September 21, 2020

Michael Williams
Principal Deputy General Counsel
Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0500

SUBMITTED VIA: www.regulations.gov

RE: Department of Housing and Urban Development Proposed Rule Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs RIN: HUD-2020-0047, Docket No. FR-6152-P-01, 85 Federal Register 44811 (July 24, 2020)

Dear Mr. Williams:

On behalf of the American Bar Association (ABA), the largest voluntary association of attorneys and legal professionals in the world, I write to express our views regarding the above-referenced rule (the Proposed Rule) proposed by the Department of Housing and Urban Development (HUD). As explained below, the ABA opposes the Proposed Rule and respectfully urges that it be rescinded.

The ABA supports efforts to reduce homelessness and provide safe emergency shelter for at-risk populations. The 2012 Equal Access Rule and the 2016 amended Equal Access Rule both ensured equal access to HUD facilities, and the 2016 amended Equal Access Rule offered just treatment to transgender and gender nonconforming individuals seeking shelter, holding the promise of vastly improving their outcomes. The Proposed Rule jeopardizes their health and safety, ignores applicable federal law, violates their civil and human rights, and increases risks during the COVID-19 pandemic by denying access to a vulnerable population. The ABA has been committed to expanding civil rights protections in the fight against discrimination to include LGBTQ individuals in housing and all other areas. Federal law supports this position.

1. Federal Sex Discrimination Laws apply to Transgender Individuals

Transgender individuals are consistently protected against discrimination by Federal Law. In Grimm v. Gloucester County School Board, the U.S. Court of Appeals for the Fourth Circuit
recently ruled that prohibiting transgender individuals from using restrooms that align with their gender identity discriminates against them on the “basis of sex” under Title IX of U.S. Education Amendments of 1972 and denies them Equal Protection of the law under the Fourteenth Amendment to the Constitution. This is supported by the Supreme Court’s recent decision in *Bostock v. Clayton County* that held that transgender individuals are protected in the workplace “on the basis of sex” under Title VII of the Civil Rights Act of 1964.

Section 1557 of the Affordable Care Act covered transgender individuals until just weeks ago. As stated in the Summary of the Final Rule Implementing Section 1557 of the Affordable Care Act, “The law prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. Section 1557 builds on long-standing and familiar Federal civil rights laws: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975.” This also provided Equal Protection under the law to transgender individuals on the basis of sex, as supported by both the Supreme Court and U.S. Courts of Appeals.

The Violence Against Women Act (VAWA), in advancing the justice-system and community-based responses to domestic and sexual violence, prohibits discrimination against individuals not only based on gender identity, but also based on perceived gender identity.

In VAWA, if refusing shelter to a transgender individual was not considered sex discrimination, the transfer recommendation would not be a valid replacement because the rule does not guarantee a comparable service. According to VAWA,

> A comparable service is one that is designed to confer a substantially equal benefit ... in determining whether services are comparable include the following: the nature and quality of the services provided, the relative benefits of different therapeutic modalities or interventions, geographic location or other aspects of accessibility, the characteristics of the facilities where services are provided, and the characteristics of the individuals who provide the service. Services need not be identical to be comparable, but they must be of the same or similar quality and duration.

A transfer recommendation cannot be comparable to the current shelter because there is no requirement to ensure an available spot, or that the shelter will accept a transgender individual.

VAWA also states, “A recipient may not make a determination about services for one beneficiary [the transgender homeless individual] based on the complaints of another beneficiary [a cisgender woman] when those complaints are based on gender identity,” which is precisely the rationale used by HUD in the Proposed Rule.

The Americans With Disabilities Act (ADA) protects people with gender dysphoria, very common among transgender individuals, from discrimination. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in federally assisted programs or activities, which includes shelters affected by the Proposed Rule. As quoted from HUD.gov:
Section 504 states: No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program, service or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency... This means that Section 504 prohibits discrimination on the basis of disability in any program or activity that receives financial assistance from any federal agency, including HUD as well as in programs conducted by federal agencies including HUD.

