January 19, 2016

Submitted Electronically

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

Re: Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, Docket No. FR-5863-P-01

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, Institutional Religious Freedom Alliance, National Association of Evangelicals, Ethics and Religious Liberty Commission of the Southern Baptist Convention, Family Research Council, Christian Legal Society, Christian Medical Association, Liberty Institute, National Catholic Bioethics Center, and National Association of Catholic Nurses U.S.A., we respectfully submit the following comments on the proposed HUD regulations pertaining to equal access in accordance with an individual's gender identity in community planning and development programs. 80 Fed. Reg. 72642 (Nov. 20, 2015).

The proposed regulations would "require recipients and subrecipients of assistance from HUD's Office of Community Planning and Development (CPD), as well as owners, operators, and managers of shelters, buildings and other facilities and providers of services covered by CPD's programs, to provide transgender persons and other persons who do not identify with the sex they were assigned at birth with access to programs, benefits, services, and accommodations *in accordance with their gender identity*." 80 Fed. Reg. at 72643 (preamble) (emphasis added).

No person should be denied a safe place to live. The proposed regulations, however, impose requirements that cannot reasonably be derived from, and that indeed are positively at odds with, the Fair Housing Act, 42 U.S.C. §§ 3601 to 3631. In addition, while the regulations purport to protect health and safety, they fail to advance, and in fact positively undermine, these and other legitimate interests, including expectations of privacy.

I. Inconsistency with the Fair Housing Act

The proposed regulations would forbid discrimination on the basis of "gender identity." 80 Fed. Reg. at 72648-49 [§ 5.106]. The regulations define the term "gender identity" as "the gender with which a person identifies, regardless of the sex assigned to that person at birth." *Id*. at 72648 [§ 5.100].[1]

HUD asserts no statutory authority for this rule. In fact, Congress has never prohibited discrimination in housing on the basis of gender identity, either in the Fair Housing Act or any other statute. Accordingly, there is no statutory basis for a regulation forbidding differential treatment in housing on that ground.

Indeed, the proposed regulations are affirmatively inconsistent with the Fair Housing Act. As HUD acknowledges, "[a]n emergency shelter and other building and facility that would not qualify as dwellings under the Fair Housing Act are not subject to the Act's prohibition against sex discrimination and thus *may be permitted by statute to be sex segregated*." 80 Fed. Reg. at 72644 n.2 (preamble) (emphasis added). By forbidding sex discrimination as to dwellings but *not emergency shelters or other buildings or facilities*, Congress made the deliberate decision to permit sex-segregated housing in the latter case. If a women's shelter were required to admit a biological man based merely upon his assertion that he "identifies as" a woman, or if a men's shelter were required to admit a biological woman based merely upon her assertion that she "identifies as" a man, then Congress's decision to allow single-sex facilities that do not qualify as dwellings would be unenforceable.

[1] Our use of the term "gender identity" is not intended to suggest agreement with the notion that a person's sex is "assigned … at birth." An individual's biological sex is not chosen by that individual or "assigned" by others, but is a given characteristic of that person's nature. HUD's proposed definition of gender identity is consistent with the mistaken claim that sex is chosen at will, a claim that is integral to so-called gender theory. *See* Pope Francis, General Audience on Man and Woman (Apr. 15, 2015) ("For example, I ask myself, if the so-called gender theory is not … an expression of frustration and resignation, which seeks to cancel out sexual difference because it no longer knows how to confront it. Yes, we risk taking a step backwards. The removal of difference in fact creates a problem, not a solution."), https://w2.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco_20150415_udienza-generale.html.

There is also an inconsistency between the proposed regulations and the Administration's previously-stated views on gender identity and sex discrimination. Elsewhere the Administration has taken the position that differential treatment based on gender identity is a form of sex discrimination. *See, e.g.*, 80 Fed. Reg. 54172 (Sept. 8, 2015). We believe that position is erroneous.[2] If it were true, however, that such differential treatment is a form of sex discrimination, as the Administration claims, and if emergency shelters and other housing are not subject to the sex discrimination prohibition of the Fair Housing Act as HUD concedes (80 Fed. Reg. at 72644 & n.2), then neither are such facilities subject to a ban on differential treatment based on gender identity. There is, of course, no other applicable statutory category that is even claimed to include gender identity.

