

September 22, 2020

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

Re: Docket No. FR-6152-P-01, Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs



1 Whitehall Street, 3rd Fl.
New York NY 10004
nyclu.org

Donna Lieberman
Executive Director

Robin Willner
President

Dear Mr. Hughes,

The New York Civil Liberties Union, a not-for-profit, nonpartisan organization with over 190,000 members and supporters and the New York state affiliate of the American Civil Liberties Union, submits these comments in strong opposition to the Department of Housing and Urban Development's proposed rule entitled Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs (Docket No. FR-6152-P-01). The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution through an integrated program of litigation, legislative advocacy, public education, and community organizing. This includes the principles of equality and personal autonomy implicated by the proposed rule that is the subject of these comments.

Introduction

Affordable housing is the most humane and effective response to homelessness, but federal housing programs have been underfunded for decades, leaving about one-in-four eligible households without access to a subsidized affordable home.¹ Because of this policy failure, people who cannot afford market rate rent must often rely on shelters as their only source of the critical resources an affordable home would provide, such as protection from the elements, hygiene, and water. Transgender individuals experience multiple forms of oppression, putting them at increased risk of homelessness. By eviscerating the existing rule prohibiting shelters from discriminating based on gender identity, the proposed rule will deprive transgender individuals of access to resources we all need to stay alive.

¹ Douglas Rice & Barbara Sard, *Decade of Neglect Has Weakened Federal Low-Income Housing Programs*, Center on Budget and Policy Priorities (Feb. 24, 2009), <https://www.cbpp.org/sites/default/files/atoms/files/2-24-09hou.pdf>.



This change runs counter to the very purpose of HUD, which is to maximize access to housing and “to ensure that *every* resident of the United States has access to decent shelter or assistance in avoiding homelessness” and “to improve housing opportunities for all residents of the United States, particularly members of disadvantaged minorities, on a nondiscriminatory basis.”² Particularly during COVID-19³ and a major economic downturn, the Department’s priorities should focus on keeping people from losing housing they already have, helping people without housing to obtain it, and ensuring that everyone at least has access to shelter that is as safe and sanitary as possible for as long as they need it. Because transgender, gender nonconforming, non-binary, and intersex people are particularly likely to experience homelessness, and also particularly likely to experience discrimination and violence in homeless shelters and on the streets, the Department should prioritize expanding housing opportunities for transgender, gender nonconforming, non-binary, and intersex people.

Instead, the Department’s proposal sends a message of gratuitous cruelty. It is plainly drafted to incite discrimination against transgender, gender nonconforming, non-binary, and intersex individuals and will also provoke discrimination against anyone whose appearance does not conform to gender stereotypes, whether or not they are transgender. Moreover, as New York’s experience illustrates, this rule does not address a need nor respond to a problem, and it comes at a time when the need for shelter is more acute. It is unpracticable and will simply sow confusion at a time when individuals experiencing homelessness and social service providers can least afford it.

The Department’s Proposed Rule Discriminates Against Transgender, Gender Nonconforming, Non-binary, and Intersex Individuals, as well as Individuals Who Do Not Conform to Gender Stereotypes

While we are grateful that the proposed rule leaves intact our more protective state law, we are alarmed by HUD’s proposal. It evinces a callous disregard not only for transgender individuals experiencing homelessness, but also for any person experiencing homelessness whose appearance does not conform to conventional gender norms.

² 42 U.S.C. 12702 (emphasis added).

³ Because congregate shelters can spread COVID-19, the CDC has urged that individual housing accommodations for people experiencing homelessness during the pandemic. See *Coronavirus Disease 2019 (COVID-19): Considerations for encampments*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html#facility-encampments> (last updated Aug. 6, 2020). To the extent that congregate shelters are used, the CDC provides guidelines to make them safer. *Interim Guidance for Homeless Service Providers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/plan-prepare-respond.html> (last updated Aug. 5, 2020).



The proposed rule purports to allow women’s shelters to turn away transgender women and non-binary people who are homeless and men’s shelters to turn away transgender men and non-binary people who are homeless. This requirement effectively requires transgender people to act as if they were not transgender, compromising their health, safety, and dignity, as a condition of shelter. The Supreme Court has made it clear that transgender people need not try to pretend to be cisgender – that is, to abide by expectations for those of their assigned sex at birth – to be entitled to protection from discrimination.⁴ The Supreme Court has also acknowledged that placing transgender women in men’s congregate facilities can put them at obvious risk of rape.⁵

The questions the Department asks about its proposal further evince the intent of the rule: to give shelters license to discriminate against transgender people. The Department asks whether it “should maintain the anti-discrimination protections[.]”⁶ as if begging for an excuse to eliminate anti-discrimination protections all together. It asks whether it is “unduly burdensome” to require a shelter that turns away an individual based on their actual or perceived gender identity to make a transfer recommendation to that individual.⁷ The proposed rule, as drafted, does not require objecting shelters to provide transportation to another shelter, but merely requires them to provide recommendations for places where an individual could seek shelter.⁸ It is difficult to read this question without wondering how the simple act of making a recommendation could be burdensome – the question suggests that the Department believes that transgender, gender nonconforming, non-binary, and intersex individuals are less deserving of shelter than cisgender people.

