanding access to stable housing and shelter to all who need it, especially the most vulnerable.

Sincerely,

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³² Romero, *supra* at 18–19.

³³ *Id.*

³⁴ Grant, *supra* at 118.

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