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Regulations Division, Office of General Counsel
Department of Housing and Urban Development
451 7th St. NW, Room 10276
Washington, D.C. 20410

RE: Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, Proposed Rule, RIN 2506-AC40

To Whom It May Concern:

The National Center for Transgender Equality (NCTE) appreciates this opportunity to provide comments in response to the Notice of Proposed Rulemaking. NCTE is one of the nation's leading social justice organizations winning life-saving change for transgender people. We believe in the critical importance of safe, equal, and dignified access to shelters for all transgender and gender nonconforming people and commend HUD for its efforts to ensure that federally-funded shelters recognize and respect this particularly vulnerable group and protect both their safety and their equal access to shelters. We therefore support this proposed rule and make the following recommendations to clarify and strengthen the final rule.

A. Strengthened definition of gender identity—§ 5.100

We support the proposed definitions of gender identity and perceived gender identity. We appreciate that the definition of perceived gender identity covers discrimination based on gender expression, and we urge HUD to include language to this effect in the preamble to the final rule, and to discuss gender expression in training and technical assistance for grantees.

B. Removal of prohibition on inquiries on sexual orientation or gender identity—§ 5.105

We support the elimination of the inquiries prohibition provision for several reasons. First, it is likely to cause confusion in the context of applying proposed § 5.106, as it may be construed to prohibit any discussion of gender identity. Second, it appears to prohibit the routine and voluntary collection of demographic data regarding sexual orientation and gender identity for purposes of program evaluation. While an inquiry regarding sexual orientation or gender identity may constitute discrimination or be evidence of discrimination under subparagraph (i) of the rule, inquiries for legitimate and non-discriminatory purposes should be permitted. We urge HUD to state clearly in the preamble to the final rule, and in training and technical assistance to the field, that inquiries that are used to limit the provision of housing, to harass an individual, or in any other discriminatory fashion fall under the prohibition in subparagraph (i) on discrimination. By contrast, HUD should state clearly that the routine

and voluntary collection of demographic information from all clients or program participants is permissible, so long as it is collected and used in a nondiscriminatory fashion.

C. Providing access in accordance with the individual's gender identity—§ 5.106

Support for providing access consistent with gender identity

We strongly support § 5.106(c)'s requirement that recipients treat individuals in accordance with their gender identity in shelter placements and access to other sex-specific programs or facilities. This provision is essential to protect the safety, wellbeing, and dignity of shelter-seekers.

Personal experiences shared by transgender people, together with data from national studies, depict a shelter system where discrimination is commonplace: in the absence of clear rules from HUD, transgender people are routinely denied access to shelters, forced into shelters that are inconsistent with their gender, and endure harassment and violence in disproportionate numbers. In response to HUD's request for public comment, NCTE asked transgender people across the country to share their personal stories; a selection of these stories is presented here.

In the 2011 National Transgender Discrimination Survey, nearly one in three (29 percent) transgender people who attempted to access a shelter reported being turned away due to their transgender status, and an additional 25 percent were evicted once shelter staff discovered their transgender identity.¹

Forty-two percent of transgender shelter-seekers report having been forced to live as the wrong gender as a condition of access to a shelter.² One transgender woman said that for her, as for many other transgender people, changing her appearance to conform to her sex assigned at birth was the only way she could stay in a shelter. Notably, even attempting to conceal her gender identity did not prevent her from being noticed and feeling targeted as a woman in a men's shelter:

I'm a transwoman living in Memphis, TN. I experienced some financial hardship and was homeless for a three-month period in which I was sent to the local homeless shelter, where I was turned away for being feminine. So I had to go and act like a guy in order to sneak in to have a place to stay for the night. While there, I felt uncomfortable because the men were making advances at me, so I didn't sleep that night. After that time, I started living in my car until I was placed in a transitional home.