If the Fair Housing Act *did* prohibit discrimination on the basis of gender identity, efforts in the current Congress to enact the Equality Act, a bill that would forbid discrimination in housing on the basis of gender identity, would be inexplicable.[3] There would be no proposal in the current Congress to prohibit gender identity discrimination in housing if federal law already prohibited it. *See Simonton* v. *Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (rejection of legislative proposal to forbid discrimination on the basis of a particular category, in this case "sexual orientation," is "strong evidence" that the category is not already protected at law).

For these reasons, the proposed regulations are not authorized by, and are in fact inconsistent with, the Fair Housing Act.

II. Violating the Rights of Beneficiaries

Even if the proposed regulations were supported by the Fair Housing Act, which they are not, they would still be problematic because they fail to protect the health, safety, and privacy of beneficiaries. An understanding of this point requires familiarity with the text of the proposed regulations.

The regulations state that recipients, subrecipients, owners, operators, managers, and providers must adopt and enforce policies to ensure that—

> Equal access to programs, shelters, other buildings and facilities, benefits, services, and accommodations is provided to individuals in accordance with the individual's gender identity…. [Such an individual must be] placed, served, and accommodated in accordance with the individual's gender identity. 80 Fed. Reg. at 72649 [§ 5.106(b)].

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[2] *See* Comment Letter of USCCB *et al.* (Nov. 6, 2015), www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf.

[3] S. 1858, § 10(a)(1); H.R. 3185, § 10(a)(1).

The proposed regulations next address requirements with respect to "shared sleeping quarters" and "shared bathing facilities."[4] The regulations state—

> (c) *Placement and accommodation in facilities with shared sleeping quarters or shared bathing facilities*. Placement and accommodation of individuals in shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities shall be made in accordance with the individual's gender identity. 80 Fed. Reg. at 72649 [§ 5.106(c)].

The proposed rule, then, is that a man who asserts that he is a woman may not be refused access to shared women's sleeping quarters and bathing areas. Similarly, a woman who asserts that she is a man may not be refused access to shared men's sleeping quarters and bathing areas. From this general rule, there is a limited exception:

> Under narrow circumstances, a written case-by-case determination can be made as to whether an alternative accommodation is necessary to ensure health and safety. It shall be prohibited for such a determination to be based solely on a person's actual or perceived gender identity, the complaints of other clients, beneficiaries, or employees when those complaints are based on actual or perceived gender identity, or on an actual or perceived threat to health or safety that can be mitigated in some other way that is less burdensome. In order to avoid unwarranted denials of placement in accordance with an individual's gender identity, decisions to provide accommodations based on concern for the health and safety of the individual seeking accommodations should be based on the individual's own request to be otherwise accommodated. [*Id.*]

To summarize, the *sole* exception[5] to the proposed rule requiring access to shared sleeping and bathing areas in accordance with a person's stated gender identity is (a) limited to "*narrow* circumstances,"[6] and involves a determination of whether (b) an "alternative accommodation is *necessary*" to (c) the accomplishment of either of two interests, namely, *health and safety*. Under the proposed regulations, (d) *no other legitimate interest*, including the interest in privacy, may be taken into account.[7] In making this determination, (e) the complaints of employees or other beneficiaries, insofar as they are rooted in the asserted (as opposed to

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[4] HUD states in the preamble that "[f]or purposes of this proposed rule, shared sleeping quarters or shared bathing facilities are those that do *not* accommodate privacy." 80 Fed. Reg. at 72644 n.3 (emphasis added).

[5] *See also* 80 Fed. Reg. at 72646 (preamble) (confirming that this is the "only exception").

[6] In the preamble, HUD elaborates that any accommodation should be "rare." 80 Fed. Reg. at 72646.

