



## The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness

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September 22, 2020

The Honorable Benjamin S. Carson, Sr., M.D.  
Secretary  
U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW,  
Washington, DC 20410-0500  
Attn.: Regulations Division, Office of General Counsel

**RE: Comments in Response to Proposed Rule “Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs”, Docket No. FR-6152-P-01**

Dear Secretary Carson:

Thank you for the opportunity to submit the following comments to the U.S. Department of Housing and Urban Development (“HUD” or “Department”) in response to its Notice of Proposed Rulemaking (“NPRM”) published in the Federal Register on July 24, 2020. Because the proposed rule would permit homeless and domestic violence shelters to discriminate against shelter seekers on the basis of their actual or perceived sex, the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness (the “Commission”) opposes finalization and implementation of this proposed rule.

### **Introduction**

The Commission was established in 2005 by the three branches of Pennsylvania’s government to implement the recommendations from a Pennsylvania Supreme Court study on racial and gender bias in the justice system. The final report from the study was completed in 2003, and contained chapters on fourteen topics, including perceptions and occurrences of racial, ethnic, and gender bias in the courtroom, discriminatory practices in the family court and juvenile justice systems, and discriminatory treatment of domestic violence and sexual assault victims within the court system, among others.<sup>1</sup> The Commission has expanded its areas of focus to include working to end discrimination against LGBTQ Pennsylvanians in our courts and throughout the Commonwealth. To that

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<sup>1</sup> See Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, <http://www.pa-interbranchcommission.com>.

end, the Commission has been actively involved in supporting legislation to amend the Pennsylvania Human Relations Act to extend housing, workplace, and public accommodation discrimination protections to LGBTQ Pennsylvanians, conducting training sessions to educate Pennsylvania attorneys and judges on anti-LGBTQ bias in jury selection, and working to amend statewide policy to address discrimination against LGBTQ youth in Pennsylvania’s juvenile justice and child welfare systems.

### **1. The Proposed Rule Encourages HUD-Funded Facilities to Discriminate Against Already Vulnerable Individuals on the Basis of Their Sex**

The proposed rule seeks to eliminate protections provided to transgender individuals under HUD’s 2016 rule entitled Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Program Rule (“Equal Access Rule”).<sup>2</sup> The Equal Access Rule uniformly prohibits HUD-funded community planning and development programs from discriminating against program beneficiaries on the basis of their gender identity. The proposed rule would amend the Equal Access Rule to permit single-sex shelter facilities that receive government funding to implement admission policies that discriminate against those seeking shelter on the basis of their perceived or actual biological sex, without taking into account their gender identity. Allowing single-sex shelter operators to create and implement such policies will cause transgender individuals, who already suffer from homelessness, hate-based violence, and intimate partner violence at high rates, to remain in unsheltered or otherwise dangerous situations.

Indeed, transgender individuals already experience homelessness at higher rates than their cisgender<sup>3</sup> counterparts. According to the National Center for Transgender Equality, one in five transgender people experience homelessness in their lifetime.<sup>4</sup> Additionally, based on aggregate data from three national studies examining homelessness among transgender individuals and heterosexual cisgender individuals, the Williams Institute reported in May 2020 that eight percent of transgender adults experienced homelessness within the 12 months immediately preceding the studies, compared to only one percent of cisgender adults.<sup>5</sup> Furthermore, while transgender individuals only account for 0.6% of

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<sup>2</sup> 24 CFR § 5.106.

<sup>3</sup> Cisgender is a term used to describe a person “whose gender identity corresponds with the sex the person had or was identified as having at birth.” See *Cisgender*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/cisgender>.

<sup>4</sup> See National Center for Transgender Equality, *Housing and Homelessness*, TransEquality, <https://transequality.org/issues/housing-homelessness> (last visited Sept. 21, 2020).

<sup>5</sup> See Bianca D.M. Wilson *et al*, *Homelessness Among LGBT Adults in the US*, UCLA Williams Institute (May 2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-homelessness-us/>.

the entire U.S. adult population,<sup>6</sup> HUD's *The 2018 Annual Homelessness Assessment Report (AHAR) to Congress*, which tracked the demographics of nearly all homeless individuals on a single night in January 2018 across the country, showed that transgender individuals accounted for 0.7% of all homeless individuals on that night, a 22% increase from the previous year.<sup>7</sup>