The harassment described is hardly uncommon: in fact, 55 percent of transgender people who stayed at shelters reported being harassed by staff or other residents.³ One transgender man shared the following:

¹ Nat'l LGBTQ Task Force & Nat'l Ctr. for Transgender Equality, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 116 (2011), http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf.

² *Id.* at 118.

³ *Id.* at 117.

I was homeless for 10 years.... [T]he worst, absolute worst, nearly suicide-inducing horrors came when after living as male for 20 years I was outed at homeless shelters and forced to stay in the women's side.... The women were just as horrified [as I was].... I was subjected to obligatory women's meetings at which I was harassed by the entire group of staff and women residents. [They] pressured to dress as female, pretend to be female, use perfume and makeup, etc. This kept me in a constant terror. The male residents accepted me simply and supported my view that I should be on the men's side....

Another individual related: "I had to endure violence, verbal and physical, making it more hospitable to sleep outside abandoned buildings." Indeed, 25 percent of transgender people who had stayed at a shelter reported that they had been physically assaulted by other residents or by staff. A stark 22 percent reported experiencing sexual assault.⁴

Many of those who are able to access shelters consistent with their gender identity do so only after being subjected to invasive and degrading examinations, often based on shelter staff's belief that only transgender people who had undergone genital reconstruction surgery should be housed in facilities consistent with their gender identity. For example, one individual reported, "[I was forced] to show my privates to prove that I had surgery."

Overall, nearly half of transgender shelter-seekers said they ultimately left a shelter due to mistreatment.⁵ The threat of being harassed, assaulted and denied access to gender-appropriate facilities drives many transgender people to avoid shelters entirely, even when the alternative puts their life at risk. One service provider said that they "saw firsthand how many homeless transgender people would never enter a shelter no matter how horrible the weather was, as the conditions in shelters were even more hostile." Some transgender people opt to stay in abusive or dangerous relationships rather than seek access to a shelter:

I'm a transman who was too afraid of [shelter policies] to attempt to get help several years ago. As a result, I stayed with an abusive partner for over a year, because I had nowhere else to go. This should not happen.

Lack of access to safe, affirming shelters can compound the existing trauma that many transgender shelter-seekers have already experienced and exacerbate the vulnerabilities they face:

I am a transgender woman who has been turned away from shelters when fleeing from domestic violence, which left me in the same situation of receiving physical and sexual abuse from my spouse and other family [members]. I have also been denied housing due to discrimination against my gender identity. This left me homeless and vulnerable. By law, I was not allowed to live on the street, yet I was not allowed to live at a shelter, or more permanent domicile. This left me being arrested many times, simply for being

⁴ *Id.* at 117-18.

⁵ *Id.* at 116.

homeless. ... [The] length of negative events could have been shortened if I had been allowed shelter from domestic violence, instead of being treated like a potential predator.

According to one rape crisis counselor, discriminatory shelter policies can leave transgender individuals with few options to escape poverty and abuse:

There have been several times that I have been unable to refer people to safe housing, because they are unable to present as the gender that they are assigned at birth. So they end up back on the streets or go back to live with an abusive partner, because there is no place that will take them in their lived gender. This is a heartbreaking occurrence, and it happens a lot.

Such policies can ultimately have tragic consequences. On December 17, 2008, hours after singing “Silent Night” to a city council meeting, local homeless activist and political candidate Jennifer Gale was found dead outside an Austin, TX church of a heart condition exacerbated by sleeping outside. Ms. Gale had long spent most nights outdoors, and while it’s not known for certain whether and where she had sought shelter from local agencies, it was known in the community that other transgender women had been turned away or told they would have to stay in men’s facilities. Local advocates attributed Ms. Gale’s death in part to those policies, which have since changed.⁶