[7] Recipients, subrecipients, owners, operators, managers and providers are required under proposed Section 5.106(b) (relating to equal access) to have policies and procedures "to protect privacy," but there is no mention of privacy in Section 5.106(c) (relating to placement and accommodation in facilities with shared sleeping quarters or shared bathing facilities).

biological) sex of the person seeking admission, may *not* be considered. Finally, (f) where there is a concern about health or safety, the accommodation "should be based on the [transgendered] individual's *own request*" to be accommodated, which suggests that an accommodation can be provided *only* when the individual himself or herself has requested it.

These various rules are problematic for several reasons.

First, they violate legitimate expectations of privacy of men and women, including those occupying single-sex housing facilities. This is especially true in the case of shared sleeping and bathing areas. It is important to recognize the privacy expectations of *all* housing residents, not just those claiming to be a sex other than their biological sex. Just as a patient may insist that a health care provider be of the same sex when this protects the patient's bodily privacy,[8] a client's biological sex is relevant to decisions about single-sex housing and shared sleeping and bathing areas. Even prison inmates retain legitimate interests in such privacy.[9] If this is true of prisoners, who have forfeited many of their civil liberties by virtue of lawful incarceration, it is all the more true of ordinary citizens who are not incarcerated and have forfeited none of their civil liberties.

Second, the proposed regulations are a departure from HUD's own regulations. Those regulations have generally recognized and respected residents' interest in privacy, particularly when it concerns shared sleeping and bathing areas. *E.g.*, 24 C.F.R. § 578.93(b)(1) (providing that housing for permanently or temporarily homeless persons "may be limited to one sex where such housing consists of a single structure with shared bedrooms or bathing facilities such that

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[8] *See, e.g.*, *Healey* v. *Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996) (assigning female child care specialist to night shift was not unlawful because the presence of both males and females on all shifts was necessary to meet the privacy needs of a mixed-sex patient population of children and adolescents in a psychiatric hospital); *Jones* v. *Hinds Gen. Hosp.*, 666 F. Supp. 933 (S.D. Miss. 1987) (male patients in a hospital have a right to a hospital orderly who is male); *Local 567* v. *Mich. Council*, 635 F. Supp. 1010 (E.D. Mich. 1986) (patients in a state mental hospital have a right to a personal hygiene aide of the same sex); *Backus* v. *Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981) (ob-gyn patients have a privacy right to an obstetrical nurse who is female), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Fesel* v. *Masonic Home of Del.*, 447 F. Supp. 1346 (D. Del. 1978) (female residents of a retirement home have a privacy right to a nursing aide who is female).

[9] *Everson* v. *Mich. Dep't of Corr.*, 391 F.3d 737, 757 (6th Cir. 2004) ("a convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners."); *Lee* v. *Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981) (most people "have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating. When not reasonably necessary, that sort of degradation is not to be visited upon those confined in our prisons.").

The interest in bodily privacy has also been recognized outside the prison context. *York* v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."); *G.G.* v. *Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015) (citing bodily privacy of students in rejecting claim of gender identity discrimination arising out of school board's policy on restroom access).

the considerations of personal privacy … make it appropriate for the housing to be limited to one sex"); 24 C.F.R. § 882.803(a)(6) (providing that "[s]ingle sex facilities are allowable" under a housing program for homeless persons provided that "considerations of personal privacy require that the facility (or parts of the facility) be available only to members of a single sex"); 24 C.F.R. § 982.401(d)(2)(ii) & (b)(2)(i) (stating that "[c]hildren of opposite sex … may not be required to occupy the same bedroom or living/sleeping room," and that a dwelling unit must include a "bathroom … in a separate private room"); 24 C.F.R. § 982.605(b)(2)(i) (providing that housing units must include "[a]t least one flush toilet that can be used in privacy"); 24 C.F.R. § 982.614(c)(i)(A) (providing that group homes must include a "flush toilet that can be used in privacy"); 24 C.F.R. § 5.703(d)(3) (providing that HUD dwelling units must include a "sanitary facility … usable in privacy"); 24 C.F.R. § 576.403(c)(5) (providing that residents in permanent housing "must have access to sufficient sanitary facilities that are … private").