Transgender individuals also suffer elevated rates of physical and sexual violence. The National Center for Transgender Equality reports that more than one in four of all transgender individuals have experienced bias-motivated violence at one point in their lives.<sup>8</sup> This statistic is even higher for transgender women of color.<sup>9</sup> In 2018, despite transgender adults only accounting for 0.6% of the U.S. adult population, the FBI's Annual Hate Crimes Statistics Report revealed that hate crimes perpetrated because of a victim's gender identity comprised 2.4% of all reported bias-motivated crimes in the United States.<sup>10</sup> The total number of reported gender identity hate-based crimes in 2018 marked a 41% increase from the total number of gender identity hate-based crimes reported to the FBI in 2017.<sup>11</sup> With respect to incidents of sexual assault, the 2015 U.S. Transgender Survey, a national survey wherein 27,715 transgender respondents from all 50 states commented on their personal experiences in dealing with education, employment, housing, health, and criminal justice related issues, revealed that 47% of all respondents had been sexually assaulted during their lifetime.<sup>12</sup>

Moreover, the Williams Institute reports that transgender individuals are at an increased risk of suffering from intimate partner violence. According to various intimate partner studies examined by the Williams Institute, transgender people suffer intimate partner

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<sup>6</sup> Andrew R. Flores, *How Many Adults Identify as Transgender in the United States?*, UCLA Williams Institute (June 2016), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/>.

<sup>7</sup> Meghan Henry *et al*, *The 2018 Annual Homelessness Assessment Report (AHAR) to Congress*, HUD, at 24, 31 (Dec. 2018), <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.

<sup>8</sup> See National Center for Transgender Equality, *Anti-Violence*, <https://transequality.org/issues/anti-violence> (last visited Sept. 21, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> See *2018 Hate Crime Statistics*, FBI.gov, <https://ucr.fbi.gov/hate-crime/2018/topic-pages/incidents-and-offenses> (last visited September 21, 2020).

<sup>11</sup> See Sam Levin, *Violent Hate Crimes in US Reach Highest Levels in 16 Years*, *FBI Reports*, *The Guardian* (Nov. 12, 2019), <https://www.theguardian.com/society/2019/nov/12/hate-crimes-2018-latinos-transgender-fbi>.

<sup>12</sup> Sandy E. James, *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality, at 5 (Dec. 2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

violence at equal rates, if not higher rates, than their cisgender counterparts.<sup>13</sup> One study that directly compared the prevalence of intimate partner violence between transgender and cisgender individuals found that 31.1% of transgender people have experienced intimate partner violence or dating violence in their life, compared to 20.4% of cisgender people.<sup>14</sup> Other studies examining the rate at which transgender individuals experience intimate partner violence suggest that between 31.1% and 50% of transgender individuals suffer from intimate partner violence, and between 25% and 47% suffer intimate partner sexual assault.<sup>15</sup>

As these statistics highlight, transgender individuals are already among those most susceptible to suffering from episodes of homelessness, hate-based violence, and intimate partner violence. Consequently, these individuals need adequate access to resources that will help ameliorate their situations, including access to shelters. If finalized, the proposed rule would restrict their access to such resources because it would enable single-sex shelter operators to turn away transgender individuals who present themselves for help, even if such individuals are, in fact, members of the sex that the operator serves. This is especially true given the fact that the NPRM states that single-sex shelters may, in good faith, determine a person's eligibility to be admitted into their facility based upon examination of arbitrary physical characteristics the person possesses. These physical characteristics include assessing "[a person's] height, the presence (but not the absence of) facial hair, [and] the presence of an Adam's apple." The presence of one or more of these physical characteristics neither definitively nor accurately determines the sex of an individual. Yet, the proposed rule would allow single-sex shelter operators to engage in these sex stereotyping practices as a means to restrict access to those whom they do not perceive as conventionally male or female.

Restricted access to homeless and domestic violence shelters means that transgender individuals are at greater risk of remaining on the streets or in the same household as their abusers, increasing the likelihood that they will suffer serious injury or death in the long-run. In essence, permitting shelters to discriminate against individuals on the basis of individuals' perceived or actual biological sex will exacerbate the homelessness and domestic violence epidemics this country is currently experiencing.