The individuals who will bear the brunt of this policy are those whose appearances do not align with societal expectations, whether or not they are transgender. The rule encourages shelters to admit individuals who “identify themselves as the sex that is served by the shelter . . . unless the shelter has a good faith basis to doubt the consistency of the sex asserted with the sex served by the shelter.”⁹ The Department proposes any number of actions a shelter could take to supposedly confirm an individual’s sex – mercifully, stopping short of a strip search.¹⁰

⁴ See *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020).

⁵ See *Farmer v. Brennan*, 511 U.S. 825, 848 (1994).

⁶ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811, 44817 (proposed July 24, 2020) (to be codified at 24 C.F.R. pts. 5, 576).

⁷ *Id.*

⁸ *Id.* at 44815.

⁹ *Id.*

¹⁰ *Id.* at 44816 (“Evidence requested must not be unduly intrusive of privacy, such as private physical anatomical evidence.”).



Still, the methods the Department suggests for ascertaining “sex” remain offensive, arbitrary, and designed to encourage discrimination. The proposed rule suggests, “a combination of factors 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.”¹¹ In other words, although the Department does not offer a definition of “biological sex,” the proposed rule makes clear that by “biological sex,” it narrowly means the physical appearance of a person, based on sex stereotypes and judged by the shelter. The selection of these characteristics appears designed to prevent transgender women and many non-binary people from gaining access to women’s shelters and to prevent transgender men and many non-binary people from gaining access to men’s shelters. But these criteria would also prevent many cisgender people from gaining access to appropriate shelters as well, especially cisgender people who are intersex, elderly, people of color, or chronically ill.¹²

For example, three percent of women are taller than the average man, and six percent of men are shorter than the average woman,¹³ with Asian and Hispanic men tending, on average, to be shorter than non-Hispanic white and Black men.¹⁴ Older men tend, on average, to be shorter than younger men.¹⁵

Similarly, cisgender women with polycystic ovary syndrome, Cushing syndrome, congenital adrenal hyperplasia, and certain tumors can develop hirsutism (unusual amounts of facial and body hair for cisgender women). Hirsutism also occurs commonly during menopause, and some cisgender women develop hirsutism without any identifiable cause.¹⁶ Hirsutism

¹¹ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44816.

¹² See, e.g., *De Veloz v. Miami-Dade Cty.*, 756 F. App’x 869, 872 (11th Cir. 2018), cert. denied sub nom. *Rodriguez-Garcia v. de Veloz*, 140 S. Ct. 127 (2019) (cisgender woman past menopause classified as male and placed in men’s jail because, like many transgender women, she took prescription estrogen); Hannah Eko, *As A Black Woman, I’m Tired Of Having To Prove My Womanhood*, BuzzFeed (Feb. 27, 2018), <https://www.buzzfeednews.com/article/hannaheko/aint-i-a-woman> (describing stereotyped misperceptions of Black women as nonfeminine, emasculating, or male, with heightened vulnerability among Black women who are tall, dark-skinned, fat, butch, or trans).

¹³ Londa Sciebinger et al., *Analyzing Sex*, Gendered Innovations in Science, Health & Medicine, Engineering, and Environment, <https://genderedinnovations.stanford.edu/methods/sex.html> (last visited Aug. 24, 2020).

¹⁴ Cheryl D. Fryar et al., *Mean Body Weight, Height, Waist Circumference, and Body Mass Index Among Adults: United States, 1999-2000 Through 2015-2016*, 122 Nat’l Health Statistics Rep. 1, 7 (2018).

¹⁵ Max Roser et al., *Human Height*, Our World in Data, <https://ourworldindata.org/human-height> (last updated May 2019).

