



PUBLIC COMMENT

December 15, 2015

SUBJECT: Public Comment in Response to **Docket ACF-2015-0010**

The National Center for Transgender Equality commends the Family Violence Prevention and Services Administration (FVPSA) on their proposed rules and offer the following public comments in response to FVPSA's notice of proposed rulemaking. While we have joined recommendations submitted by a number of other LGBTQ organizations, we submit the following comments to provide additional background on some of those recommendations.

§ 1370.5—What additional non-discrimination requirements apply to these programs?

General Prohibition on Discrimination—Section 1370.5(a)

While we strongly support this provision, we urge ACF to strengthen it by expressly prohibiting discrimination based on sexual orientation and gender identity. Discrimination based on sexual orientation and gender identity necessarily constitute discrimination on the basis of sex, and therefore fall within the sex discrimination prohibitions applicable to programs under Title IX of the Education Amendments of 1972, Section 1557 of the Affordable Care Act, and the FVSPA statute.¹

Gender identity discrimination is sex discrimination

Numerous courts have interpreted Title VII of the 1964 Civil Rights Act and other federal sex discrimination laws to include discrimination on the basis of gender identity, gender transition, or transgender status.² In 2012, the Equal Employment Opportunity Commission followed these decisions and held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII.”³ The Commission explained its reasoning as follows:

¹ 20 U.S.C. § 1681; 42 U.S.C. § 18116(a); 42 § 10406(c)(2)(B).

² See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Rumble v. Fairview Health Services*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Affordable Care Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Finkle v. Howard Cty., Md.*, 12 F.Supp.3d 780 (D. Md. 2014). The few cases finding that Title VII does not protect transgender workers, see, e.g. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984), reached their conclusions based on case law that has since been repudiated by the Supreme Court's holding in *Price Waterhouse v. Hopkins*, which determined that Title VII's prohibition on sex discrimination includes sex stereotyping. 490 U.S. 228 (1989). For an analysis of these cases, see Statement of Interest of the United States at 14, *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. Jan. 26, 2015).

³ *Macy v. Holder*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, *12 (Apr. 20, 2012).

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that “an employer may not take gender into account in making an employment decision.”⁴

The Commission stressed the conclusion that gender identity discrimination is covered can be reached by “any number of formulations”—as based on sex stereotypes about gender identity or expression or gender roles, as based on an outward change in sex, or as based on gender identity itself as a component of sex—all of which “are simply different ways of describing sex discrimination.”⁵ The Attorney General has reaffirmed this interpretation,⁶ and the Department of Labor,⁷ the Office of Special Counsel, the Merit Systems Protection Board, and the Office of Personnel Management⁸ have taken the same position in guidance and proposed or final regulations. As a natural outgrowth of this interpretation, the Commission has consistently held that workplace harassment on the basis of an employee’s gender identity is a form of sex harassment.⁹ Similarly, the Departments of Education and Justice have clarified on multiple occasions that under Title IX discrimination based on gender identity and nonconformity to sex stereotypes is discrimination based on sex.¹⁰ The Department of Health and Human Services has adopted a similar approach in its interpretation of Section 1557 of the Affordable Care Act, and has clarified that under the ACA discrimination based on sex includes discrimination on the basis of gender identity.¹¹

Sexual orientation discrimination is sex discrimination

⁴ *Id.* at *7.

⁵ *Id.* at *10.

⁶ Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); *see also* Jamal v. SAKS & Co., No. 14-2782 (S.D. Tex.), Statement of Interest of the United States (Jan. 26, 2015); Burnett v. City of Philadelphia, No. 09-4348 (E.D. Pa.), Statement of Interest of the United States (Apr. 4, 2014).

⁷ Dep’t of Labor, Apprenticeship Programs; Equal Opportunity, Proposed Rule, 80 Fed. Reg. 68908 (Nov. 6, 2015); Dep’t of Labor, Discrimination on the Basis of Sex, Proposed Rule, 80 Fed. Reg. 5246 (Jan. 30, 2015); Office of Federal Contract Compliance Programs (OFCCP) Dir. 2015-1, Handling Individual and Systemic Sexual Orientation and Gender Identity Discrimination Complaints (Apr. 16, 2015); OFCCP Dir. 2014-02, Gender Identity and Sex Discrimination (Aug. 19, 2014).

⁸ *See* 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105; OPM, EEOC, OSC, & MSPB, Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities (2015).

⁹ *See Lusardi*, E.E.O.C. App. No. 0120133395 at 15; *Jameson*, E.E.O.C. Appeal No. 0120130992 at 2.