A more recent study by the Center for American Progress and the Equal Rights Center investigated such policies and found that only 30 percent of shelters were willing to house transgender women with other women.⁷ The study, which used test callers to inquire into the practices of 100 shelters across four states (Connecticut, Washington, Tennessee and Virginia), found that shelters refused services outright; deliberately referred to callers by the wrong pronouns or gender-related titles (for example, addressing a trans woman seeking access to a women’s shelter as “sir”); cited genitalia or surgery requirements as prerequisites to placement consistent with gender identity; and cited the discomfort of other shelter residents as a basis for refusing placements consistent with gender identity. The willingness of a shelter to house transgender women in accordance with their gender identity varied depending on state laws and shelter type. Shelters in states with LGBT protections were twice as likely to be willing to provide appropriate shelter to test callers. Since 32 states lack explicit gender identity protections in housing, HUD’s rule will help ensure equal access to shelters for transgender and gender nonconforming individuals. As HUD recognizes in the preamble to the proposed rule and as it has found through its

⁶ John Wright, WATCH: Homeless transgender woman Jennifer Gale sings ‘Silent Night’ on the eve of her death (Dec. 16, 2010), <http://www.dallasvoice.com/watch-homeless-transgender-woman-jennifer-gale-sings-silent-night-eve-death-1056574.html>; Sophie Wilkinson, Texas homeless shelters adapt for trans people (Apr. 6, 2009), <http://www.pinknews.co.uk/2009/04/06/texas-homeless-shelters-adapt-for-trans-people>; John Wright, Trans woman’s death shines light on plight of homeless, Dallas Voice (Dec. 23, 2008), <http://www.dallasvoice.com/trans-womans-death-shines-light-on-plight-of-homeless-1018519.html>.

⁷ Ctr. for Am. Progress and the Equal Rights Ctr., *Discrimination Against Transgender Women Seeking Access to Homeless Shelters* (2016), <https://www.americanprogress.org/issues/lgbt/report/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/>.

own consultations with service providers, these discriminatory practices are pervasive and deny not only the dignity of transgender shelter-seekers but their basic access to safe shelter.⁸

Other agencies across the federal government have already adopted policies expressly acknowledging that equal opportunity includes treating individuals consistent with their gender identity, including equal access to gender-specific facilities. Agencies have acknowledged this basic principle of non-discrimination with respect to a wide range of settings, including workplace restrooms,⁹ school restrooms and locker rooms,¹⁰ dormitories,¹¹ health care facilities,¹² and domestic violence shelters.¹³ To date, at least 13 states and the District of Columbia have, by regulations, guidance, case law, or specific statutory language, clarified that state laws prohibiting gender identity discrimination require that transgender individuals have access to sex-segregated facilities consistent with their gender identity.¹⁴ Additionally, courts have rejected claims that a third party's discomfort with the presence of a transgender person in a sex-specific facility implicates any legally cognizable right.¹⁵

⁸ Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, Proposed Rule, 80 Fed. Reg. 72542, 72644 (Nov. 20, 2015).

⁹ See, e.g., *Lusardi v. McHugh*, E.E.O.C. App. No. 0120133395, 15 (Apr. 1, 2015); Discrimination on the Basis of Sex, Notice of Proposed Rulemaking, 80 Fed. Reg. 5246 (Jan. 30, 2015); Report of Prohibited Personnel Practice, Office of Special Counsel File No. MA-11-3846 (Jane Doe) (Aug. 28, 2014); Dep't of Labor, Training and Employment Guidance Letter No. 37-14, The Workforce Development System: Training and Employment Guidance Letter on Gender Identity, Gender Expression and Sex Stereotyping (May 29, 2015).

¹⁰ See, e.g., Brief of the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, (4th Cir. Oct. 28, 2015); Statement of Interest of the United States at 5, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54 (E.D. Va. June 29, 2015); *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015); Resolution Agreement between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division (OCR No. 09-12-1020) (DOJ No. 169-12C-70) (July 24, 2013); Resolution Agreement between the Downey Unified School District and the U.S. Department of Education, Office for Civil Rights (OCR Case No. 09-12-1095 Oct. 8, 2014).

¹¹ Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015).