¹⁶ Mayo Clinic, *Hirsutism: Causes* (Dec. 14, 2019), <https://www.mayoclinic.org/diseases-conditions/hirsutism/symptoms-causes/syc-20354935>.

appears to be somewhat more common among cisgender Latinx, South Asian, Middle Eastern, and Black women compared to women of other races.¹⁷

While the laryngeal prominence (“Adam’s apple”) is on average larger in those who go through a typical male puberty, people of all sexes have a laryngeal prominence.¹⁸ Some cisgender men do not have a particularly large or noticeable laryngeal prominence, and some cisgender women do, especially if they are intersex.¹⁹ Asian people tend to have somewhat smaller laryngeal prominences than European people do,²⁰ and when scientists carefully measured thyroid cartilage across seventeen dimensions in an attempt to determine sex, they were incorrect 8% of the time.²¹ Untrained shelter staff who are just relying on visual estimates and stereotypes are sure to make more mistakes.



In addition to transgender individuals, the people who will be turned away from shelter under this proposed rules include taller cisgender women, shorter cisgender men, cisgender women with hirsutism, and cisgender men and women whom shelter staff determine – based on their own subjective criteria and stereotypes – to be insufficiently “male” or “female” – as already happens with gender bathroom policing. And this remains true with regard to any other physical attribute associated with sex that the Department might choose instead of or in addition to height, facial hair, and Adam’s apple, such as breast size, voice pitch, or shoulder breadth. The Proposed Rule’s provision that shelter providers may request documentary evidence would not cure this problem, since, as HUD acknowledges,²² many low-income U.S. residents and people experiencing homelessness lack identification documents.²³ The rule

¹⁷ L. Afifi, et al., *Association of ethnicity, Fitzpatrick skin type, and hirsutism: A retrospective cross-sectional study of women with polycystic ovarian syndrome*, 3 *Int’l J. Women’s Dermatology* 37 (2017).

¹⁸ Eric Hunter et al., *Gender differences affecting vocal health of women in vocally demanding careers*, 36 *Logoped Phoniatr Vocol* 129 (2011); *Everything You Should Know About the Adam’s Apple*, Healthline, <https://www.healthline.com/health/adams-apple#men-vs.-women> (last updated Jan. 10, 2018).

¹⁹ Ulrika Nygren et. al, *Voice dissatisfaction in individuals with a disorder of sex development*, 91 *Clinical Endocrinology* 220 (2019).

²⁰ Necati Enver, et al., *A morphometric analysis of laryngeal anatomy: A cadaveric study*, 28 *Turkish J Ear Nose Throat* 76 (2018).

²¹ Subramanam Subil, et al., *Sex Determination from Anthropological Measurements of Thyroid Cartilage in the Population of Punjab*, 36 *J. Indian Acad. Forensic Med.* 367 (2014).

²² *Id.*

²³ See Brennan Ctr. for Justice, *Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification*, 3 (Nov. 2006),

https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (“At least 15 percent of voting-age American citizens earning less than \$35,000 per year do not have a valid government-issued photo ID.”); Nat’l Law Ctr. on Homelessness & Poverty, *Photo Identification Barriers Faced by Homeless Persons: The Impact of September 11*, 13 (Apr. 2004) (“A total of 10.7% of clients lacked photo identification.”).



sends the message that the Department is so committed to ensuring that transgender individuals are excluded from shelter that it is willing to exclude cisgender people whose appearances do not conform to society's expectations as well.

The Department suggests that because a women's shelter that rejects transgender women would be required to admit transgender men, and because a women's shelter would be required to offer a transfer recommendation to the transgender women it turns away, the shelter's action would not constitute discrimination. That is wrong.

First, discrimination cannot be cured by telling the person who was discriminated against that they can go somewhere else that may not discriminate against them. Nor can refusing services to one person for a discriminatory reason be made right by offering services to another person.²⁴

Second, using the procedure the Department has laid out, it is likely that a women's shelter committed to turning away transgender women would also turn away transgender men. Consider this example. A shelter has decided it wishes to serve only people it considers to be "biologically female," and determines that it will use the criteria the Department has indicated will be acceptable to make this determination. One transgender woman and one transgender man, both of whom take hormones, arrive at the shelter.²⁵ The transgender woman arrives and says she is a woman. Shelter staff decide that she is probably not a "real" woman under their definition, because she has obvious facial hair and a deep voice, and her height is 5'10". They tell her to leave. Then the transgender man arrives at the shelter and says he is a man but was assigned female at birth. They decide that he is probably not "really" a woman either, because he also has obvious facial hair and a deep voice, and his height is also 5'10".

New York Prohibits Discrimination Against Transgender People in Shelters, and the Harms Enumerated in the Proposed Rule Have Not Materialized

New York law prohibits shelters from discriminating against transgender people, and that protection is not abrogated by the Department's proposed rule. Shelters in New York state must continue granting all residents and applicants equal access to programs and facilities consistent with their gender identities.

²⁴ *Bostock*, 140 S. Ct. at 1741.