Therefore, if a transgender individual is otherwise qualified to be admitted to a shelter and is refused service, and that person suffers gender dysphoria, the shelter is in violation of the ADA.

2. The Proposed Rule Violates Fundamental Civil and Human Rights

Transgender individuals have a human right to be free from discrimination, threats and violence based on their LGBTQ status, and adequate housing is a human right. Yet, many people do not have housing and must rely on shelters for safety and warmth. Providing that housing is a compelling government interest. Institutions that discriminate in any of their operations should not be eligible for federal financial assistance, as the Proposed Rule allows. Rather, regulations should remain in place that require nondiscrimination throughout an institution to benefit from federal funding.

Domestic violence is an epidemic and does not discriminate based on gender, sexual orientation or gender identity. In fact, a transgender individual is at higher risk of being a victim of domestic violence than a cisgender individual. 42% of respondents to the National Center for Transgender Equality’s 2015 U.S. Transgender Survey reported that they were the victims of physical intimate partner violence. According to the CDC, one in four women and one in seven men will experience physical intimate partner violence. Freedom from domestic, dating and sexual violence, and stalking and all other forms of gender-based violence is a fundamental human right, and regulations should not allow discrimination in housing of any kind that would negatively affect these victims. The Proposed Rule professes to protect these victims without acknowledging that the transgender individuals turned away are those victims. The ABA urges government agencies to adopt and enforce regulations to protect these victims and combat such discrimination.

The ABA believes that federal statutory protections for religious freedom do not authorize violation of nondiscrimination laws; religiously neutral laws of general applicability prohibiting discrimination based on sexual orientation or gender identity do not improperly burden the religious free exercise rights of those operating places of public accommodation. Providing housing for an at-risk population is a compelling government interest. Institutions that discriminate in any of their operations should not be eligible for federal financial assistance, as the Proposed Rule allows. Rather, regulations should remain in place that require nondiscrimination throughout an institution to benefit from federal funding.

3. The Proposed Rule Poses a Danger to Youth
A significant percentage of transgender homeless individuals are under the age of 21, and LGBTQ homeless youth comprise up to 40% of the homeless youth population in the United States. LGBTQ youth are disproportionately represented among homeless youth and are at higher risk of violence, discrimination, and poor health.

Studies have shown that homeless, LGBTQ youth are at a higher risk for victimization and suffer higher incidence of mental health problems and unsafe sexual behavior than non-LGBTQ homeless youth. They experience an average of 7.4 more acts of sexual violence toward them than their non-LGBTQ peers and are more likely to attempt suicide (62 percent) than their non-LGBTQ homeless peers (29 percent). Nearly 30% of LGBTQ homeless youth have been robbed as opposed to 21% of other youth. 28% of LGBTQ youth have been physically assaulted vs. 18% of other youth. And 22% of LGBTQ youth have been sexually assaulted or raped, more than three times the rate of other youth. LGBTQ homeless youth are at higher risk for sex trafficking, mental health problems and suicidality.

According to the National Alliance to End Homelessness Demographic Data Project on Gender Minorities, the Equal Access Rule, with 2016 amendments, is credited with providing safe, welcoming and supportive environments that help transgender and gender nonconforming individuals connect with necessary community supports and return to housing. One survey measuring gaps in service found that about one in five LGBTQ youth could not access short-term shelter, a figure twice that for non-LGBTQ homeless youth.

4. The Proposed Rule Does Not Protect the Interests of the Transgender Community

Transgender individuals face steep barriers to accessing shelter. The 2015 U.S. Transgender Survey found that 70% of respondents reported mistreatment in shelters due to their gender identity. The same survey also indicated that 44% of respondents left a shelter due to poor or unsafe conditions, despite not having alternative shelter. Furthermore, 1 in 10 respondents who had stayed in a shelter a year prior were evicted once staff discovered they were transgender. HUD’s current protections are needed so transgender individuals can safely access shelter consistent with their gender identity.