¹⁰ Finding Letter from Adele Rapport, Director of Chicago Reg’l Office of Office for Civil Rights of U.S. Dept. of Educ., to Dr. Daniel E. Cates, Superintendent of Township High School District 2011 (Nov. 2, 2015); *G.G. v. Gloucester County School Board*, No. 15-2056 (4th Cir.), Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellant and Urging Reversal (Oct. 28, 2015); *G.G. v. Gloucester County School Board*, No. 4:15cv54, (E.D. Va.), Statement of Interest of the United States (June 29, 2015); *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466 (E.D. Mich.), Statement of Interest of the USA (Feb. 24, 2015); Dep’t of Educ., *Title IX Resource Guide*, 1 (Apr. 2015); Dep’t of Educ., “Questions and Answers on Title IX and Sexual Violence,” 5 (Apr. 29, 2014). *See also* Dep’t of Educ., “Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,” 25 (Dec. 1, 2014); Dep’t of Educ., “Dear Colleague,” 7-8 (Oct. 26, 2010).

¹¹ Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).

Federal courts and agencies have likewise endorsed the application of sex discrimination prohibitions to discrimination based on sexual orientation. For example, the EEOC held this past summer that Title VII's prohibition on employment decisions based on "sex-based considerations" includes considerations based on an individual's sexual orientation.¹² The Commission clearly stated that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."¹³ The EEOC further clarified that "[a] complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account."¹⁴

Some older federal decisions held that sexual orientation discrimination is not actionable under existing sex discrimination laws; however, those decisions are based on outmoded rationales that cannot be reconciled with the U.S. Supreme Court's contemporary sex discrimination jurisprudence. Many are based simply on a conclusory statement that "Title VII [of the Civil Rights Act of 1964] does not prohibit harassment or discrimination because of sexual orientation."¹⁵ To the extent these decisions include any analysis at all, they reason that Congress did not intend to protect gay, lesbian, and bisexual people when it enacted Title VII—the same logic employed by courts holding Title VII does not cover bias based on gender identity.¹⁶ These decisions find that Congress had only the "traditional notions of sex in mind" when it passed Title VII and that those "traditional notions" did not include sexual orientation.¹⁷ However, the Supreme Court rejected this mode of statutory interpretation in *Oncale v. Sundowner Offshore Services, Inc.*, holding that "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."¹⁸ Interpreting Title VII to exclude coverage of discrimination based on sexual orientation violates this principle by inserting a judicially crafted exception into the plain language and reasonable application of the text.

Just as *Oncale* held that Title VII must be applied to prohibit sexual harassment of men by other men, even though Congress did not have that problem in mind when it enacted Title VII,¹⁹ so Title VII must be applied to prohibit discrimination based on sexual orientation, an intrinsically sex-based issue, regardless of whether Congress expressly intended to do so. The plain language of Title VII does not exclude discrimination on the basis of sexual orientation from discrimination on the basis of sex, and, as explained above, any discrimination based on a person's sexual orientation necessarily takes the

¹² *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). The Commission has developed this interpretation in a long series of decisions prior to *Baldwin*. See, e.g., *Complainant v. Johnson*, EEOC Appeal No. 0120110576 (Aug. 20, 2014); *Complainant v. Cordray*, EEOC Appeal No. 0120141108 (Dec. 18, 2014); *Complainant v. Donahoe*, EEOC Appeal No. 0120132452 (Nov. 18, 2014); *Complainant v. Secretary, Dep't of Veterans Affairs*, EEOC Appeal No. 0120110145 (Oct. 23, 2014); *Couch v. Dep't of Energy*, EEOC Appeal No. 0120131136 (Aug. 13, 2013); *Brooker v. U.S. Postal Service*, EEOC Appeal No. 0120112085 (May 20, 2013); *Culp v. Dep't of Homeland Security*, EEOC Appeal No. 0720130012 (May 7, 2013); *Castello v. U.S. Postal Service*, Appeal No. 0120111795 (Dec. 20, 2011); *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011).

¹³ *Baldwin*, EEOC Appeal No. 0120133080 at *5.

¹⁴ *Id.*

¹⁵ See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (quoting *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

¹⁶ See, e.g., *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), *abrogated by Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001).

¹⁷ *Id.* at 329.

¹⁸ 523 U.S. 75, 79 (1998).

¹⁹ *Id.* at 80-81.

category of sex into account. Some of these decisions cite the fact that Congress has debated but not yet passed legislation expressly prohibiting sexual orientation discrimination.²⁰ The Supreme Court has ruled, however, that “[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.”²¹ Indeed, it is common for federal legislation to seek to codify judicial interpretations existing laws where doing so will provide additional clarity and guidance. In sum, most of the federal court decisions declining to recognize sexual orientation discrimination as sex discrimination pre-date the Supreme Court’s decisions in *Price Waterhouse* and *Oncale*, and none can be reconciled with the holdings in those cases.