²⁵ Hormones cause facial hair growth and a deeper voice in transgender men, but do not stop facial hair growth or lead to a higher voice in transgender women. As a basic form of necessary primary care, even some transgender people who are homeless may be able to obtain hormone treatment. But it is vanishingly rare for homeless people to be able to afford electrolysis, laser hair removal, or voice coaching, and it is often difficult for homeless people to even maintain basic hygiene, especially if they are not staying in a shelter.



New York City has protected individuals from discrimination on the basis of gender identity since 2002.²⁶ Since 2015, New York state has had regulations in place confirming that discrimination based on gender identity and expression is a form of sex discrimination and that discrimination based on gender dysphoria is a form of disability discrimination.²⁷ And, in January 2019, New York enacted the Gender Expression Non-Discrimination Act (GENDA), which added explicit protections for gender identity and expression to New York’s Human Rights Law; this includes protections against discrimination in housing accommodations.²⁸

In the years that the city and state have prohibited shelters from discriminating against transgender people, none of the harms articulated by the proposed rule have come to fruition. At the same time, these unequivocal city and state protections have proved necessary to address the harms transgender, gender nonconforming, non-binary, and intersex people so frequently experience navigating the shelter system.

Transgender Women Have Not and Do Not Pose a Threat to Cisgender Women

The Department cites concerns over the “mental health and privacy” of cisgender women as justification for the proposed rule.²⁹ In particular, the Department claims to be concerned with the well-being of survivors of domestic violence, dating violence, sexual assault, and stalking.³⁰ The Department concludes that women who have been victimized by men should not be forced to sleep alongside men.³¹ This is a red herring argument, because transgender women are women.

First, the Department can produce no evidence that housing transgender people according to their gender identities increases safety risks for cisgender women in women-only shelters, because none exists. As research has demonstrated many times over, there are not wide-scale instances of transgender women harming cisgender women in women-only spaces.³² The proposed rule seeks to fix a problem that the Department itself can adduce no evidence of.³³

²⁶ N.Y.C. Admin. Code § 8-102(23) (2002).

²⁷ N.Y. Comp. Codes R. & Regs. tit. 9 § 466.13 (N.Y.C.R.R.).

²⁸ S.1047/A.747, 2019-2020 Reg. Sess. (N.Y. 2019).

²⁹ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44814.

³⁰ *Id.*

³¹ *Id.* at 44815.

³² Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, Media Matters for America (Mar. 19, 2014, 4:06 PM), <https://www.mediamatters.org/sexual-harassment-sexual-assault/15-experts-debunk-right-wing-transgender-bathroom-myth>.

³³ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44815.



Second, the Department similarly can produce no evidence that cisgender men are posing as transgender women to enter women’s shelters, because none exists. The proposed rule states: “While HUD is not aware of data suggesting that transgender individuals pose an inherent risk to biological women, there is anecdotal evidence that some women may fear that non-transgender, biological men may exploit the process of self-identification under the current rule in order to gain access to women’s shelters.”³⁴ In the absence of actual data, the Department relies on anecdotal evidence of an unnamed number of women’s fears of cisgender men.³⁵ Again, the proposed rule seeks to fix a problem that the Department has no credible evidence even exists.

Third, the Department’s example of a cisgender man surreptitiously sneaking into a women’s shelter as justification for amending the Equal Access Rule ignores that admitting cisgender men to women’s shelters is not required by the 2016 Equal Access Rule. The Equal Access Rule does not require that women-only shelters admit men; rather, it requires that women-only shelters admit transgender women. The concern that “non-transgender, biological men” could enter women-only shelters cannot be used to justify rolling back the 2016 Equal Access Rule, as such a scenario is not mandated.³⁶

Fourth, the Department’s example of a man assaulting women in women’s shelters ignores that assaulting another person in a shelter remains against the law in every single state. Nondiscrimination laws protecting transgender people have not weakened public safety or existing criminal laws, nor have they undermined their enforcement. The Department’s example also erases the fact that violence sometimes occurs between cisgender women.

Finally, nondiscrimination laws mandating transgender inclusion have not led to an increase in public safety issues. Nondiscrimination laws protecting transgender people have existed for decades, and no jurisdiction with housing laws mandating the inclusion of transgender people based on their self-identified gender has marked a rise in sexual violence or other public safety issues. Research conducted on this issue bears out that there is no relationship between mandating transgender inclusion in public accommodations and reports of crime in public restrooms and other gender-segregated facilities.³⁷

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See id.*

³⁷ Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 Sex Res. & Soc. Policy 70 (2019); Sarah McBride et al., *We the People: Why Congress and U.S. States Must Pass Comprehensive LGBT Nondiscrimination Protections*, Center for American Progress, 18 (Dec. 10, 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/LGBT-WeThePeople-report-12.10.14.pdf>.



