



HANDS ACROSS THE AISLE COALITION * WOMEN'S LIBERATION FRONT
CONCERNED PARENTS AND EDUCATORS
FAMILY POLICY ALLIANCE

May 1, 2017

The Honorable Benjamin Carson, M.D.
Secretary
U.S. Department of Housing and Urban Development
Attn: Rules Docket Clerk, Room 5218
451 Seventh Street, SW
Washington, DC 20410

**Re: Petition For Rulemaking To Protect The Safety And Privacy Of Women
In Need Of Shelter Due To Homelessness Or Violence**

Dear Mr. Secretary:

We write to urge you to amend 24 C.F.R. Part 5, to protect the safety and privacy of women in need of shelter due to homelessness or violence. We are a diverse group of women and organizations allied in a common cause: mothers, feminists, women of faith, lesbian and bisexual women's rights activists, and concerned neighbors, convened through the Hands Across The Aisle Coalition, to request your consideration for our sisters without stable housing.

We specifically request that you rescind and revise the final rule adopted by the Department of Housing and Urban Development (HUD), entitled "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs," 81 Fed. Reg. 64763 (Sept. 21, 2016), now codified at 24 C.F.R. Part 5 (hereafter, "the Rule"). Currently these regulations require men to be placed in programs and shelters previously reserved as safe havens for women, based on the self-reported "gender identity," and without regard to sex recorded at birth. Shelters funded by HUD's office of Community Planning and Development must comply.

While the Rule discusses "single-sex" facilities, in reality it ended federally-funded single-sex emergency shelters with the stroke of a pen. All federally-funded women's shelters have since been required to admit male clients who claim to feel female, or risk closing their doors to the

women who desperately need them. Men’s shelters have also been required to admit female clients who claim to feel male. In all cases, this mainly puts female shelter clients in danger. As detailed below, the Rule puts already vulnerable women in danger and must be revised.

Sex is the only relevant categorization for placement in women’s single-sex shelters and other programs covered under the Rule.

In the interest of clarity and accuracy we use the relevant terms in line with their longstanding commonly-understood meanings: a woman is an adult human female, *i.e.*, an individual with XX chromosomes and predominantly female anatomy. A man is an adult human male, *i.e.*, an individual with XY chromosomes and predominantly male anatomy.¹ Sex recorded at birth is a remarkably accurate categorization, with an infant’s sex easily identifiable based on external genitalia and other factors in 99.982% (all but .018%) of all cases; the tiny fraction of individuals who make up the exception to this general rule are said to possess “intersex” characteristics, but they remain either male or female.² In any event, the misguided Rule gives primacy to “*gender identity*,” which, as discussed further below, is not a biological condition and has no relation whatsoever to intersex conditions.

For purposes of determining eligibility for residence in women’s shelters or domestic violence refuges or availability of other single-sex services, sex is also the only salient characteristic. As

¹ See Nat’l Institutes for Health, Genetics Home Reference: X chromosome (Jan. 2012), <https://ghr.nlm.nih.gov/chromosome/X.pdf> (noting that “[e]ach person normally has one pair of sex chromosomes in each cell. Females have two X chromosomes, while males have one X and one Y chromosome”); see also Joel, Daphna, *Genetic-gonadal-genitals sex (3G-sex) and the misconception of brain and gender, or, why 3G-males and 3G-females have intersex brain and intersex gender*, *Biology of Sex Differences*, DOI: 10.1186/2042-6410-3-27 (Dec. 2012) (“Whether a scientist or a layperson, when people think about sex differences in the brain and in behavior, cognition, personality and other gender characteristics, their model is that of genetic-gonadal-genitals sex. . . . 3G-sex is a categorization system in which ~99% of human subjects are identified as either ‘male’ or ‘female’, and identification with either category entails having all the characteristics of that category (*i.e.*, ‘female’ = XX, ovaries, uterus, fallopian tubes, vagina, labia minora and majora, clitoris, and ‘male’ = XY, testes, prostate, seminal vesicles, scrotum, penis”).