The EEOC’s decision in *Baldwin* decision, already recognized as “persuasive[.]” and “compelling” by one district court,²² reflects a steady, consistent development of case law that reaffirms that discrimination on the basis of sexual orientation is a form of sex discrimination. For example, in 2002, a federal court clearly stated that an employer is engaged in unlawful discrimination if the employee would have been treated differently if she were a man dating a woman, instead of a woman dating a woman.²³ A federal judge reached a similar conclusion in *Hall v. BNSF Railway Co.*, when an employee was denied same-sex spousal coverage on the company health plan.²⁴ In this case, the judge allowed a plaintiff’s claim of sex discrimination under Title VII and the Equal Pay Act to proceed to the next step of litigation. The judge explicitly provided that the plaintiff “experienced adverse employment action in the denial of spousal health benefit due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit.”²⁵ Courts have similarly held that discrimination against same-sex couples is sex-based discrimination under the Equal Protection Clause of the Constitution.²⁶ Most directly, the federal district court for the District of Columbia has held that an allegation that an employee’s “orientation as homosexual had removed him from [the

²⁰ See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001).

²¹ *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citation omitted) (internal quotation marks omitted).

²² *Isaacs v. Felder Services, LLC*, No. 2:13cv693–MHT, 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015); see also *Pittman v. Cook Paper Recycling Corp.*, --- S.W.3d ---, 2015 WL 6468372 (Mo. App., W.D. Oct. 27, 2015) (Gabbert, J., dissenting).

²³ *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223–24 (D. Or. 2002). See also *Koren v. Ohio Bell Telephone Co.*, 894 F.Supp.2d 1032 (N.D. Ohio 2012) (discrimination based on sex stereotype that man should not take a male spouse’s surname is sex-based under Title VII); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (“The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, ‘real men don’t date men.’ The gender stereotype at work here is that ‘real’ men should date women, and not other men”);

²⁴ 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014).

²⁵ *Id.* at *2. See also *Deneffe v. Skywest, Inc.*, No. 14–cv–00348–MEH, 2015 WL 2265373 (D. Colo. May 11, 2015) (alleged discrimination based on use of domestic partner benefits for same-sex partner and failure to participate in colleagues’ anti-gay jokes and bragging about heterosexual sexual activity stated Title VII claim).

²⁶ See, e.g., *Latta v. Otter*, 771 F.3d 456, 480–96 (9th Cir. 2014) (Berzon, J., concurring); *Waters v. Ricketts*, 48 F.Supp.3d 1271, 1281 (D. Neb. 2015); *Rosenbrah v. Daugaard*, 61 F.Supp.3d 845, 860–61 (D.S.D. 2014); *Jernigan v. Crane*, 64 F.Supp.3d 1260, 1286 (E.D. Ark. 2014); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 996 (N.D. Cal. 2010); *Lawson v. Kelly*, 14–0622–CV–W–ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014); *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1206 (D. Utah 2013); see also *Baehr v. Lewin*, 852 P.2d 44, 64–67 (Haw. 1993) (plurality opinion); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 971–73 (Mass. 2003) (Greaney, J., concurring).

employer's] preconceived definition of male" stated a Title VII claim.²⁷ Courts have held similarly in cases of sexual orientation-based harassment under Title IX.²⁸

The 2014 Seventh Circuit decision in *Muhammad v. Caterpillar, Inc.* also illustrates the trend towards the recognition of discrimination based on sexual orientation as sex discrimination.²⁹ In this case, the plaintiff alleged that his co-workers subjected him to both racial and sexual harassment, including slurs related to his sexual orientation.³⁰ When the plaintiff informed his supervisor of the hostile work environment, he was suspended.³¹ The district court granted summary judgment for the defendant, claiming that Title VII's protections from harassment only apply to gender and not sexual orientation.³² A Seventh Circuit panel upheld the decision and affirmed the lower court's interpretation that Title VII protections do not extend to sexual orientation discrimination. Although the Seventh Circuit later denied the plaintiff's motion for a panel rehearing, the panel, significantly, amended its original opinion by removing the explicit language stating that Title VII did not extend to discrimination based on sexual orientation.³³ The ruling was affirmed on other grounds and no longer relies on Title VII's supposedly limited scope. This significant action by the Seventh Circuit signals the viability of future claims based on sexual orientation in the context of Title VII.

ACF has independent authority to adopt nondiscrimination rules to protect FVPSA's objectives

In addition, prohibiting discrimination based on sexual orientation and gender identity falls squarely within ACF's authority under the FVPSA statute to "prescribe such regulations and guidance as are reasonably necessary in order to carry out the objectives and provisions" of FVPSA.³⁴ Such discrimination by a recipient clearly undermines the FVPSA's objective of providing immediate shelter and supportive services to victims and their dependents, by creating arbitrary barriers to individuals in need of support, and in many cases by re-traumatizing victims.³⁵ Accordingly, ACF can and should add sexual orientation and gender identity to this section quite apart from the prohibition on sex discrimination.