Since New York promulgated its 2015 rule, more transgender people have moved into homeless shelters, and the harms imagined by Department have not come to fruition. New York’s sheltered homeless population has increased by nearly 5% while its homeless population has increased by only 4%.³⁸ And, since GENDA was enacted in early 2019, the unsheltered population in New York state declined by nearly 6% from the prior year.³⁹ Meanwhile, New York’s State Index on Youth Homelessness score has improved from 59 to 72.⁴⁰

Allowing federally-funded shelters to turn transgender people away pushes a vulnerable population onto the street, exposing them to violence and criminalization. Forcing transgender women into men’s shelters will expose them to harassment and assault – the very harms that the proposed rule claims to guard against.

The efforts to ban transgender people from shelter discounts that all of us, including transgender people, are acutely concerned about safety and privacy. Transgender people already experience unconscionably high rates of harassment and assault – and forcing them out of facilities consistent with their gender identities makes them even more vulnerable to violence.

Religious Shelters Are Not Negatively Impacted by Admitting Transgender People

The Department claims that the 2016 Equal Access Rule imposed a burden on shelters with deeply held religious beliefs.⁴¹ Religious organizations operate at least 30% of emergency shelter beds for families and single adults in the country.⁴²

Despite the high numbers of faith-based shelters, the Department can only cite to one example of a religious organization protesting the rule and fails to articulate any tangible harm experienced by the shelter.⁴³ Religious shelters

³⁸ *State of Homelessness: State and Continuum of Care Dashboards*, Nat’l Alliance to End Homelessness, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-dashboards/?State=New%20York> (last visited Sept. 17, 2020).

³⁹ *Id.*

⁴⁰ True Colors United, which addresses youth homelessness and focuses in particular on LGBTQ youth, and the National Law Center on Homelessness and Poverty release the State Index on Youth Homelessness to provide “a snapshot of some of the legal, systemic, and environmental barriers and complex challenges youth experiencing homelessness face.” *2019 State Index on Youth Homelessness*, True Colors United, <https://truecolorsunited.org/index/> (last visited Sept. 17, 2020).

⁴¹ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44814.

⁴² Nat’l All. to End Homelessness, *Faith-Based Organizations: Fundamental Partners in Ending Homelessness*, 1 (May 4, 2017).

⁴³ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44814.



required to provide shelter and services to transgender individuals have not experienced backlash, lost residents, or shut down. To the extent there is any religious objection, moreover, the government’s interest in ensuring nondiscriminatory access to shelter more than justifies the continuation of the current rule.

The Department’s Reference to New York City’s Law to Justify Its Rule is Misplaced

The Department suggests that its rule is in part responsive to state and local nondiscrimination laws that it claims are inconsistent with the 2016 Equal Access Rule and cites New York City’s code for this proposition.⁴⁴ This assertion is baffling. In making this claim, the Department first emphasizes that “New York City’s code defines gender to encompass perceived gender identity,”⁴⁵ while the 2016 Equal Access Rule “define[s] gender identity to ignore an individual’s perceived gender identity.”⁴⁶ This is a distinction without a difference, because HUD was clear in promulgating the 2016 Equal Access Rule that, like New York City’s law, it prohibits discrimination on the basis of perceived gender identity, as well as gender identity.⁴⁷

The Department’s reliance on New York City’s exception for “shelters for the homeless where such distinctions are intended to recognize generally accepted values of personal modesty and privacy or to protect the health, safety or welfare of families with children”⁴⁸ is similarly unavailing. That exception only applies to those portions of the City Human Rights Law “which prohibit *distinctions* on the basis of gender,” thus confirming the single-sex facilities are not prohibited.⁴⁹ It does *not* create an exception allowing shelters to otherwise engage in prohibited discrimination on the basis of gender – including the type of discrimination contemplated by the Department’s proposed rule – and, in fact, the same New York City guidance the Department cites makes explicit that transgender, gender

⁴⁴ *Id.* at 44813.

⁴⁵ *Id.* (citing N.Y.C. Admin. Code § 8-102).

⁴⁶ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 4413.

⁴⁷ See Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. at 64770 (“In the final rule, the definition is amended to read as follows: Perceived gender identity means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, or other gender-related characteristics, or sex assigned to the individual at birth or identified in documents. Because the definition of perceived gender identity included in the proposed rule and adopted by this rule includes gender expression, § 5.105(a)(2) of the rule addresses the commenter’s concern that HUD-assisted or -insured housing be made available without regard to an individual’s gender expression.”).