Third, the requirements that an accommodation be permitted only in "narrow" or "rare" circumstances, and then only when "necessary" to ensure two specified interests—health and safety— is too circumscribed to adequately protect the interests of all residents. An accommodation that furthers the interests in protecting the health and safety of residents should be allowed, for example, even if not, strictly speaking, "necessary."[10] And, as we have noted, the accommodation also fails to protect other important interests, such as privacy.

Fourth, even when an accommodation *is* "necessary" to ensure "health and safety,"[11] the proposed regulations allow the accommodation to be implemented only if *requested* by one claiming to be transgender. Thus, a man declaring himself to be a woman may insist upon admission to a female-only shelter and access to women's shared sleeping and bathing areas by simply declining other arrangements, even when the refusal to accept an accommodation would threaten the safety or privacy of *that* person *or others* residing at the shelter. Likewise, a woman, by declaring herself a man, may insist upon being admitted to a male-only shelter and access to sleeping and bathing areas reserved to men, by declining another arrangement, even if the operator of the facility has determined that such a placement would pose a risk to the safety or privacy of *that* person or of *others*.

[10] "Necessary" can mean "essential" or "indispensable." Webster's New World Dictionary (3d College ed.).

[11] Allowing biological women to use bathing and sleeping areas reserved for men, and allowing biological men to use bathing and sleeping areas reserved for women, would seem to create an inherent security risk in homeless shelters. In the preamble to the regulations, HUD itself cites a report that "25 percent of transgender individuals who stayed in shelters were physically assaulted, and 22 percent were sexually assaulted, by another resident or shelter staff." 80 Fed. Reg. at 72644. It is not clear how the proposed regulations would remedy the high reported incidence of assault on persons claiming to be transgender and, in fact, the regulations may exacerbate the problem. It should be borne in mind that this is a client population with serious vulnerabilities even without the added complication of special rules pertaining to gender identity. *See, e.g.*, Substance Abuse and Mental Health Services Administration, *Current Statistics on the Prevalence and Characteristics of People Experiencing Homelessness in the United States* (July 2011) (noting that in a given night in January 2010, "26.2 percent of all sheltered persons who were homeless had a severe mental illness," and "34.7 percent of all sheltered adults who were homeless had chronic substance use issues"), http://homeless.samhsa.gov/ResourceFiles/hrc_factsheet.pdf.

Fifth, even as to housing facilities that admit *both* men and women, residents should not be required to share with persons of the opposite sex those areas, such as sleeping and bathing areas, properly reserved to persons of one sex, for reasons of privacy.

Sixth, the regulations may place a significant burden upon the associational and religious liberty of beneficiaries and other stakeholders. Some beneficiaries may consider it impermissible on religious grounds, for example, to share sleeping and bathing areas with adults to whom they are neither married nor related and who are biologically of the opposite sex. Similarly, a rule that forbade faith-based providers of housing to treat biological men as men, or biological women as women, could substantially burden their religiously-motivated mission to provide housing to those who need it. *See, e.g*., Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq.

III. Violating the Administrative Procedure Act

The proposed regulations are inconsistent with the Fair Housing Act, and will adversely affect the interests of persons served by HUD programs. For those reasons, they violate the Administrative Procedure Act. 5 U.S.C. § 706 (authorizing a court to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law").

III. Conclusion

The health, safety and privacy of *all* persons served by HUD programs are important. The proposed regulations, however, poorly serve, and in fact are contrary to, those interests. First, there is no statutory basis for treating gender identity as a protected category. Second, the housing needs of a man who self-identifies as a woman, or of a woman who self-identifies as a man, can and should be met in a way that objectively respects his or her health, safety, and privacy, but *without compromising the health, safety, or privacy of other beneficiaries*. Recipients, subrecipients, owners, operators, managers, and providers should be given the discretion to address such situations on a case-by-case basis in order to ensure that the health, safety, and privacy of all persons will be safeguarded. The proposed regulations fail to allow such discretion and therefore operate against the best interests of all beneficiaries.

Thank you in advance for your careful consideration of these comments.

Respectfully submitted,

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