We support the proposed rules protections for the minor children of victims. While FVPSA is clearly intended to provide needed services for all dependents of victims, some recipients have imposed unnecessary barriers to shelter and other services for some dependents. In particular, victims with adolescent sons have often been denied services by programs whose clients are primarily women and girls. While we recognize that this program to date has primarily affected victims with adolescent sons, we recommend that the rule language be broadened to make clear that all minor children of victims should have equal access to services and be housed with their parents.

²⁷ *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (allegation that plaintiff's "orientation as homosexual had removed him from [the employer's] preconceived definition of male" stated Title VII claim). See also *Boutillier v. Hartford Pub. Sch.*, 2014 WL 4794527 (D. Conn. 2014) (plaintiff stated Title VII harassment claim by alleging she was "subjected to sexual stereotyping during her employment on the basis of her sexual orientation").

²⁸ *Estate of Brown v. Ogletree*, 2012 WL 591190 at *16-17 (S.D. Tex. Feb. 21, 2012), modified on other grounds by *Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 2012 WL 1900929 (S.D. Tex. May 23, 2012); *Schroeder v. Maumee Board of Education*, 296 F. Supp. 2d 869, 871 (N.D. Ohio 2003); *Ray v. Antioch Unified Sch. Dist.*, 107 F.Supp.2d 1165, 1170 (N.D.Cal.2000); see also Letter of Findings to Tehachapi Unified School District, ED/OCR Case No. 09-11-1031, DOJ Case No. DJ 169-11E-38, at 14. (June 30, 2011).

²⁹ 767 F.3d 694 (7th Cir. 2014).

³⁰ *Id.* at 696.

³¹ *Id.* at 697.

³² *Id.*

³³ *Id.*

³⁴ 42 U.S.C.A. § 10404(a)(4).

³⁵ See 42 U.S.C.A. § 10401(b)(2).

It is important to note that nothing in these proposed regulations tells a victim who has been discriminated against what their remedies are. Without an explicit complaint procedure, those who are considering seeking services and who fear encountering discrimination may not even approach a service provider. It is therefore critical to the effectiveness of the whole non-discrimination provision to add some sort of complaint or enforcement mechanism

RECOMMENDATION

We recommend that the language in § 1370.5(a) be revised as follows:

(a) No person shall on the ground of sex, ***sexual orientation, gender identity***, or religion be excluded from participation in, be denied the benefits of, or be subject to discrimination under, any program or activity funded in whole or in part through FVPSA. FVPSA grantees must provide comparable services to victims regardless of gender. This includes not only providing access to services for male victims of family, domestic, and dating violence, but also making sure not to limit services for victims with ***minor*** sons (up to the age of majority). Victims and their ***minor children*** must be sheltered or housed together unless requested otherwise or unless the factors or considerations identified in the paragraph directly below require an exception to this general rule.

Ensuring Equal Access Consistent with an Individual's Gender Identity—Section 1370.5(c)

Support for the proposed rule

We strongly support § 1370.5(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 will protect the safety, well-being, and dignity of victims and dependents who are transgender. While data regarding FVPSA programs is not available, national research indicates that people experiencing homelessness frequently face barriers to accessing safe shelter. In the National Transgender Discrimination Survey, nearly one in three (29%) transgender people report being turned away from a shelter due to their transgender status and 22% of those who stayed at a shelter reported experiencing sexual assault from staff or other residents. Furthermore, 42% of transgender people facing homelessness report having been forced to stay in a shelter living as the wrong gender. Overall, nearly half of transgender shelter-seekers said they ultimately left a shelter due to mistreatment.³⁶ Thus, respect for an individual's self-identified gender is both a basic matter of dignity and critical to providing safe and accessible shelter.

ACF's proposal is consistent with the views of federal and state agencies and courts

Agencies across the federal government have already made it explicit that, under Title VII and other sex discrimination laws, equal opportunity includes treating individuals consistent with their gender identity, including equal access to gender-appropriate facilities. For example, the Equal Employment Opportunity Commission recently held that an employer's refusal to provide equal access to workplace facilities that are consistent with an employee's gender identity, solely because the employee is transgender, violates Title VII.³⁷ The Commission's precedential ruling made clear that neither asserted concerns about the objections of other employees, nor provision of a different single-user facility, nor

³⁶ *Id.*

³⁷ *Lusardi*, E.E.O.C. App. No. 0120133395.

offering access contingent on evidence of the completion of a medical procedure, nor an employee's temporary and voluntary agreement to accept different treatment, may justify such disparate treatment.³⁸ The Commission has since filed litigation against a private employer alleging a violation of Title VII in just this scenario.³⁹

The Justice Department has also adopted this view under Title IX and the Violence Against Women Act. In two recent Statements of Interest, the Justice Department has argued that a school violates Title IX when it denies a transgender student equal access to school facilities consistent with their gender identity.⁴⁰ In two public resolution agreements to date, the Department of Justice and Department of Education have required school districts to provide for equal use of school restrooms consistent with an individual's gender identity, and in all other respects to treat transgender students on the basis of their gender identity.⁴¹