⁴⁸ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 4413 (citing N.Y.C. Admin. Code § 8-107(5)(k)).

⁴⁹ N.Y.C. Admin. Code § 8-107(5)(k) (emphasis added).

nonconforming, non-binary, and intersex individuals can choose “placement in a shelter type (men’s or women’s) that feels safest for them based on their gender identity.”⁵⁰

Rates of Homelessness Among Transgender People and Cisgender Women are Increasing

While the Department’s proposed rule fails to address any identifiable problem, it does threaten to exacerbate a very real crisis: the rates of homelessness in the United States have reached epidemic proportions. According to HUD’s Point-in-Time data, approximately 567,715 people in the United States experienced homelessness on a single night in January 2019.⁵¹ This represents a rate of approximately 17 people experiencing homelessness per every 10,000 people in the general population.⁵² Compared to the previous year, homelessness increased by 3% in the 2019 Point-in-Time study, marking the third consecutive year that the number of homeless people has increased.⁵³ COVID-19 and related unemployment have escalated – and will continue to escalate – the rates of homelessness across the country.



New York is no exception to this nationwide trend. Between 2007 and 2019, New York’s population experiencing homelessness increased by 47%,⁵⁴ and, as one of the states that was hardest hit by COVID-19 and related increases in unemployment, we, unfortunately, expect the number of homeless New Yorkers to increase in 2020. Transgender New Yorkers, who already disproportionately live in poverty, are especially likely to be impacted.⁵⁵

Rates of Homelessness Among Transgender People

Because of a cycle of discrimination and poverty, transgender people are more likely than their cisgender peers to experience homelessness and more likely

⁵⁰ N.Y.C. Department of Homeless Services, Office of Police, Procedures, and Training, DHS-PB-2019-015 at 9 (July 15, 2015); *see also id.* at 8 (“Drop-in centers accept clients of all genders. However, within a facility, chairs may be separated by gender (“male” and “female”). Clients may choose to sit in the section in which they feel most comfortable. Clients may choose to switch sections at any time . . . Most safe havens are gender-specific. Clients may choose the area which best fits their gender identity.”).

⁵¹ Meghan Henry et al., U.S Dept. of Hous. & Urban Dev.: Office of Cmty. Planning & Dev, *The 2019 Annual Homeless Assessment Rep. (AHAR) to Congr.*, 8 (Jan. 2020).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *State of Homelessness: State and Continuum of Care Dashboards*, Nat’l Alliance to End Homelessness, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-dashboards/?State=New%20York> (last visited Sept. 17, 2020).

⁵⁵ Soon Kyu Choi, M.V. Lee Badgett, & Bianca D.M. Wilson, *State Profiles of LGBT Poverty in the United States*, Williams Institute, UCLA Law 21 (Dec. 2019) (34% of transgender New Yorkers live in poverty in comparison to 17% of cisgender women and 16% of cisgender men).



to be unsheltered.⁵⁶ The 2015 U.S. Transgender Survey conducted by the National Center for Transgender Equality found that 30% of respondents had experienced homelessness at some point in their lifetimes and that 12% were homeless within the one year prior to the survey.⁵⁷ In New York state, 27% of respondents had experienced homelessness at some point in their lives, and 11% experienced homelessness in the year preceding the survey.⁵⁸

A comprehensive survey of 7,000 transgender adults conducted by the National Alliance to End Homelessness offered insight into a few of the causes of high rates of transgender homelessness: nationwide, 19% of transgender adults reported having been refused a house or apartment, and 11% of transgender adults reported having been evicted because of their gender identity and/or expression.⁵⁹ In New York, the numbers are similar with 21% of the National Center for Transgender Equality's respondents saying that, in the year prior to the study, they experienced some form of housing discrimination, such as being evicted or denied an apartment, because they were transgender.⁶⁰

Among transgender people, transgender women of color are especially likely to experience homelessness in their lifetimes, including Indigenous (59%), Black (51%), multiracial (51%), and Middle Eastern (49%) women.⁶¹ Transgender people with disabilities – particularly mental disabilities like post-traumatic stress disorder⁶² and chronic illnesses like HIV⁶³ – are also especially likely to be homeless.

Transgender youth are also at a disproportionate risk of homelessness. Studies consistently find that between 20% and 45% of homeless youth identify as LGBTQ, at least 2 to 4 times more than their prevalence in the

⁵⁶ Nat'l All. to End Homelessness, *Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us*, 4 (July 2020).

⁵⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equal., 13 (2016).

⁵⁸ *2015 U.S. Transgender Survey New York State Report*, Nat'l Ctr. for Transgender Equal., 2 (October 2017).