² Sax, Leonard. “*How Common Is Intersex? A Response to Anne Fausto-Sterling.*” *The Journal of Sex Research*, V. 39, no. 3 (2002): 174-78. <http://www.jstor.org/stable/3813612>; see also Dawkins, R. *The Ancestor’s Tale, A Pilgrimage to the Dawn of Evolution*, 135 (Mariner Books ed. 2005) (stating that, “[i]ndeed, the gene determining maleness (called *SRY* [sex determining region y]) has never been in a female body”); Nat’l Institutes for Health, Genetics Home Reference: *SRY* gene (March 2015) <https://ghr.nlm.nih.gov/gene/SRY.pdf> (noting that “[a] fetus with an X chromosome that carries the *SRY* gene will develop male characteristics despite not having a Y chromosome”).

an initial matter, women are the only sex vulnerable to involuntary impregnation through rape.³ Further, as demonstrated consistently by the FBI's Uniform Crime Reporting system and similar state programs, women face a dramatically disproportionate statistical risk of violence, rape, assault, or voyeurism, and in the vast majority of cases women suffer these harms at the hands of violent men. For crimes reported by law enforcement to the FBI in 2015, males committed over 97% of rapes, nearly 80% of all violent crime (defined as murder, nonnegligent manslaughter, rape, robbery, or aggravated assault) and over 92% of sex offenses other than rape or prostitution.⁴ Homeless women in general have tremendously high documented risks of rape or other sexual assault.⁵ By mandating the placement of men in intimate living spaces with women in need of shelter, the Rule places those women at greater statistical risk of harm.

Available evidence indicates that males' disproportionate engagement in violent criminal behavior does not change significantly based on their subjective gender feelings: one long-term study of post-operative transsexuals confirmed that males continued to engage in a significantly higher rate of violent crime compared to females, but not compared to males, particularly in the absence of focused and intensive investment in specialized counseling and social services⁶—which are *not* mandated as a condition for cross-sex admission to single-sex shelters or services under HUD's Rule.

Women's disproportionate vulnerability applies in men's single-sex shelters as well. According to the 2003 report by the National Gay and Lesbian Task Force Policy Institute, Transitioning

³ Nat'l Institutes for Health, Genetics Home Reference: AMH gene (March 2011), <https://ghr.nlm.nih.gov/gene/AMH.pdf> (noting that the AMH (anti-Mullerian hormone) gene, which expresses itself in males, prevents the development of the uterus and fallopian tubes necessary for pregnancy). *See also* Center for Disease Control and Prevention, Pregnancy Mortality Surveillance System, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html> (noting that “the number of reported pregnancy-related deaths in the United States steadily increased from 7.2 deaths per 100,000 live births in 1987 to a high of 17.8 deaths per 100,000 live births in 2009 and 2011,” with 17.3 deaths per 100,000 live births in 2013, the latest available year of data).

⁴ Dept. of Justice Fed'l Bureau of Investigation, 2015 Crime in the United States, Table 33, *Ten-Year Arrest Trends by Sex, 2006–2015*. <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-33>

⁵ *See generally* Goodman, et al., *No Safe Place: Sexual Assault in the Lives of Homeless Women*, (Sept. 2006), and studies cited therein, <http://vawnet.org/material/no-safe-place-sexual-assault-lives-homeless-women>.

⁶ Cecilia Dhejne, et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden* (February 22, 2011), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885> (finding that males who claim some sort of female or woman identity had a significantly increased risk for violent crime compared to females, but not compared to males).

Our Shelters, there had already been incidents at that time of transgender-identified females (“trans men”) having been gang-raped in men’s shelters.⁷

As advocates for women, we are appalled at HUD’s disregard for women’s safety under this Rule. While members of many communities have specific religious or cultural objections to sharing mixed-sex accommodations, weighty concerns about privacy and safety in these circumstances are shared by women from all walks of life. Our opinions are informed by histories of exposure to predominantly male violence that some of us have in common with many homeless or abused women, particularly mothers.

In adopting the Rule the prior administration ignored the disproportionate harmful effects on black and Hispanic women, poor women, and women who are victims of domestic violence.