Numerous other federal agencies have also adopted this view. The Office of Special Counsel found last year that refusal to permit a transgender employee to use restrooms consistent with her female gender identity unless she provided invasive medical evidence not only violated federal civil service protections but also likely constituted sex discrimination under Title VII.⁴² The Department of Labor has taken the same approach in guidance for the Job Corps programs⁴³ and other employment and training programs,⁴⁴ and in proposed sex discrimination rules for federal contractors.⁴⁵ Consistent with this approach, the Department of Education has also instructed schools that, under Title IX, they must generally treat students according to their gender identity in all single-sex classes and programs.⁴⁶

³⁸ *Id.*

³⁹ *EEOC v. Deluxe Financial Services, Inc.*, No. 15-cv-02646-ADM-SER (D. Minn. Civ., filed June 4, 2015).

⁴⁰ *G.G. ex rel. Grimm v. Gloucester County School Board*, No. 15-2056, Brief of the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal (4th Cir. filed 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. filed June 29, 2015) (“Under Title IX, discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex. As such, prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX”); Statement of Interest of the United States at 12, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. filed Feb. 24, 2015) (“‘On the basis of sex’ includes discrimination based on the fact that an individual is transgender (i.e., has a gender identity different from the person's sex assigned at birth) or the perception that an individual has undergone, or is undergoing, a gender transition.... Plaintiff has alleged facts that, when read in the light most favorable to him, are sufficient to establish a prima facie case of sex discrimination based on his gender identity, transgender status, and nonconformity to sex stereotypes. Specifically, Plaintiff alleges...that unlike other male students, he was denied access to the boys' restrooms.”)

⁴¹ See 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).

⁴² Report of Prohibited Personnel Practice, OSC File No. MA-11-3846 (Jane Doe) (Aug. 28, 2014), https://osc.gov/Resources/2014-08-28_Lusardi_PPP_Report.pdf.

⁴³ 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).

⁴⁴ 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), http://wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14_Acc.pdf.

⁴⁵ Discrimination on the Basis of Sex, Notice of Proposed Rulemaking, RIN 1250-AA05, 80 Fed. Reg. 5247 (Jan. 30, 2015), (defining sex discrimination to include bias based on gender identity, transgender status, or sex reassignment or related treatment; including “[d]enying transgender employees access to the bathrooms used by the gender with which they identify”), <http://www.gpo.gov/fdsys/pkg/FR-2015-01-30/pdf/2015-01422.pdf>.

⁴⁶ Dep't of Educ., “Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,” 25 (Dec. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

Importantly, the Department of Housing and Urban Development (HUD) and the Department of Justice's Office on Violence Against Women have adopted the same approach with respect to homeless shelters and domestic violence programs (including shelters), respectively.⁴⁷ In its recent proposed rule, HUD reported on a listening session it conducted together with the U.S. Interagency Council on Homelessness. At the listening session, "homeless service providers reported that, if given the choice between a shelter designated for their assigned birth sex or sleeping on the streets, many transgender shelter-seekers would choose the streets. One participant reported that, in her community, "transgender women are excluded from the women's shelter, and conditions for them are so dangerous at the men's shelter that the shelter forces them to try to disguise their gender identity."⁴⁸

Also significant for ACF, HHS itself has adopted this approach in its proposed rules under Section 1557 of the Affordable Care Act, which require that covered entities treat participants in all § 1557-covered programs in accordance with their gender identity.⁴⁹

To date, 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.⁵⁰ For example, guidance from Iowa's Civil Rights Commission states: "[Question:] May a shelter or dormitory require a patron to use a facility inconsistent with their gender identity? [Answer:] NO. People must be allowed to use facilities consistent with their gender identity."⁵¹

⁴⁷ Dep't of Hous. & Urban Dev., Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, Proposed Rule, RIN 2506-AC40, 80 Fed. Reg. 72542 (Nov. 20, 2015); 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); Dep't of Justice, Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013, at 9 (Apr. 9, 2013).

⁴⁸ Dep't of Hous. & Urban Dev., Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, Proposed Rule, RIN 2506-AC40, 80 Fed. Reg. 72542, 72644 (Nov. 20, 2015).

⁴⁹ Nondiscrimination in Health Programs and Activities, Notice of Proposed Rulemaking, RIN 0945-AA02, 80 Fed. Reg. 54172 (Sept. 8, 2015); *See also* Office for Civil Rights, Bulletin: The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients (July 14, 2015).

