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September 22, 2020

Submitted via www.regulations.gov

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

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

Dear Office of General Counsel:

The Center for Elder Law & Justice (CELJ) submits these comments in response to the Department of Housing and Urban Development's (HUD) proposed rule change published in the Federal Register on July 24, 2020 (RIN 2506-AC53; HUD Docket No. FR-6152-P-01) entitled, "Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs." We strongly urge that this proposed rule change be withdrawn in its entirety.

CELJ is a civil legal services agency based in Buffalo, New York and serves nine Western New York counties. Since 1978, we have provided free comprehensive legal services to the community's older adults, people with disabilities, and the lower income community. Our mission to improve the quality of life of older adults, people with disabilities, disabled and low-income persons in Western New York. As a proud provider of culturally-competent legal services to older members of the LGBTQ community, we oppose this proposed rule in the interest of upholding the rights and wellbeing of our clients and the community.

(1) The proposed rule permits discrimination on the basis of sex which blatantly violates the Fair Housing Act's antidiscrimination provision.

Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) prohibits the refusal "to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or

otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”¹ The Fair Housing Act goes on to define a dwelling as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.”²

Contrary to the claims made in the proposed rule, several federal courts have held that this definition encompasses emergency homeless shelters, considering a number of factors including the following: general stay of one to 90 days, receipt of mail at the shelter, dispensation of medication, return to sleeping areas in the evening, and receipt of federal funds.³ Therefore, in crafting regulations concerning the operations of temporary homeless shelters, the Fair Housing Act applies.

As noted above, one of the key protections within the Fair Housing Act is a prohibition of discrimination based on sex.⁴ Federal Law has explicitly held that the definition of “sex,” with relevant protections, extends to discrimination based on sexual orientation or transgender status. Most recently, the Supreme Court in Bostock v. Clayton County, Georgia held that Title VII prohibits discrimination against employees for being homosexual or transgender, as “the employer must intentionally discriminate against individual men and women in part because of sex.”⁵ Recognizing the intertwined protections of Title VII and the Fair Housing Act, courts interpreting protections under the Fair Housing Act have historically looked to decisions under Title VII itself.⁶ Given this general tendency, the protections found in Bostock against discriminating on the bases of being transgender in Title VII are logically applied to the Fair Housing Act.

The proposed rule permits federally-funded shelters to, among other things, determine “whether to restrict access based on an individual’s sex for the purposes of determining admission.”⁷ Specifically, the rule permits said shelters to “decline to accommodate a person who identifies as female but who is a biological male.”⁸ On its face, this allows HUD-funded

¹ 42 U.S.C.A. § 3604(a).

² 42 U.S.C.A. § 3602(b).

³ See DeFiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413 (W.D. Pa. 2013); see also Hunter on behalf of A.H. v. District of Columbia, 64 F. Supp. 3d 158 (D.D.C. 2016) (focusing on the receipt of “consideration” for shelter, “whether it be from federal or other funding.”).

⁴ 42 U.S.C.A. § 3604(a).

⁵ 140 S. Ct. 1731, 1743 (2020).

⁶ See, e.g. Smith v. Avanti, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017) (“The Tenth Circuit looks to Title VII discrimination cases for guidance in addressing discrimination cases for guidance in addressing discrimination issues”), citing Mtn. Side Mobile Estates Partnership v. S’y of Hous. & Urban Dev., 56 F.3d 1243, 1251 n. 7 (10th Cir. 1995).

⁷ 85 Fed. Reg. 44816.

⁸ 85 Fed. Reg. 44812.

shelters to discriminate against transgender individuals on the basis of their sex. Thus, due to the fact that under the plain meaning of the Fair Housing Act the proposed rule permits discrimination on the basis of sex, it should be rescinded in its entirety.

(2) Any “good faith considerations” to discern biological sex inherently discriminate against transgender men and women.

The proposed rule requests recommendations on what types of “good faith considerations” shelter staff can rely upon to determine a person’s biological sex. What the rule fails to recognize is that a person’s biological sex is merely one part of their identity, and fails to account for gender identity and expression. While biological sex is determined by biological combinations of chromosomes and cells, gender identity can be described as a “person’s internal, personal sense of being a man or a woman.”⁹

For transgender people, their biological sex at birth does not align with their gender identity. Therefore, any attempts to screen individuals that focus exclusively on biological sex completely ignore the gender identity of any given individual, and thus present blatant discrimination against transgender people. Furthermore, not only are such “good faith considerations” inherently discriminatory, but they are bound to rely on unconscionable stereotypes regarding gender roles and gender identity.

Rather than enumerating a set list of considerations embedded in stereotypical and discriminatory decisions by shelter staff, these shelters should instead focus on providing culturally-competent trainings and policies to their intake workers. Armed with an understanding of concepts such as gender identity and expression, overall safety and efficiency of these shelters can be upheld. By accepting residents based upon their gender identity, this further allows such residents to be served in the most timely and non-discriminatory way possible.

(3) The delay imposed by any suggested transfer attempts places an undue burden on potential residents, and interferes with overall public health and safety.

The proposed rule permits shelter staff to turn away transgender men and women, if their biological sex does not match their gender identity. In the event of such a denial, the rule provides for the Continuum of Care (CoC) groups to enact a transfer to a more “suitable” facility. In doing so, the rule threatens to delay access to necessary and essential services, such as a shelter and nourishment, for those most in need of those services.

⁹ *What Does Transgender Mean?*, GLAAD, <https://www.glaad.org/transgender/transfaq> (last accessed 9/17/2020).

The National Center for Transgender Equality estimates that nearly one-third of transgender individuals experience homelessness at some point in their lives.¹⁰ One source estimates as many as 1.4 million adults who identify as transgender in the United States alone.¹¹ This can mean thousands of transgender individuals per year seeking services from homeless shelters. Given the sheer magnitude of the potential transfers that will be required if the proposed rule stands, already scarce resources will be diverted to finding other, “suitable” arrangements.

Furthermore, a denial of services and a forced transfer upon entering a given shelter stand to further traumatize and endanger transgender men and women. Without access to any form of shelter or support, many transgender people will be forced to live in unsafe conditions, harming their health and wellbeing. Without such housing options, transgender people will be far more likely to suffer adverse health outcomes requiring emergency medical care and services. Not only is this harmful to the individual person exhibiting these acute medical needs, but it is also burdensome to the already strained public health system.

Moving forward with this proposed rule change in the midst of a global pandemic is particularly egregious and cruel. By limiting access to safe and healthy shelters for transgender persons, HUD’s rulemaking will create additional barriers for individuals to safely physically distance and self-isolate. This not only harms those individuals being discriminated against, but also poses public health threats on a wider scale.

In light of the foregoing, we urge HUD to immediately withdraw its current rule change proposal and dedicate its efforts to mitigating the current effects that COVID-19 has had on housing stability for not only the LGBTQ+ community but for everyone. The country is in the midst of an economic, health, and housing crisis. The administration should be not devoting scarce agency resources to facilitating discrimination and perpetuating stereotypes.

Thank you for the opportunity to submit comments on the proposed rulemaking.

Sincerely,

A handwritten signature in cursive script that reads "Christopher J. Phillips".

Christopher J. Phillips, Esq.
Staff Attorney

¹⁰ *The Report of the 2015 U.S. Transgender Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY 1, 13, <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

¹¹ *How Many Adults Identify as Transgender in the United States*, UCLA SCHOOL OF LAW, WILLIAMS INSTITUTE (June 2016), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/>.