⁵⁹ Nat'l All. to End Homelessness, *Supporting Homeless Transgender and Gender Nonconforming Youth*, (Sept. 19, 2012), <https://endhomelessness.org/resource/supporting-homeless-transgender-and-gender-nonconforming-youth/>.

⁶⁰ *2015 U.S. Transgender Survey New York State Report*, Nat'l Ctr. for Transgender Equal., 2 (October 2017).

⁶¹ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equal., 1, 9 (2016).

⁶² Brodie Fraser et al., *LGBTIQ+ Homelessness: A Review of the Literature*, 16 *Int'l J. Env'tl. Res. Pub. Health* 2677 (2019)

⁶³ *Id.*



general population.⁶⁴ Among young adults aged 18-25, LGBTQ people have a 2.2 times greater risk of homelessness than non-LGBTQ people.⁶⁵

Even without the proposed rule, transgender people who experience homelessness have higher rates of being unsheltered than their cisgender peers. Studies show that transgender people have difficulty accessing shelter, at least in part because of their gender identities. 63% of transgender people experiencing homelessness are unsheltered, compared to 49% of cisgender people experiencing homelessness.⁶⁶ Because of the economic downturn and inadequate shelter resources, these numbers have increased drastically in the last few years. Since 2016, the number of adult transgender people experiencing unsheltered homelessness has increased 113%,⁶⁷ and the population of gender non-conforming individuals experiencing homelessness has increased by 80% from 2017 to 2019.⁶⁸ COVID-19 has only worsened the situation. According to recent data, 22% of LGBTQ people of color in the U.S. have become unemployed since the onset of COVID-19, compared to 13% of people in the U.S. overall.

Shelter options are already inadequate for homeless people across the board. Almost half of cisgender adults experiencing homelessness lack shelter nationally. Those numbers are even worse for transgender and gender nonconforming people: 63% of houseless transgender adults are unsheltered, and 80% of houseless gender nonconforming adults are unsheltered. The Proposed Rule would shrink the shelter options available to a group of people already unsheltered at disproportionately high rates.

Transgender people who are homeless face extremely high levels of harassment and violence on the street. Access to a welcoming shelter that does not discriminate can alleviate those harms.

Erecting barriers to shelter for this already vulnerable population, as the Department's rule proposes to do, will only amplify these harms.

The Department's Proposed Rule Is Impracticable and Will Engender Confusion

In the face of these data, the Department proposes two methods for addressing the undisputed homelessness crisis. First, it requires shelters that exclude individuals based on their sex assigned at birth "to provide a transfer

⁶⁴ Adam P. Romero et al., *LGBT People and Housing Affordability, Discrimination, and Homelessness*, UCLA School of Law Williams Inst., 3 (April 2020).

⁶⁵ *Id.*

⁶⁶ Nat'l All. to End Homelessness, *Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us*, 1 (July 2020).

⁶⁷ *Id.*

⁶⁸ Nat'l All. to End Homelessness, *Trans and Gender Non-Conforming Homelessness*, <https://endhomelessness.org/trans-and-gender-non-conforming-homelessness> (last visited Aug. 7, 2020).



recommendation to an alternate shelter or location.” As discussed above, the Department’s questions about the proposed rule indicate that it may not be committed to this requirement.⁶⁹ Second, it suggests that the “key test” for whether a shelter’s policy conforms to the law “is whether if another shelter adopted a ‘mirror’ policy (that is, the same policy but directed at the other sex), any person not accommodated at one shelter would be accommodated at the other shelter.”⁷⁰ In addition to this suggestion’s failure to ameliorate the rule’s discriminatory intent or impact,⁷¹ the Department fails to grapple with whether shelters with “mirror” policies in fact exist. In a community where the men’s shelter houses individuals in accordance with their gender identity and the women’s shelter houses individuals according to their sex assigned at birth, where is a transgender woman to go? How far away can a shelter with a “mirror” policy be from the initial shelter? Given that the Department is not requiring shelters to provide transportation for the individuals to whom it offers a transfer recommendation, how far does the Department expect a person experiencing homelessness to travel to seek shelter? Even if there are other shelters that do not discriminate within a reasonable distance, their beds may be full.

The Department also suggests moving from a clear, uniform rule requiring shelters nationwide to house individuals based on their gender identities⁷² to a rule permitting shelters to each make their own housing policy in accordance with state and local laws. New York is one of eighteen states, along with the District of Columbia and Puerto Rico, that explicitly prohibits homeless shelters from discriminating based on gender identity, and almost every state prohibits sex discrimination in housing.⁷³ Prohibitions on sex discrimination should be interpreted as prohibiting discrimination against people for being transgender, non-binary, gender nonconforming, or intersex.⁷⁴ More than 200 cities and counties have local prohibitions against gender identity discrimination in the shelter system.⁷⁵ The Department’s proposed rule threatens to sow confusion as overtaxed and under-resourced

⁶⁹ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44811. See p. 3, *supra*.