¹² Nondiscrimination in Health Programs and Activities, Notice of Proposed Rulemaking, 80 Fed. Reg. 54172 (Sept. 8, 2015); Dep't of Health & Human Servs., Office for Civil Rights, Bulletin: The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients (July 14, 2015).

¹³ Dep't of Justice, Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013, at 9 (Apr. 9, 2013).

¹⁴ See CAL. EDUC. CODE § 221.5(f); N.J. STAT. ANN. § 10:5-12(f)(1); 3 COLO. CODE REGS. § 708-1:81.11; D.C. MUN. REGS. tit. 4, § 802.1; OR. ADMIN. R. 839-005-0031(2) (2014); WASH. ADMIN. CODE § 162-32-060 (2015); *Dep't of Fair Emp't & Hous. v. Am. Pac. Corp.*, Case No. 34-2013-00151153-CU-CR-GDS (Cal. Sup. Ct. Mar. 13, 2014); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014); *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, Determination (Colo. Div. of Civil Rights Jun. 18 2013); *Sommerville v. Hobby Lobby Stores*, Charge Nos. 2011CN2993/2011CP2994 (Ill. Human Rights. Comm'n, May 15, 2015); *Jones v. Johnson Cty. Sheriff's Dep't*, CP No. 12-11-61830, Finding of Probable Cause (Iowa Civil Rights. Comm'n Feb. 11, 2013); Conn. Safe Sch. Coal., Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws 8 (2012), http://www.sde.ct.gov/sde/lib/sde/pdf/equity/title_ix/guidelines_for_schools_on_gender_identity_and_expression2012oct4.pdf; Iowa Civil Rights Comm'n, Guidance on Sexual Orientation & Gender Identity: A Housing Provider's Guide to Iowa Law Compliance (2012), https://icrc.iowa.gov/sites/files/civil_rights/publications/2012/SOGIEmpl.pdf; Mass. Dep't of Elementary and Secondary Educ., *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity* 9-10 (2013), <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>; Nev. Equal Rights Comm'n, Facts About Gender Identity or Expression Discrimination (2012),

Clarifying that individualized alternative or modified accommodations must be based on individual requests

We applaud the proposed rule’s adoption of a clear standard that shelters shall place individuals consistent with their gender identity. We strongly recommend, however, that the provision permitting program staff to make alternative accommodations on a case-by-case basis be changed in several important respects.

First, we urge HUD to clarify that shelter staff cannot *require* a transgender person to use an alternative or modified placement. While shelter staff may share information about alternative or modified placements that could be provided, a transgender person must have access to the same facilities and options as others. In particular, a transgender person cannot be made to use an alternative placement to accommodate the wishes or discomfort of others. The sole purpose of any such alternative or modified placement must be to address the health, safety, or privacy concerns of the requesting individual and must be made only at that individual’s request.

An individualized accommodation might include providing additional privacy while sleeping, bathing or showering, assigning a staff member to oversee safety concerns, providing a bed close to facility staff or in other more protected areas, or providing a separate accommodation such as a hotel voucher, among other options. Given the research showing that inappropriate and unsafe placements of transgender individuals are pervasive and that very high percentages of transgender shelter seekers are either excluded from shelters altogether or refused access to a shelter consistent with their gender identity, the final rule should provide clear guidance on this issue.

Second, the rule should also make clear that shelter staff must provide accommodations requested by the shelter seeker when those accommodations are reasonable and appropriate to protect the health, safety or privacy of that individual.

Third, the rule should make clear that any alternative or modified placements must provide access to substantially equivalent services. Unfortunately, we have heard from local service providers and advocates that in some cases individuals are instead provided with an inadequate accommodation, such as a hotel voucher, that may fall far short of being equivalent to what is provided to others.

http://detr.state.nv.us/Nerc_pages/NERC_docs/Facts_About_Gender_Identity_or_Expression_Discrimination.pdf; New York State Educ. Dep’t, Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students (2015),

http://www.p12.nysed.gov/dignityact/documents/Transg_GNCCGuidanceFINAL.pdf; Vt. Human Rights Comm’n, Sex, Sexual Orientation and Gender Identity: A Guide to Vermont’s Anti-Discrimination Law for Employers and Employees (2012), <http://hrc.vermont.gov/sites/hrc/files/publications/trans-employment-brochure.pdf>.