The harms facilitated by the Rule will fall disproportionately on already-vulnerable women. Statistics reviewed by the U.S. Department of Health and Human Services in 2016 showed that as many as 93 percent of mothers staying in homeless shelters are trauma survivors, often due to physical or sexual abuse, and multiple studies show that significant numbers of them (between 22% and 57%) are immediately homeless because of intimate partner violence.⁸ According to the American Civil Liberties Union (ACLU), “While women at all income levels experience domestic violence,” “[w]omen with household incomes of less than \$7,500 are 7 times as likely as women with household incomes over \$75,000 to experience domestic violence.”⁹ Black and Hispanic mothers are particularly vulnerable.¹⁰

⁷ Mottet, L., & Ohle, J. (2003). “Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People.” New York: The National Coalition for the Homeless and the National Gay and Lesbian Task Force Policy Institute.

<http://www.thetaskforce.org/transitioning-shelters/>

⁸ U.S. Department of Health & Human Services, Administration for Children & Families, Family & Youth Services Bureau. “Domestic Violence and Homelessness: Statistics (2016).” Published, June 24, 2016, accessed March 21, 2017.

<https://www.acf.hhs.gov/fysb/resource/dv-homelessness-stats-2016>

⁹ ACLU Women's Rights Project, Domestic Violence and Homelessness at 1, <https://www.aclu.org/sites/default/files/pdfs/dvhomelessness032106.pdf>, citing Callie Marie Rennison & Sarah Welchans, Department of Justice, NCJ 178247, Intimate Partner Violence 4 (2000).

¹⁰ HUD’s 2016 Annual Homeless Assessment Report to Congress revealed that nearly half (49%) of sheltered people in families with children were African American, and nearly one-third (31%) of people experiencing homelessness in families with children were Hispanic or Latino. <https://www.hudexchange.info/resources/documents/2016-AHAR-Part-1.pdf> at 32 (Nov. 2016). The same report shows that women are more likely than men to be the head of a household with children living in a shelter. *Id.* at 33, Exhibit 3.4. The 2010 issue of the same

In spite of this history of trauma and violence in the women’s shelter population, and the known propensity of abusive male partners to continue to try and gain access to their victims once they’ve left the home, the previous administration refused to prioritize or even study the needs and risks faced by women and their children in shelters. It flatly refused to consider *why* Congress expressly allowed for the establishment and funding of single-sex facilities, stating only that “HUD does not opine on Congress’s intent behind permitting single-sex facilities.”¹¹ It further made the bizarre claim that “[t]here is no reason to assume that transgender persons pose risks to health or safety,” pretending that there is no meaningful difference between the risks of violence faced by women housed with transgender-identified males versus men housed with transgender-identified females.¹² Instead, their top priority was to affirm the feelings of individuals who claim to have a “gender identity” they or others perceive to be inconsistent with their sex.¹³

The Rule itself silences reasonable objections and makes objective reporting impossible or risky for HUD-funded shelters.

Because the Rule dictates that one’s natal sex is irrelevant, and impermissible to mention against one’s wishes, it forces vulnerable women to repress their concerns of personal safety and privacy when sharing intimate spaces in shelters with men. HUD’s regulations now forbid staff from excluding transgender-identified male clients from shared shower and sleeping areas in ostensibly single-sex women’s shelters.¹⁴ It requires all complaints by women about sharing intimate quarters with the opposite sex to be treated as “opportunities to educate and refocus”

report similarly revealed that “[p]ersons in families are also more likely to be minorities, headed by a woman.” HUD, The 2010 Annual Homeless Assessment Report to Congress, 19-20, Exhibit 3-4, <https://www.hudexchange.info/resources/documents/2010HomelessAssessmentReport.pdf>.

¹¹ Rule at 64771.

¹² Rule at at 64773.

¹³ For example, the proposed rule relied on an unpublished listening session in which one transgender-identified male complained of having been forced to “disguise their gender identity” (which we take to mean no longer claiming to identify as a woman) while staying in a men’s shelter. *Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs*, Proposed Rule, 80 Fed. Reg. 72642 at 72644 (Nov. 20, 2015). Yet women forced to be housed with males have no similar ability to “disguise” themselves so as to counteract their particular vulnerability to male violence.

