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Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 SW 7<sup>th</sup> St. SW  
Room 10276  
Washington, DC 20410-0500

Submitted electronically: regulations.gov

**Re: 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**

Dear Secretary Carson:

Benefits Law Center (“BLC”) appreciates the opportunity to provide comments on the above-referenced Notice.

BLC provides accessible legal advocacy to people living with physical and mental disabilities so that they may obtain the resources necessary to overcome barriers to financial and medical stability. We further our mission through targeted advocacy projects that help people with Social Security problems. One of our projects is the Disabled Homeless Advocacy Project (“DHAP”). Through DHAP, we represent homeless individuals of all genders, many of whom utilize shelters, in their Social Security cases.

BLC strongly opposes the proposed rule because it fails to justify the immense burden on the rights of transgender individuals, is vague and sets unclear standards, and creates more barriers to accessing shelters for transgender homeless individuals.

We respectfully request that the Department of Housing and Urban Development (“HUD”) reviews each of the sources cited and made available to the agency through active hyperlinks. We further request that the full text of each of the sources cited, along with the full text of our comments, be considered part of the administrative record in this matter for purposes of the Administrative Procedure Act. Finally, we recommend that the rule not be adopted, for the reasons put forth below.

**The Proposed Rule Fails to Justify Its Harm to the Rights of Transgender Individuals**

We recommend that the proposed rule be rejected because it fails to justify its harm to the rights of transgender individuals. The proposed rule would allow homeless shelter

providers to consider the “biological sex” of an individual seeking placement in a single-sex facility.<sup>1</sup> Whereas previous rules promulgated by HUD prohibited such discriminatory policies, the proposed rule will, for example, let a single-sex women’s shelter reject transwomen.

Unfortunately, many transgender people in the United States are living in poverty and experiencing homelessness. According to the Williams Institute, almost 30% of transgender adults were living in poverty in 2019.<sup>2</sup> Similarly, 30% of transgender people reported experiencing homelessness at some point in their lives, with 12% reporting having experienced homelessness within the last year.<sup>3</sup> Homelessness also disproportionately affected transgender people of color, with more than half of Black, Native American, and multiracial transgender adults having experienced homelessness in their lives.<sup>4</sup> Between January 2017 and January 2018, the number of homeless transgender people jumped 22%.<sup>5</sup>

Transgender people have been subject to discrimination and violence in shelters. Before the implementation of the 2016 Rule, 4% of transgender people who were homeless in the year of 2014 reported being denied access to a shelter due to being transgender.<sup>6</sup> In the previous year, 70% of transgender people who lived in a shelter in the previous year reported mistreatment due to being transgender.<sup>7</sup> In addition, 9% were thrown out of a shelter once staff found out that they were transgender.<sup>8</sup> Ultimately, 44% chose to leave the shelter due to the treatment they received and the conditions of the shelter.<sup>9</sup> Of those transgender people who stayed at a shelter, 25% presented as the wrong gender in order to feel safe at the shelter.<sup>10</sup> Shelter staff reportedly forced 14% of them to present as the wrong gender to stay at the shelter.<sup>11</sup> Of those transgender individuals who stayed at a shelter, 49% were verbally harassed, 19% were physically attacked, and 17% were sexually assaulted because they were transgender.<sup>12</sup>

The prevalent harassment and abuse within the shelter system thus prevents many transgender people from even seeking shelter when they become homeless. According to the 2015 Transgender Survey, only 10% of transgender people who have experienced homelessness sought and actually stayed at one or more shelters.<sup>13</sup> If policies designed to protect transgender people are rescinded, it is very likely that transgender people will not be able to access shelters when they experience homelessness. Those that do seek shelter, will

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<sup>1</sup> 85 Fed. Reg. 44811, 44812

<sup>2</sup> Adam P. Romero, Shoshana K. Goldberg, and Luis A. Vazquez, “LGBT People and Housing Affordability, Discrimination, and Homelessness,” *The Williams Institute*, April 2020, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>, last accessed July 23, 2020, 10.

<sup>3</sup> *Id.* at 14-15.

<sup>4</sup> *Id.* at 15.

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

<sup>6</sup> Sandy E. James, Jody L. Herman, Susan Rankin, et al, *The Report of the 2015 U.S. Transgender Survey*. National Center for Transgender Equality. <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>., last accessed July 23, 2020, 176.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 182.

<sup>13</sup> *Id.* at 180.

likely be placed in shelter environments that are dangerous for those individuals. Examples in other institutions show that segregating based on “biological sex” is dangerous for transgender individuals. For example, according to the 2015 Survey, 30% of transgender individuals who were incarcerated were physically and/or sexually assaulted by prison staff or fellow inmates in the past year.<sup>14</sup> The National Center for Transgender Equality found that most agencies that administer incarceration in the United States place incarcerated persons in facilities automatically according to their “biological sex.”<sup>15</sup> Thus, this proposed rule will impose significant burdens on transgender people across the nation, and put them at risk of discrimination, harassment, and violence.