¹⁵ See *Cruzan v. Special Sch. Dist.*, #1, 294 F.3d 981 (8th Cir. 2002) (rejecting as insufficient teacher’s assertion that her “personal privacy” was invaded when school permitted transgender woman to use women’s room); *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991) (non-transgender female prisoner’s objection to sharing a cell with a transgender woman implicated no clearly established right); see also Nedda Reghabi, *A Balancing Act for Businesses: Transsexual Employees, Other Employees, and Customers*, 43 ARIZ. ST. L.J. 1047 (2011) (concluding invasion-of-privacy claims by customers offended by transgender employees’ use of appropriate restrooms would also likely fail for lack of actual harm).

Accordingly, we urge HUD to clarify that shelters will not comply with the rule if they provide vouchers but otherwise deny equivalent services, such as the same length of stay, other supportive services offered by the shelter, or services provided at the primary program site due to a lack of transportation.

We also suggest other changes to the structure and text of this section for purposes of clarity. A person's ability to request an alternative or modified placement should not be limited to "shared sleeping quarters or shared bathing facilities." We therefore recommend that the provision for such accommodations be incorporated into paragraph (b) rather than in a separate paragraph. In addition, consistent with HUD's prior guidance, we strongly recommend that the rule explicitly prohibit program staff from asking individuals questions about their anatomy or medical history or making requests for identity documents or other documentation of gender as a precondition for being housed consistent with the person's gender identity.¹⁶

To meet these goals, we strongly recommend that HUD adopt the language provided in the "Recommendation" section below to help ensure that transgender people have safe, equal, nondiscriminatory access to shelters and shelter services.

HUD should clarify that the Equal Access Rule is consistent with the principled approach taken by other federal agencies implementing federal nondiscrimination laws

The proposed regulations should also expressly clarify that HUD is adopting a clear nondiscrimination rule categorically requiring that all people be given equal access to facilities consistent with their gender identity, rather than a discretionary standard. This clarification would be consistent with regulations and guidance adopted by other federal agencies, including the Departments of Labor,¹⁷ Education,¹⁸ Justice,¹⁹ and Health and Human Services,²⁰ as well as the Equal Employment

¹⁶ Dep't of Hous. & Urban Dev., Notice CPD-15-02: Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities (Feb. 2015); *see also* Family Violence Prevention and Services Programs, Notice of Proposed Rulemaking, 80 Fed. Reg. 61890, 61910 (Oct. 14, 2015) (to be codified at 45 C.F.R. pt. 1370); Dep't of Justice, *Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013* (Apr. 9, 2013).

¹⁷ *See, e.g.*, Discrimination on the Basis of Sex, 80 Fed. Reg. at 5277 (stating that "[d]enying transgender employees access to the bathrooms used by the gender with which they identify" constitutes unlawful sex discrimination under Executive Order 11246).

¹⁸ *See, e.g.*, Letter of Finding from Adele Rapport, Regional Director, Office for Civil Rights of U.S. Department of Education, to Dr. Daniel E. Cates, Superintendent of Township High School District 2011 (Nov. 2, 2015) (finding Title IX violation where school imposed differential locker room access on transgender student).

¹⁹ *See, e.g.*, Statement of Interest of the United States, *G.G. ex rel. Grimm*, No. 4:15cv54 (E.D. Va. June 29, 2015) (arguing that prohibiting a student from accessing restrooms consistent with their gender identity violates Title IX); Statement of Interest of the United States, *Tooley*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015) (same).