Members of the LGBTQ community, especially transgender people, have historically and disproportionately suffered from homelessness. Transgender women of color suffer at an even higher rate. According to the 2015 U.S. Transgender Survey, nearly 33% of transgender individuals experience homelessness at some point in their lives. That number increases to 50% for transgender people of color. A study by the Center for American Progress found that 21% of shelters refuse to serve transgender women. The Proposed Rule will only increase this number and further marginalize an already marginalized population.

While the Proposed Rule requires that a transgender person who is denied access to a shelter is provided a transfer recommendation, this does not require confirmation that the transfer will accept them. Nor is transportation provided, imposing a financial burden and a safety risk to the homeless individual. Theoretically, because private shelters can reject anyone, and the Proposed Rule allows shelters receiving federal funds to reject transgender people without securing a place
for them (only a transfer recommendation), a transgender individual might only be left to stay at an uninhabitable space. It is not appropriate to treat a transgender woman in a manner that a cisgender woman would not be.

The Proposed Rule will allow each shelter to decide a person’s gender subjectively, based on the individual’s features. Transgender individuals who are able to live “stealth” would be admitted. Those who could not “pass” would be sent away. Yet these individuals face higher risk of violence on the street. There is nothing to prevent shelter staff from turning away a cisgender woman, from a women’s shelter simply because she has physical characteristics that give the staff member a “good faith belief” that she was born male.

5. Introducing the Proposed Rule during the COVID 19 Pandemic Worsens a Bad Situation for a Vulnerable Population

The coronavirus has created a situation where people confined to their homes are experiencing incidences of abuse that are far higher than usual. To promote the Proposed Rule now is especially harmful, as more people than ever are experiencing homelessness and seeking shelter from domestic abuse. These victims are especially vulnerable and some of them are transgender. This regulation is discriminatory and flies in the face of the inclusivity mandated by VAWA and the Equal Access Rule; using violence against women to replace inclusive policies with discriminatory ones is disingenuous.

COVID 19 is a global pandemic of unprecedented scope and economic ramifications. Over 1 million people are filing for unemployment weekly. Even before the pandemic, transgender people suffered economic disparities and hardships. The 2015 United States Transgender Survey showed that transgender people were three times more likely to be unemployed. It also found that 19% of transgender people live in poverty and 13% of transgender people lack access to health insurance. Further reducing protections to a vulnerable community during a time of heightened economic, health, and housing insecurity would be devastating.

6. Federal Courts reject claims that Transgender-Inclusive policies violate the rights of others

The ABA agrees with the need to be mindful of the mental health and privacy interests of at-risk clients, and facilities should not be permitted to deny shelter to those most at-risk. If shelters are concerned with “particularly the special needs of program residents that are victims of domestic violence” along with “dating violence, sexual assault, and stalking,” transgender clients they turn away are some of the very people they need to protect. Like HUD admits, there is no data showing transgender people pose any risk to cisgender women. It is unconstitutional to infringe upon their rights because of the unjustified fears of others.

In Students & Parents for Privacy v. U.S. Dep't of Educ. the court rejected arguments that school policy protecting transgender students violated other students' rights under Title IX. In Doe v. Boyertown Area School District, the court rejected arguments that a school policy protecting transgender students violated other students' rights (2019). This year, the court rejected arguments that a school policy protecting transgender students violated other students' rights in
Parents for Privacy v. Barr. And almost 20 years ago, the Eighth Circuit Court of Appeals rejected arguments that a school policy protecting transgender employees with respect to restroom use violated another employee’s rights under Title VII in Cruzan v. Special Sch. Dist. No. 1.

The Proposed Rule will create a more dangerous situation for vulnerable transgender individuals, put disproportionately LGBTQ homeless youth at risk, contradict constitutional and federal legal principles, and further distress people during a pandemic that has already caused 200,000 deaths and record job and economic losses.

The ABA therefore urges that the Department withdraw the Proposed Rule. Thank you for considering our perspective on this important issue. If you have any questions regarding the ABA’s position, please contact the Thomas Susman in the ABA Governmental Affairs Office (Thomas.Susman@americanbar.org; 202-662-1765).

Sincerely,

Patricia Lee Refo
President