⁵⁰ *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); *Dept. of Fair Emp't & Hous. v. Amer. 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); *Coy 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. Hum. Rts. Comm'n, May 15, 2015); *Jones v. Johnson Cty. Sheriff's Dept.*, CP No. 12-11-61830, Finding of Probable Cause (Iowa Civ. Rts. Comm'n Feb. 11, 2013); Conn. Safe Schools Coalition, 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 Civ. Rts. 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. Dept. 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 Rts. Comm'n, Facts About Gender Identity or Expression Discrimination (2012), http://detr.state.nv.us/Nerc_pages/NERC_docs/Facts_About_Gender_Identity_or_Expression_Discrimination.pdf; New York State Educ. Dept., 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_GNCGuidanceFINAL.pdf; Wash. State Hum. Rts. Comm'n, Guide to Sexual Orientation and Gender Identity 5 (2014), <http://www.hum.wa.gov/Documents/Guidance/GuideSO20140703.pdf>; Vt. Hum. Rts. 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>.

⁵¹ Iowa Civ. Rts. Comm'n, Guidance on Sexual Orientation & Gender Identity: A Housing Provider's Guide to Iowa Law Compliance (2012).

Common arguments against equal access do not withstand scrutiny

A commonly asserted justification for discrimination against transgender people in gender-specific settings is that such discrimination is necessary to protect the privacy interests of others who are uncomfortable with the presence of a transgender person.⁵² While it may be that some people are uncomfortable using a single-sex program or facility alongside a transgender person, another person's desire to avoid the presence of a transgender person does not implicate any legally protected privacy right. No court has ever held that there is any legal right to privacy that would be violated simply by permitting a transgender person to access a sex-specific program or facility that corresponds to his or her gender identity. In fact, courts have rejected such claims.⁵³ Indeed, to the extent that privacy concerns enter into this calculus, they actually weigh in favor of providing equal access to all individuals in accordance with their gender identity. Transgender people have a constitutional right to privacy concerning their transgender status.⁵⁴ In recognizing this right, the U.S. Court of Appeals for the Second Circuit has stated that, for many transgender people, the intensely private nature of transgender status "is really beyond debate."⁵⁵ Denying a transgender individual access to the facilities consistent with their gender or forcing them to use facilities associated with their birth sex publicly signals their transgender status to others in violation of their right to privacy.

While some non-transgender individuals may feel genuine discomfort with the presence of a transgender person of the same self-identified and lived gender, these feelings of discomfort are rooted in unfortunate cultural bias and stereotypes regarding transgender people. It is well-settled law that the discomfort of third parties that is based on a protected characteristic, framed as a "customer preference" defense in the employment context, cannot constitute a legitimate, nondiscriminatory motive for adverse treatment.⁵⁶ The purpose of Section 1557 is to ensure that a person's opportunities to access

⁵² See, e.g. Letter from Anurima Bhargava, Chief of Educational Opportunities Section of Civil Rights Division of U.S. Department of Justice, & Arthur Zeidman, Director of San Francisco Regional Office of Office for Civil Rights of U.S. Department of Education, to Joel Shawn, Arcadia Unified School District, 3 (July 24, 2013) (describing district's reliance on "generalized concerns about safety and privacy" to deny equal access to transgender student).

⁵³ 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 that invasion-of-privacy claims by offended customers in this scenario would also likely fail for lack of actual harm).

⁵⁴ *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) ("We now hold... that individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality").

⁵⁵ *Id.* at 111. See also *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (recognizing right to medical confidentiality and finding this right has particular significance in cases of serious and socially stigmatized medical conditions such as HIV); *K.L. v. State of Alaska, Dep't of Administration, Div. of Motor Vehicles*, Case No. 3AN-11-05431 CI (Alaska Sup. Ct., 2012) (right to privacy is infringed when a transgender person is unable to change the gender designation on his or her driver's license to correspond to his or her lived gender, and the person's transgender status is effectively disclosed each time they must produce identification); *in re E.P.L.*, 26 Misc. 3d 336, 339 (N.Y. Sup. Ct. 2009) (transgender man was entitled to exemption from publication requirement for obtaining a name change, because he "has a right to feel threatened for his personal safety in the event his transgender status is made public").

⁵⁶ *Schroer*, 577 F. Supp. 2d at 302 (noting that if an employer defers to the biases of others, he is acting discriminatorily, "no less than if [he] act[ed] on behalf of his own prejudices"); *Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1560 n. 13 (9th Cir. 1994) (faculty beliefs about "Japanese cultural preferences" could not justify gender discrimination in hiring director for Asian legal studies program); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (female employee could not be fired simply because certain foreign clients would only work with men); EEOC Decision No. 78-47, EEOC Dec. P 6730 (Oct. 2, 1978) (company discriminated under Title VII when it refused to hire a white, female truck driver because African-American employees of the company were uncomfortable riding with a white woman through predominantly African-

critical health programs and activities are not subordinated to another person's negative feelings about a group of people, however genuine those feelings may be.⁵⁷ These feelings may be sincere, deeply felt, and not consciously malicious, but they are nevertheless a manifestation of bias, not a cognizable right or a justification for discriminatory conduct. Equal opportunity for transgender people does not infringe on the rights of other individuals, nor does it create any other basis for third-party liability. In fact, the U.S. Court of Appeals for the Eighth Circuit—the only court to be squarely presented with the claim sharing a restroom with a transgender person infringed on another person's rights—roundly rejected that claim, holding that the complaining employee suffered no cognizable harm.⁵⁸