²⁰ *See, e.g.*, Nondiscrimination in Health Programs and Activities, Notice of Proposed Rulemaking, 80 Fed. Reg. 54172, 54219 (Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92) (stating that health programs and activities, "shall treat individuals consistent with their gender identity," including in access to facilities, to avoid unlawful sex discrimination under Section 1557 of the Affordable Care Act)

Opportunity Commission.²¹ These agencies have made clear that this protected right to equal access based on gender identity cannot be limited by an employer, school, health care provider, or other covered entity, as giving covered entities the discretion to deny equal access based on the entity's own judgment would be fundamentally inconsistent with the principle of equal opportunity. HUD should clarify that its Equal Access Rule is consistent with the principled approach taken by other federal agencies implementing nondiscrimination requirements. This approach is not only necessary to ensure the equality and dignity of transgender persons, it is the only approach that is consistent with the requirements of federal non-discrimination law.

HUD should not follow the approach taken by Department of Justice in a very different context—namely, the implementation of the Prison Rape Elimination Act. The Department of Justice adopted final regulations in 2012 to implement the Prison Rape Elimination Act of 2003 (PREA), and included provisions regarding placement of transgender prisoners in prisons, jails, and other correctional facilities. These provisions allow correctional agencies to make “case-by-case” decisions regarding whether placement in a male or female facility would ensure the individual's health and safety.²² While the Department of Justice explained in the preamble to the final rule that “an agency may not simply assign the inmate to a facility based on genital status,”²³ few, if any, state agencies are complying with this provision. Instead, the result has been that agencies are maintaining their prior practices of automatically placing individuals exclusively based on their genital anatomy, even when nominally adopting policy language that mirrors the federal rule while maintaining their prior automatic placement practices.²⁴ As a consequence of the broad discretion given by the PREA language, agencies have maintained policies that endanger the safety of transgender inmates in a manner contrary to DOJ's intent and leave DOJ with the burden of enforcing and clarifying these standards well after publication of the final rule.

Further, the rationale for taking this approach in the PREA regulations does not apply to the Equal Access Rule: unlike the Equal Access Rule, the PREA regulations were not developed based on nondiscrimination statutes or nondiscrimination principles, but rather implemented a general mandate for “standards for the detection, prevention, reduction, and punishment of prison rape,”²⁵ and were likely based in part on the Attorney General's pragmatic recognition that enforcement of the PREA

²¹ See, e.g., *Lusardi*, E.E.O.C. App. No. 0120133395 (holding that denying a transgender woman equal access to restrooms consistent with her female identity, or requiring medical documentation regarding a transgender employee's gender as a condition of equal restroom access, constituted unlawful sex discrimination under Title VII).

²² 28 C.F.R. §§ 115.42(c) (adult prisons and jails), 115.242(c) (community confinement facilities), 115.342(d) (juvenile detention facilities).

²³ Dep't of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape, Final Rule, 77 Fed. Reg. 37106, 37110 (June 20, 2012).

²⁴ See, e.g., Melanie Asmar, “How Do Colorado Prisons and Jails House Transgender Prisoners?” *Westword* (Aug. 19, 2015) (quoting Colorado Department of Corrections spokesperson in stating that that “in general,” inmates will be housed “in accordance with their natal gender, as determined by their external genitalia”), <http://www.westword.com/news/how-do-colorado-prisons-and-jails-house-transgender-prisoners-7030043>; Samantha Melamed, “Pa. Prisons Overhaul Policies for Transgender Inmates,” *Phila. Inquirer* (Aug. 25, 2015) (quoting Pennsylvania Department of Corrections spokesperson that of 137 transgender prisoners in custody, all are housed based on anatomy), http://articles.philly.com/2015-09-24/entertainment/66826544_1_transgender-women-solitary-confinement-prisons.

²⁵ 42 U.S.C. § 15607(a)(1).

standards largely relied on voluntary compliance.²⁶ Such discretion is not appropriate or permissible under regulations implementing federal nondiscrimination requirements, including the Equal Access Rule.