¹⁴ See Rule at 64788 (“This final rule makes clear that providers do not have the discretion to suggest that individuals may not be accommodated in shelters that match their gender identity because their gender identity differs from their sex assigned at birth.”); 24 C.F.R. § 5.106(c).

shelter occupants, and requires or allows staff to evict women if they continue to object to the presence of men in the shelter.¹⁵ Therefore, women who feel harassed, intimidated, or concerned over sharing a shelter with men, showering or dressing in front of men, or humiliated by having to deal with menstrual discharge in a wash area where a man might walk in, are made to feel that they are perpetrators of harassment towards the men demanding to be placed in a women's shelter.

Traumatized women who object to sharing group living accommodations with men have been stripped of the right to complain, and could lose their place for continuing to do so. Yet from the data compiled in 2016 and referenced by HUD to support this change,¹⁶ it seems likely that these changes were made against most service providers' wishes, given that 70 percent of shelters surveyed at the time refused to house male clients with women. But the Rule silenced all opposition from both clients and providers, by tying federal funding to acceptance of the belief that males can be females if they say so.

“Gender identity” is not a proper basis for determining eligibility for single-sex shelters because the concept is subjective, vague, and circular. It is also inconsistent with Supreme Court case law regarding discrimination on the basis of sex stereotypes.

Instead of placement by an individual's biological sex recorded at birth, HUD's Rule allows placement in shelters based on “the individual's own self-identified gender identity,” a concept that lacks scientific evidentiary support or societal consensus.

One of the core components of the Rule is its definition of “gender identity,” which is defined as “the gender with which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person's perceived gender identity.”¹⁷ Because the Rule did not include a definition of “gender,” this definition is hopelessly vague, subjective, and circular. The Rule's definition of “perceived gender identity” is perhaps even worse: it means “the gender with which a person is perceived to identify based on that person's appearance, behavior, expression, other gender related characteristics, or sex assigned to the individual at birth or identified in

¹⁵ Rule at 64768.

¹⁶ Caitlin Rooney, *et al.*, Center for American Progress and the Equal Rights Center Discrimination Against Transgender Women Seeking Access to Homeless Shelters, January 7, 2016. <https://cdn.americanprogress.org/wp-content/uploads/2016/01/06113001/HomelessTransgender.pdf>

¹⁷ Rule at 64782, citing the current version of 24 C.F.R. § 5.100.

documents.”¹⁸ Thus, the definition refers to one person’s subjective perception of another person’s subjective perception of their own subjective state. This is patently absurd.

What are “gender related characteristics”? No one can define what it means to “feel” female or male in one’s mind or, stated differently, to “feel like a woman” or like a man. In general, people do not “feel” but rather they know that they are either female or male, because they possess the external genitals or other physical characteristics that have long been defined in medicine and science as either male or female. A person cannot claim to know what it “feels” like to be the sex that is opposite of their biological sex, except through reference to sex stereotypes – for example, the notion that only women are nurturing, or the notion that only men are drawn to math and science. Stereotypes can also revolve around superficial modes of appearance or fashion.

From the Rule’s definitions, we can surmise that the prior administration believed that “gender related characteristics” include appearance, behavior, and expression—all of which are culturally-constructed and culturally-dependent, and none of which have any bearing on whether a person is a man or a woman. Because there *cannot be* any mode of appearance, behavior, or expression that is inconsistent with the biological state of being either male or female, the definition indicates that the previous administration had sex-stereotypes in mind as the basis for a core component of the Rule.

That flies in the face of the legal principle, established by the Supreme Court in *Price Waterhouse v. Hopkins*, that discrimination on the basis of non-conformance with sex-stereotypes is prohibited sex discrimination.¹⁹ At the same time, the U.S. Circuit Court for the Tenth Circuit has rejected an attempt to extend this principle in the very manner encompassed by the Rule: “However far *Price Waterhouse* reaches [in establishing that discrimination based on sex stereotypes constitutes discrimination on the basis of sex], this court cannot conclude it requires employers to allow biological males to use women’s restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.”²⁰ The same is true for single-sex shelters and safe havens designed to serve vulnerable women: while a man’s refusal or inability to conform to male sex stereotypes cannot justify denying him admission to a men’s shelter, nor can his identification with female sex stereotypes justify housing him in a women’s shelter, for it is only sex that is relevant in applying for admission to single-sex programs, not the sex stereotypes that form the basis of “gender

¹⁸ *Id.*

¹⁹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that employers can violate Title VII by making employment or promotion decisions based on performance reviews that result from sex stereotyping).