Anti-discrimination rules ensure that individuals are not denied equal opportunity based on “prejudice, stereotypes, or unfounded fear.”⁵⁹ Whether couched in terms of privacy, modesty, or fears about safety, the desire to avoid the presence of a transgender person in the context of sex-segregated or sex-specific programs or activities represents precisely the sort of entrenched cultural bias that federal nondiscrimination rules are designed to address.⁶⁰

Equal access for individuals with non-binary gender identities

It is important to note that the principle of equal access consistent with a person's gender identity applies not only to women and men—whether transgender or not—and also to individuals whose gender identity is not male or female. The gender identity of non-binary individuals, who identify with a gender other than male or female, is a deeply-rooted aspect of who they are.⁶¹ However, in the case of otherwise lawful sex-specific programs, program staff may misunderstand how to apply this principal for non-binary individuals. Refusing service or access to individuals because their non-binary gender identity does not correspond to male or female program or facility options would clearly violate the proposed rule. While a covered entity may voluntarily provide an alternative accommodation upon request, all individuals have the right to access to generally available programs and facilities that are

American areas). *See also Olsen v. Merritt Intern., Inc.*, 75 F. Supp. 2d 1052, 1065 (“Courts have consistently rejected requests for a BFOQ [bona fide occupational qualification] based on customer preference”).

⁵⁷ *C.f. Macy*, E.E.O.C. App. No. 0120120821 at *12 (“Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender..., by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort.”).

⁵⁸ *See Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273 (1987).

⁵⁹ *Cruzan*, 294 F.3d at 983–84 (rejecting a sex-based and religious discrimination claim by an employee who objected to a transgender woman's use of the women's restroom); *see also Crosby*, 763 F. Supp. at 670 (rejecting a similar claim in the prison context).

⁶⁰ *See Sch. Bd. of Nassau Cty.*, 480 U.S. at 287.

⁶¹ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (holding exclusion of men from flight attendant positions could not be justified on basis of customer expectations: “While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices [Title VII] were meant to overcome.”). *See also Jennifer Levi & Daniel Redman, The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 144 (2010) (arguing that arguments for denying equal facility access to transgender people mirror arguments offered in support of long-dead, unconstitutional laws against public cross-dressing).

⁶¹ *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).

most consistent with their gender identity.⁶² Individuals have the right to state their own gender identity as well as, in the case of non-binary individuals, which program or facility is most consistent with their identity. We urge ACF to include language to this effect in preamble to the final rule, and to discuss the rule's application to non-binary individuals in training and technical assistance for grantees.

Clarifying that alternative accommodations should be provided only upon request

While a placement consistent with an individual's gender identity will in most cases be the safest and most appropriate and is generally required to avoid discrimination against transgender individuals, shelters should make accommodations on an individual basis if an individual requests an alternative accommodation for their own personal safety or privacy. We support the intent of the proposed rule to allow for such alternative placements while ensuring they are limited narrowly to cases where such accommodation is requested by the individual.

As written, we are concerned that this section fails to make clear the general applicability of the requirement to treat individuals consistent with their gender identity, and the very limited situations in which programs should have discretion to make alternative placements that are not consistent with a person's gender identity. Given the research showing that inappropriate and unsafe placements of transgender individuals have been a very common occurrence, the final rule should provide clear and unambiguous guidance on this issue. Placements not consistent with a victim/client's gender identity should only be made in response to an explicit request by the victim/client, and should not be initiated by program staff. It is only in this narrow circumstance that program staff should be making case by case decisions with regard to placement in sex-specific programs. We recommend ACF adopt language provided below, which would make this point clear and help ensure appropriate, safe, and nondiscriminatory placement decisions.

ACF should follow the categorical nondiscrimination approach of other federal agencies

This approach would be more consistent with regulations and guidance adopted by other federal agencies. The Departments of Labor, Education, Justice, the Equal Employment Opportunity Commission, and HHS itself have all taken the view that, under federal sex discrimination laws, individuals have a right to equal access to facilities that are consistent with their gender identity.⁶³ Crucially, these agencies have taken a categorical approach, making clear that individuals have a right to equal access that cannot be limited by an employer, school, health care provider, or other covered

⁶² 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").