In order to ensure that transgender persons have safe and equal access to shelters and shelter services in all HUD-funded programs throughout the country, HUD should clarify that its Equal Access Rule is consistent with the principled approach followed by other agencies implementing equal opportunity laws and regulations and requires transgender persons to be given access to shelters and shelter services consistent with their gender identity.

Ensuring the safety of all shelter residents

Additionally, we believe it is essential that the proposed rule address more directly the problem of violence, including the high rates of sexual assault, against LGBT and gender non-conforming persons in federally-funded shelters. We therefore urge HUD to require HUD-funded programs to create and implement written policies specifying how they will combat harassment, violence and sexual assault and, in particular, how they will protect the health and safety of LGBT and gender non-conforming persons and others who are at increased risk of sexual violence. We encourage HUD to provide guidance detailing necessary provisions of such policies and recommended best practices through training and technical assistance for grantees. HUD should also specify that the failure to create and implement such policies could result in noncompliance with the regulations, thereby jeopardizing federal funding.

D. Clarifying application to individuals whose gender identity is not male or female

As written, the proposed rule, including the proposed definition of gender identity in § 5.100, applies to individuals of all gender identities. This includes individuals who do not identify as either male or female, who face pervasive bias and misunderstanding and often are unable to access basic social services as a result. The gender identity of individuals who identify with a gender other than male or female is a deeply-rooted aspect of who they are; while perhaps less familiar to many program staff, this vulnerable sub-group within the transgender population is entitled to the same acceptance and respect for their gender identities as are others.²⁷ We urge HUD to expressly acknowledge their

²⁶ See 42 U.S.C. § 15607(c).

²⁷ The medical community has widely recognized the importance of recognizing gender identities other than male or female, or non-binary genders, and providing those with non-binary genders equal access to services. See, e.g., Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People* 6 (2015) ("a non-binary understanding of gender is fundamental to the provision of affirmative care for [transgender and gender non-conforming] people"); World Prof. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender and Gender-Nonconforming People* 171, 175 (2012) (requiring physicians to provide affirming care for both binary and non-binary transgender and gender non-conforming patients); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Version 5* 451 (2013) (defining gender identity to include identities other than male or female); Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 25-26 (2011) (same).

inclusion and protection in the preamble to the final rule, and to discuss the rule's application to such persons (discussed further below) in training and technical assistance for grantees.

The requirement of § 5.106 to provide equal access consistent with a person's gender identity likewise applies to all persons, including individuals who are gender non-conforming or whose gender identity is not male or female. As noted above, this segment of the transgender community may be less familiar to program staff, who may therefore benefit from more express guidance and direction about applying the Equal Access Rule to individuals whose gender identity is not male or female. To ensure that program staff understand how to apply the requirement of equal access to such persons, we urge HUD to clarify that refusing service or access to individuals who are gender non-conforming or who do not identify as male or female violates the proposed rule. While a covered entity must provide an alternative accommodation when reasonable and appropriate to any person upon request, all individuals—including those who do not identify as male or female—have a right to access generally available programs and facilities that are most consistent with their gender identity, based upon the person's self-identification. Importantly, such persons have the same right to shelter as others and cannot be denied access or made to accept alternative housing when only male or female accommodations are available. Rather, when only male or female accommodations are available, equal access requires that persons who do not identify as either male or female must be permitted to determine which option is most consistent with their gender identity.

Individuals have the right to state their own gender identity as well as, in the case of individuals whose gender identity is not male or female, which program or facility is most consistent with their identity.²⁸ We urge HUD to include language to this effect in the preamble to the final rule, and to discuss the rule's application to persons who are gender non-conforming or who do not identify as male or female in training and technical assistance for grantees.