HUD fails to justify this immense burden on homeless transgender people. The proposed rule states that the 2016 Rule “impermissibly restricted single-sex facilities in a way not supported by congressional enactment, minimized local control, burdened religious organizations, manifested privacy issues and imposed regulatory burdens.”<sup>16</sup> However none of these alleged purposes justify rejecting shelter for many transgender people, or exposing those who are sheltered to harassment, discrimination, and violence. For example, HUD claims that due to high rates of intimate partner violence against homeless women, women “would be expected to distrust and feel unsafe around biological men, even though they self-identify as women.”<sup>17</sup> But HUD does not articulate why cisgender women would feel unsafe around transwomen. Instead, HUD relies on archaic and discriminatory generalizations about how transwomen should be perceived as “biological men.” HUD even admits that it is “not aware of data suggesting that transgender individuals pose an inherent risk to biological women.”<sup>18</sup> HUD attempts to provide anecdotal evidence of instances in which cisgender women at shelters were harassed by a transgender woman, but even in those instances, shelters would be able to remove harassing and violent residents regardless of their gender. The existence of examples of cisgender women being harassed by transgender women only suggests the importance of conduct policy enforcement, not rules that discriminate against transgender people due to their gender identity. HUD does not provide any rationale for their inference of causal connection between transgender identity and harassment of cisgender women.

The proposed rule also claims that the 2016 Rule “minimized local control” and “burdened those shelters with deeply held religious convictions.”<sup>19</sup> But, such an immense burden on transgender individuals requires more compelling justifications than what HUD can provide. HUD writes that the 2016 Rule “adopted a one-size-fits-all approach to admission and accommodation by gender identity in temporary shelters, despite significant variation in State and local law.”<sup>20</sup> HUD says that the 2016 Rule “raises the same potential issue of coercing ministries to... ‘abandon [their] mission and message...’ in order to

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<sup>14</sup> *Id.* at 190.

<sup>15</sup> *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, THE NATIONAL CENTER FOR TRANSGENDER EQUALITY, <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf>, last accessed July 29, 2020, 14.

<sup>16</sup> 85 Fed. Reg. at 44812

<sup>17</sup> *Id.* at 44814-15.

<sup>18</sup> *Id.* at 44815.

<sup>19</sup> *Id.* at 44813-14.

<sup>20</sup> *Id.* at 44813.

participate in government-funded programs.”<sup>21</sup> But, that is exactly the purpose of federal funding schemes—to provide an incentive to come into compliance with federal government policy goals. The federal government often provides incentives for funding through compliance with federal policy objectives: for example, the federal government has provided significant funding to colleges and universities, with the caveat that those institutions ban the use of marijuana on campuses, even in states in which recreational marijuana use is legal.<sup>22</sup> HUD also writes that in some faiths “sex is viewed as an immutable characteristic determined at birth.”<sup>23</sup> But, a faith’s non-conformity with prevailing science about how transgender identities are formed and presented is not a justification for discriminating against people with those identities. HUD’s claims that local governments and religions are burdened by nondiscrimination policies are not compelling enough to permit the discrimination, harassment, and violence against transgender homeless people.

The proposed rule states that the 2016 Rule imposed regulatory burdens on shelters.<sup>24</sup> However, HUD provides no evidence for exactly how these alleged regulatory burdens affect shelters. HUD suggests that additional costs could come in the form of increased “individual privacy screens or single occupant restrooms and bathing facilities to address any privacy concerns that may arise.”<sup>25</sup> But, HUD does not cite to any research regarding how many of these screens or restrooms would need to be added for shelters to come into compliance with the 2016 Rule. Furthermore, even if nondiscrimination provisions are costly, their cost is not a justification to eliminate them. Rather, this is an argument for increased spending to ensure the safety of homeless people across the country.

HUD fails to justify the immense burden on transgender homeless people. For this reason, the proposed rule should not be adopted.

#### The Proposed Rule is Vague and Sets Unclear Standards

The proposed rule should be rejected because it is vague and sets unclear standards. The proposed rule sets forth that a shelter may ask for evidence of a person’s sex if the shelter has a “good faith belief that an individual seeking access to the temporary, emergency shelters is not of the sex, as defined in the single-sex facility’s policy, which the facility accommodates.”<sup>26</sup> Among these “good faith” considerations are consideration of facts 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.”<sup>27</sup> If a shelter has a good faith belief that the person is of a sex not served by the shelter, then the shelter may ask for evidence of the individual’s biological sex, but cannot ask for evidence that is “unduly intrusive of privacy, such as private physical anatomical evidence.”<sup>28</sup> HUD suggests that appropriate evidence would

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<sup>21</sup> *Id.* at 44814.