²⁰ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (2007) (holding that Title VII allows an employer to require transgender-identified employees to use the single-sex restroom designated for their biological sex).

identity” and “perceived gender identity.”

The Department claims statutory authority to adopt the rule based on its “responsibility under the Department of Housing and Urban Development Act to work to address “the needs and interests of the Nation’s communities and of the people who live and work in them,” and on HUD’s general rulemaking authority.²¹ In reaching this conclusion, HUD primarily relied on non-binding guidance and administrative rulings issued by HUD itself or by other agencies within the same administration, citing a 2010 HUD guidance memorandum, two administrative rulings by the Equal Employment Opportunity Commission, and a guidance memorandum issued in 2014 by the U.S. Attorney General.²² These non-binding authorities cannot overcome the fact that the Rule is inconsistent with Congressional intent to allow single-sex shelters. Indeed, in the proposed rule HUD acknowledged that “[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.”²³ It follows that the Act does not authorize HUD to adopt a rule claiming that segregation on the basis of biological sex constitutes unlawful discrimination.

Even assuming for the sake of argument that Congress gave HUD discretionary authority to dictate eligibility for HUD-funded shelters and programs based on “gender identity,” the Rule is unlawful because it is arbitrary and capricious and therefore runs afoul of the Administrative Procedure Act.²⁴ As discussed above, the Department rejected a standard that is reliable and accurate 99.982% of the time, in favor of a standard that no one can satisfactorily define or objectively measure. This is the epitome of arbitrary and capricious agency action. Given the wide latitude for abuse made possible by this switch, and the significant health and safety risks posed to women by men being able to access their shared sleeping and bathing areas, we request that this Rule be revised. Shelter providers should be allowed to run single-sex facilities again, based on their own knowledge of local needs and their capacity to meet them, and clients should have the right to expect that shared sleeping and bathing quarters will remain single-sex and private.

HUD’s desire to ensure that transgender individuals not be wrongly denied shelter does not support the conclusion that transgender-identified persons must be placed in intimate single-sex facilities with members of the opposite sex. Instead, HUD can and should revise its

²¹ Rule at 64769-70, citing 42 U.S.C. § 3531; *id.* at 64782, citing 42 U.S.C. § 3535(b).

²² Rule at 64770, n. 11 and 12.

²³ Fed. Reg. at 72644 n.2.

²⁴ 5 U.S.C. § 706 (authorizing federal courts to “hold unlawful and set aside agency action, findings, and conclusions found to be. . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

rules to reaffirm the principle that shelters and related programs cannot discriminate based on sex-stereotypes, that single-sex facilities should not be forced to permit clients of the opposite biological sex, that men who identify as women or non-binary must be kept safe at men's facilities, and that women who identify as men or non-binary should be kept safe at women's facilities. While we understand that not all shelters are single-sex facilities, we object to the *elimination* of single-sex facilities and the prior administration's insistence on allowing access for men to women's spaces. Eligibility for single-sex facilities and services must be determined solely by sex; both "gender identity" and "perceived gender identity" are irrelevant.

In conclusion, we respectfully request that you immediately open a rulemaking to amend the regulations set forth at 24 C.F.R. Part 5, to restore the ability of HUD grantees to maintain safe, sex-segregated emergency shelters. All sources cited in support of this petition are hereby incorporated by reference as though fully stated herein.

We would very much like to set up a meeting with you to discuss this matter, and to answer any questions you may have about our request to amend your regulations. Please feel free to contact us at your earliest opportunity at handsacrosstheaislewomen@gmail.com.

Thank you for your consideration.

Sincerely,

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