RECOMMENDATIONS

We recommend that the language in proposed § 5.106(b), (c), and (d) be revised as follows:

(b) *Equal access in accordance with gender identity.* The admissions, occupancy, and operating policies and procedures of recipients, subrecipients, owners, operators, managers, and providers identified in paragraph (a) of this section, including policies and procedures to protect privacy and security, shall be established or amended, as necessary, and administered so:

²⁸ See, e.g., Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015) ("For transgender students who do not identify as male or female, again, the housing preference of the student should be discussed and respected, whenever possible."); Arcadia Unified Sch. Dist., Policy Bulletin: Transgender Students: Ensuring Equity and Nondiscrimination (Apr. 16, 2015) (policy approved pursuant to ED/DOJ complaint resolution, stating that "[t]he responsibility for determining an individual's gender identity rests with the individual"). Consider the following example: Alex is a transgender person with a non-binary gender identity and a feminine gender expression. Alex states clearly that placement in a female shelter setting is consistent with her gender identity and expression, while placement in a male shelter setting is inconsistent with her gender identity. Denying Alex access placement in the female setting based on a perceived inconsistency between her gender identity and expression and her birth-assigned male gender would violate the rule.

(1) 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, and in a manner that affords equal access to the individual's family; and

(2) Individuals ~~shall be~~ **are** placed, served, and accommodated in accordance with the individual's gender identity.

(3) Individuals may request an alternative or modified placement for health, safety, or privacy reasons. Shelter staff must provide reasonable and appropriate accommodations when they are requested by the shelter seeker. Any such alternative or modified accommodation may be made only at the individual's request. No individual may be required to accept an alternative or modified accommodation.

(4) Shelter staff shall not ask questions about a shelter seeker's anatomy, assigned sex at birth, medical procedures, or medical history, or require shelter seekers to provide identity documents or other documentation of gender as a precondition for being placed or accommodated consistent with their gender identity.

(5) Shelter staff shall not make a determination regarding an alternative or modified accommodation based solely on a person's actual or perceived gender identity, or on the complaints of other clients, beneficiaries, or employees.

~~(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. 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.~~

(d) Referrals. In any instance in which **an alternative or modified accommodation case-by-case determination** is made under paragraph ~~(c)~~ **(b)(3)** of this section, the recipient, subrecipient, owner, operator, manager, or provider shall ensure that an opportunity to access equivalent alternative accommodations, benefits, and services is provided or shall refer the individual to a comparable alternative program with availability that will meet the individual's needs, **including access to an equivalent length of stay, equivalent supportive services, and transportation as needed to ensure equivalent access to services.**

~~(e)~~(d) *Documentation and record retention.* Providers shall document and maintain records of compliance with the requirements in paragraphs (b), **and** (c), ~~and (d)~~ of this section for a period of 5 years, including but not limited to:

- (1) The specific facts, circumstances, and reasoning relied upon in ***providing an alternative or modified placement based on an individual request under paragraph (b)***~~(3)that results in an alternative admission, accommodation, benefit, or service to an individual or their family;~~
- (2) The facts and circumstances regarding the opportunities to access alternative accommodations that are provided to an individual and their families by the recipient, subrecipient, owner, operator, manager, or provider; and
- (3) The facts, circumstances, and outcomes regarding each referral of an individual and their family to a comparable alternative program, including information regarding the benefits, services, and accommodations received.

(e) Affirmative safety policies. All recipients, subrecipients, owners, operators, managers, or providers shall have in place written policies specifying how they will combat harassment, violence and sexual assault and, in particular how they will protect the health and safety of LGBT and gender non-conforming persons and others who are at increased risk of sexual violence. Failure to create and implement such policies could result in noncompliance with the regulations.

E. Conclusion

We commend HUD for taking the important step of issuing this proposed amendment to the Equal Access Rule and for its ongoing work to implement crucial nondiscrimination protections for transgender individuals. We urge you to finalize the rulemaking as quickly as possible to ensure that the benefits of the Equal Access Rule reach everyone who needs them.

Thank you for your consideration.