⁶³ 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); Nondiscrimination in Health Programs and Activities, Notice of Proposed Rulemaking, RIN 0945-AA02, 80 Fed. Reg. 54172, 54219 (Sept. 8, 2015) (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); *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); *G.G. ex rel. Grimm*, No. 4:15cv54 (E.D. Va.), Statement of Interest of the United States (June 29, 2015) (arguing that prohibiting a student from accessing restrooms consistent with their gender identity violates Title IX); *Tooley*, No. 2:14-cv-13466 (E.D. Mich.), Statement of Interest of the USA (Feb. 24, 2015) (same); *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).

entity. If an entity retained discretion to deny equal access based on the entity's own judgment, this would be fundamentally inconsistent with the principle of equal opportunity. ACF's FVPSA should be fully consistent with the approach of HHS's Section 1557 rule and that of other agencies implementing nondiscrimination requirements.

Some agency regulations that have taken a less categorical approach are based on very different contexts, and their spotty implementation illustrates the dangers of leaving too much unguided discretion to program staff in an area where there is still a great deal of misunderstanding regarding transgender people. Notably, 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.⁶⁴ Importantly, these regulations were not developed based on nondiscrimination statutes or nondiscrimination principles, but instead were developed to implement a general mandate for "standards for the detection, prevention, reduction, and punishment of prison rape."⁶⁵ Although DOJ's Office on Violence Against Women borrowed language from the PREA rules in its guidance under the Violence Against Women Act (VAWA)—based in part on the fact that VAWA grantees include some jails also covered by the PREA standards⁶⁶—the broad discretion contemplated by the PREA language is inconsistent with nondiscrimination principles embodied in the Fair Housing Act and the Equal Access Rule.

The discretionary approach embodied in the PREA rule no doubt reflected the Attorney General's judgment in 2012 of the best methods for promoting safe practices in the correctional field considering that every state correctional agency was housing prisoners exclusively based on genital anatomy and the PREA standards carried only a modest financial incentive for compliance and depend largely on voluntary compliance.⁶⁷ The Department of Justice stated in the preamble to the final rule that "an agency may not simply assign the inmate to a facility based on genital status."⁶⁸ Nevertheless, based on our research and conversations with state and federal agencies, we believe that few, if any, state agencies are complying with this provision. Instead, the result has been that agencies are adopting policy language that mirrors the federal rule while maintaining their prior automatic placement practices.⁶⁹

In order to prevent an inconsistent and ineffective implementation of the FVPSA rule, ACF should follow the categorical nondiscrimination approach followed by other agencies implementing equal

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

⁶⁵ 42 U.S.C. § 15607(a)(1).

⁶⁶ See Dept. of Justice, Office on Violence Against Women, *Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013*, 9 (Apr. 9, 2013) (noting overlap between VAWA grantees and PREA-covered entities).

⁶⁷ See 42 U.S.C. § 15607(c).

⁶⁸ Dept. of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape, Final Rule, 77 Fed. Reg. 37106, 37110 (June 20, 2012).

⁶⁹ See, e.g., Melanie Asmar, "How Do Colorado Prisons and Jails House Transgender Prisoners?" *Westword* (Aug. 19, 2015) (quoting Colorado Department of Corrections spokesperson 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.

opportunity laws and regulations, rather than the discretionary approach exemplified by the PREA standards.

RECOMMENDATION

We recommend that the language in § 1370.5(c) be revised as follows:

- (c) LGBTQ individuals must have *equal* access to FVPSA-funded shelter and nonresidential programs. Programmatic accessibility for LGBTQ survivors must be afforded to meet individual needs *to the same extent as* ~~like~~ those provided to all other survivors. *ACF requires that a FVPSA grantee, subgrantee, contractor, or vendor that makes decisions about eligibility for or placement into single-sex emergency shelters or other facilities must offer every individual an assignment consistent with their gender identity.* For the purpose of assigning a beneficiary to sex-segregated or sex-specific services, a recipient ~~may~~ **should** ask a beneficiary which group or services the beneficiary wishes to join. The recipient may not, however, ask questions about the beneficiary's anatomy or medical history or make demands for identity documents *or other documentation of gender.* ~~ACF requires that a FVPSA grantee, subgrantee, contractor, or vendor that makes decisions about eligibility for or placement into single-sex emergency shelters or other facilities will place a potential victim (or current victim/client seeking a new assignment) in a shelter or other appropriate placement that corresponds to the gender with which the person identifies, taking health and safety concerns into consideration.~~ A victim's/client's or potential victim's/client's *request for an alternative or additional accommodation for purposes of own views with respect to* personal health, *privacy, or* safety must be given serious consideration in making the placement. For instance, if the potential victim/client requests to be placed based on his or her sex assigned at birth, ACF requires that the provider will place the individual in accordance with that request, consistent with health, safety, and privacy concerns. ACF also requires that a provider will not make an assignment or re-assignment based on complaints of another person when the ~~sole stated basis of the~~ complaint is *based on gender identity or other personal characteristics rather than on misconduct a victim/client or potential victim/client's non-conformance with gender stereotypes.*