⁷⁰ *Id.* at 44815.

⁷¹ See p. 6, *supra*.

⁷² Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44812.

⁷³ Nat’l Ctr. For Transgender Equal., *Know Your Rights: Housing and Homeless Shelters*, <https://transequality.org/know-your-rights/housing-and-homeless-shelters> (last visited Aug. 24, 2020) (California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Puerto Rico, Rhode Island, Vermont, and Washington all prohibit homeless shelters from discriminating based on gender identity).

⁷⁴ See *Bostock*, 140 S. Ct. at 1741.

⁷⁵ Nat’l Ctr. For Transgender Equal., *Know Your Rights: Housing and Homeless Shelters*, <https://transequality.org/know-your-rights/housing-and-homeless-shelters> (last visited Aug. 24, 2020).

social service organizations navigate their obligations under intersecting laws. At worst, shelters may misinterpret the rule's requirements and believe that it gives them permission to discriminate against transgender, gender nonconforming, non-binary, and intersex individuals despite more protective state and local laws. In order to provide clarity and avoid this outcome, if the Department elects to go ahead with finalizing the rule, it must explain how it interacts with every applicable state and local nondiscrimination law.

Rather Than Promulgate Exclusionary Rules, the Department Should Address the Discrimination Transgender Individuals Continue to Face in the U.S. Shelter System



Despite the 2016 Equal Access Rule, too many homeless shelters still fail to meet the needs of transgender populations, and LGBTQ people still fear discrimination in shelters. A survey conducted by the National Alliance to End Homelessness found that, of the transgender adults seeking access to homeless shelters, 55% were harassed by shelter staff or residents, 22% were sexually assaulted by shelter staff or residents, and 29% were turned away from the shelter.⁷⁶

In contrast to the Department's proposed rule, the 2016 Equal Access Rule responded to an actual problem: in the 2015 U.S. Transgender Survey, 25% of respondents said they had to dress or present as the wrong gender in order to feel safe in the shelter, and 14% indicated that shelter staff forced them to dress or present as the wrong gender.⁷⁷ Ultimately, 44% of respondents decided to leave the shelter due to poor treatment or unsafe conditions, even though they had no other place to go.⁷⁸

GENDA and New York's 2015 regulations also responded to a problem: according to the National Center for Transgender Equality's 2015 New York State Report, 30% of respondents who experienced homelessness in the year preceding the survey avoided shelter "because they feared being mistreated as a transgender person."⁷⁹

There is still much work that the Department could do to ensure transgender, gender nonconforming, non-binary, and intersex people are safe in homeless shelters and to advance the Department's stated purpose of increasing access to and eliminating discrimination in housing for all

⁷⁶ Nat'l All. to End Homelessness, *Supporting Homeless Transgender and Gender Nonconforming Youth*(Sept. 19, 2012), <https://endhomelessness.org/resource/supporting-homeless-transgender-and-gender-nonconforming-youth/>.

⁷⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equal., 176 (2016).

⁷⁸ *Id.*

⁷⁹ *2015 U.S. Transgender Survey New York State Report*, Nat'l Ctr. for Transgender Equal., 2 (October 2017).



people.⁸⁰ And, the Department's proposed rule takes an important enforcer of nondiscrimination protections off the beat at a time when it is sorely needed – particularly given the hurdles any person experiencing homelessness must surmount to seek redress in a court or state or local administrative agency.

Especially in the midst of a global pandemic and unemployment crisis, the Department should be taking measures to protect people experiencing homelessness, not creating barriers to shelter. Shelters are intended to be places of safety and refuge for people experiencing homelessness; however, for transgender, gender nonconforming, non-binary, and intersex people, they can be places of rejection and violence. Rather than exacerbate this state of affairs by finalizing this proposed rule, the Department should take meaningful steps to eradicate gender identity discrimination in the U.S. shelter system, because transgender, gender nonconforming, non-binary, and intersex people, like all people, need and deserve safe, appropriate housing and access to services.

Conclusion

For the foregoing reasons, the NYCLU opposes the Department's proposed rule, Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, and urges the Department to rescind the proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Allison S. Bohm", is written over a horizontal line.

Allison S. Bohm
Policy Counsel
New York Civil Liberties Union

⁸⁰ 42 U.S.C. 12702.