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<sup>13</sup> Taylor N.T. Brown and Jody L. Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People*, UCLA Williams Institute, at 3 (Nov. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/IPV-Sexual-Abuse-Among-LGBT-Nov-2015.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

## **2. The Negative Impact the Proposed Rule Change will have on Transgender Individuals Seeking Shelter Access Outweighs the Justifications Presented for the Rule Change**

In its NPRM, HUD sets forth the following two justifications for proposing the rule change: (1) the Equal Access Rule places an undue burden on faith-based, single-sex shelter operators who have the sincerely-held religious belief that sex is an immutable characteristic assigned at birth; and (2) mandating that single-sex shelter operators admit male-to-female transgender individuals who self-identify as female poses safety and privacy concerns to cisgender female shelter seekers. When comparing these stated justifications to the detrimental impact the rule change will have on transgender shelter seekers, it is clear that the danger created by the rule change outweighs the justifications for its implementation.

First, the justification that the Equal Access Rule places an undue burden on faith-based, single-sex shelter operators is patently false. When explaining this justification in the NPRM, HUD states that the undue burden placed upon these shelter operators is that the rule requires the operators to admit individuals who do not identify with the sex they were assigned at birth. However, in the next paragraph, HUD admits that single-sex shelter providers with this sincerely-held religious belief may be deemed exempt from complying with the Equal Access Rule if they file for a waiver under the Religious Freedom Restoration Act (“RFRA”) or under the Secretary of HUD’s general waiver authority. By admitting that faith-based, single-sex shelter providers can secure a legal exemption from having to comply with the Equal Access Rule, HUD contradicts its own argument that the current rule poses an undue burden on faith-based organizations. At best, the slight inconvenience involved with filing for a waiver can be described as a small administrative burden. This minimal task does not outweigh the dangers the proposed rule creates for transgender shelter seekers (i.e., having no access to housing, no avenue through which to escape from their abusers, etc.).

Second, although the safety of all shelter seekers is of the utmost importance, HUD’s justification that housing male-to-female transgender individuals in a women’s shelter places cisgender females at an increased risk of being sexually harassed or assaulted is not supported by an empirical data. In fact, HUD admits that “it is not aware of data suggesting that transgender individuals pose an inherent risk to biological women.” Without empirical data to support this justification, the claim that the presence of transgender individuals in a single-sex facility creates a heightened security or privacy risk to cisgender individuals housed in the same facility is baseless. As such, this justification for implementing the proposed rule does not outweigh the potential harms posed to transgender individuals if the proposed rule is finalized and implemented.

### 3. The Proposed Rule Change Contradicts Legal Norms Related to Sex-Based Discrimination in Other Contexts

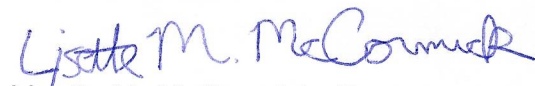
The NPRM proposes to confine the term “sex” to an individual’s sex assigned at birth or one’s “biological sex,” without taking into account gender identity. Reliance on this narrow definition of “sex” as a way to determine whether a person meets the criteria for admittance into a single-sex shelter contradicts existing legal precedent, which defines the term “sex” more broadly in other contexts. Specifically, the definition of “sex” as used in the NPRM is at odds with the more inclusive definition of the term “sex” in the U.S. Supreme Court’s recent opinion in *Bostock v. Clayton County*.<sup>16</sup> In *Bostock*, the Court was tasked with determining whether employment discrimination on the basis of “sex,” as proscribed by Title VII of the Civil Rights Act of 1964, includes discrimination on the bases of sexual orientation and gender identity.<sup>17</sup> In answering this matter of first impression, the Court rendered an opinion declaring that discrimination on the bases of sexual orientation and gender identity is discrimination on the basis of sex pursuant to Title VII.<sup>18</sup> Although Title VII only applies in an employment discrimination context, the broad definition of the term “sex” in *Bostock* is indicative of how the highest court in this country will rule if a similar discrimination challenge is brought related to the proposed rule change. Accordingly, the Commission urges HUD to abandon its proposed rule, as the Equal Access Rule is more in line with the Supreme Court’s definition of “sex” in *Bostock*.

In closing, we urge HUD to withdraw its proposed amendments to 24 CFR § 5.106. The proposed rule represents a discriminatory and harmful change that would negatively impact already marginalized and vulnerable groups in our country. Just as with all Americans, access to programs that provide for life’s basic necessities are crucial for the transgender individuals. Thank you for the opportunity to submit comments, and please do not hesitate to contact us if we can provide further information.

Respectfully,



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Commission Co-Chair



Lisette M. McCormick, Esq.  
Executive Director



Rhonda Hill Wilson, Esq.  
Commission Co-Chair



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<sup>16</sup> *Bostock v. Clayton County*, 590 U.S. \_\_\_\_ (2020).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*