<sup>22</sup> Jeremy Bauer-Wolf, “Legal Pot? Doesn’t Matter, Colleges Say,” INSIDE HIGHER ED (Dec. 19, 2017), <https://www.insidehighered.com/news/2017/12/19/despite-more-open-marijuana-laws-colleges-still-banning-it> (last accessed, July 29, 2020).

<sup>23</sup> 85 Fed. Reg. at 44814.

<sup>24</sup> *Id.* at 44816.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 44816.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

include “government identification, but government identification alone cannot be the sole basis for denying admittance on the basis of sex.”<sup>29</sup>

The proposed rule does not provide, outside of “private physical anatomical evidence,” what sort of evidence would not be acceptable. Furthermore, HUD’s formulation for acceptable evidence is “physical characteristics, which, when considered together, are indicative of a person’s biological sex.”<sup>30</sup> Not only is this standard vague to the point of being essentially useless, even the enumerated characteristics are over-inclusive; for example, this standard would potentially cause tall cisgender women to prove their biological sex, even though HUD’s apparent intent is to keep transgender women out of women’s shelters. The proposed rule doesn’t provide any evidence or rationale for why the enumerated characteristics are “indicative of a person’s biological sex.”

The proposed rule also does not explain what sort of evidence outside of physical evidence would be appropriate if an individual does not have government identification. A 2004 survey by the National Law Center on Homelessness & Poverty found that 10.7% of homeless individuals lacked any sort of government identification.<sup>31</sup> Furthermore, government identification can cost as much as \$29, without considering other costs including transportation and other documentation to provide for the government identification.<sup>32</sup> Without proposing other non-physical evidence that a person could provide to “prove” their sex, HUD is forcing homeless people to spend what little money they have on government identification to be let into emergency shelter. There are no standards to prevent abuse of the flimsy “good faith” standard. Therefore, HUD’s proposed rule is vague and sets unclear, over-inclusive standards.

#### The Proposed Rule Will Create More Barriers for Homeless People Seeking Shelter

The proposed rule should be rejected because it will create more barriers for homeless people seeking shelter. The proposed rule states that if a shelter “denies access to a person based on a determination of sex, the shelter must utilize the CoC’s [Continuum of Care’s] centralized or coordinated assessment system to provide a transfer recommendation to an alternative shelter or accommodation.”<sup>33</sup> The proposed rule does not mandate any particular policy with how a shelter chooses to accept homeless individuals, noting that shelters “may also choose to admit individuals on criteria other than biological sex.”<sup>34</sup>

Under the proposed rule, if a shelter chooses not to house a transgender person under their policy, they would have to provide alternatives for shelter. However, the proposed rule does not explain how the Continuums of Care will create a database of shelter policies and which shelters will allow transgender individuals to be sheltered according to their gender. This will be both an increased regulatory burden on shelters and Continuums of Care, as well as an increased burden on homeless transgender people finding a shelter that will appropriately accept them.

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Photo Identification Barriers Faced By Homeless Persons: The Impact of September 11*, THE NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, April 2004, [https://nlchp.org/wp-content/uploads/2018/10/ID\\_BARRIERS.PDF](https://nlchp.org/wp-content/uploads/2018/10/ID_BARRIERS.PDF), last accessed July 28, 2020, 13.

<sup>32</sup> *Id.* at 18.

<sup>33</sup> 85 Fed. Reg. at 44815.

<sup>34</sup> *Id.*

The proposed rule will revert the 2016 Rule's progress of a uniform national policy for shelters receiving federal funding. Instead, there will be a hodgepodge of policies that each shelter puts into place. The burden will then be on the homeless individual to find a shelter that will accept them, or risk wasting valuable time getting rejected by a shelter, and then risking relying on a Continuum of Care. When the difference between shelter for the night, or a night on the streets, transgender homeless individuals should not be burdened with knowing the policies of each emergency shelter in their area. Therefore, the proposed rule sets undue barriers for homeless transgender people seeking shelter.

BLC strongly opposes the Department of Housing and Urban Development's proposed rule because it fails to justify the immense burden on the rights of transgender individuals, is vague and sets unclear standards, and creates more barriers to accessing shelters for transgender homeless individuals. Therefore, the proposed rule should be rescinded in full and should not take effect.

Thank you for considering our comments. If any questions arise concerning this submission, please contact Alex KF Doolittle, Executive Director at Benefits Law Center, at [alex@benefitslawcenter.org](mailto:alex@benefitslawcenter.org), or Peter Grieser, Staff Attorney at Benefits Law Center, at [peter@benefitslawcenter.org](mailto:peter@benefitslawcenter.org).

Sincerely,

*Peter Grieser*

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Staff Attorney