

OIRA Meeting on “Revised Requirements Under Community Planning and Development Housing Programs” [RIN: 2506-AC53]

National Center for Lesbian Rights

November 5, 2019

The National Center for Lesbian Rights (NCLR)

NCLR is a non-profit, public interest law firm that litigates precedent-setting cases at the trial and appellate court levels, advocates for equitable public policies affecting the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community, provides free legal assistance to LGBTQ people and their advocates, and conducts community education on LGBT issues. NCLR has been advancing the civil and human rights of LGBTQ people and their families across the United States through litigation, legislation, policy, and public education since its founding in 1977. We also seek to equip individuals and communities to assert their own legal rights and to increase public support for LGBTQ equality through public education.

Forthcoming rule change

- U.S. Department of Housing and Urban Development: “Revised Requirements Under Community Planning and Development Housing Programs” [RIN: 2506-AC53]
- Announced in spring HUD regulatory agenda
- Amends Equal Access Rule (EAR)
 - EAR issued in 2012: Prohibits discrimination based on sexual orientation, gender identity and marital status in all housing financed or insured by HUD
 - Clarified in 2016 with regard to shelters after further study and input: must house according to gender identity
- From OIRA web site: “This **proposed rule provides that** grant recipients, subrecipients, owners, operators, managers, and providers (**Shelter Providers**) under HUD programs **which permit single-sex or sex-segregated facilities** (such as bathrooms or temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or bathing facilities) **may establish a policy**, consistent with state and local law, by which such Shelter Provider **considers an individual’s sex** for the purposes of determining accommodation within such shelters and for purposes of determining sex for admission to any facility or portion thereof. The **proposed rule permits Shelter Providers to consider a range of factors in making such determinations**, including privacy, safety,

practical concerns, **religious beliefs**, any relevant considerations under civil rights and nondiscrimination authorities, the **individual's sex as reflected in official government documents**, as well as the gender which a person identifies with. The proposed rule does not dictate a required basis for making determinations other than that they be consistent with an overall policy. The proposed rule continues HUD's policy of ensuring that its programs are open to all eligible individuals and families regardless of sexual orientation or gender identity." (Emphasis added.)

- The proposed rule rolls back protections from 2016 amendment to EAR.
- NCLR opposes this proposed rollback:
 - By allowing shelters to consider a range of factors, including religious objections, in determining whether or not to appropriately house a transgender person, the administration is attempting to create a license to discriminate by taxpayer-funded shelters.
 - This is incredibly dangerous, as the consequences of being turned away from a shelter can be dire for those who are quite literally left out in the cold.

There is no basis for this change in policy under EO 12866 principles

- Selected Executive Order 12866 principles agencies are supposed to follow:
 - Identify problem it intends to address (#1)
 - Assess costs and benefits (#6)
 - Base decisions on best available information (#7)
- **Principle #1 – identify problem rule intends to address**
 - No problem cited in description on OIRA web site
 - In a May 23 press release, HUD referred to two cases - these cases are unrelated to the Rule, but do demonstrate the need to ensure no one in need of emergency shelter is turned away simply because of who they are.
 - *Downtown Soup Kitchen v. Municipality of Anchorage* (Anchorage, Alaska)
 - In this case, a faith-based shelter repeatedly turned away a homeless woman simply because she is transgender. The shelter claims that Anchorage's nondiscrimination ordinance violates numerous provisions of the federal and state constitutions.

- In this case, the court ruled that the specific local Anchorage ordinance didn't apply to the shelter in the first place.
 - *McGee v. Poverello House* (Fresno, California)
 - In this case, a group of women claim that shelter staff failed to protect them from sexual harassment by another woman at the shelter, who allegedly made lewd comments and tried to view them while they showered.
 - In addition, they claim Poverello House should not have admitted the resident who allegedly harassed them, and instead should have turned her away because she was transgender.
 - The conduct alleged in the complaint in this case, if true, would be inappropriate for any shelter resident, transgender or not.
 - This case has nothing to do with the Equal Access Rule. The Equal Access Rule does not prevent shelter staff from addressing and stopping inappropriate behavior by anyone.
- **Principle #6: assess costs and benefits**
 - Rescinding key portions of the HUD Equal Access Rule could generate many costs for shelter-seekers, covered entities, local communities, and society as a whole.
 - Familiarization, administrative, and legal costs for covered entities.
 - Health costs due to more people lacking shelter.
 - Costs caused by encouraging shelters to adopt higher barriers to access for everyone, such as requiring shelter-seekers to show ID.
 - Intangible costs in decreased fairness, equity, personal freedom, personal privacy of shelter seekers, and respect for fundamental rights and dignity.
 - Having more people on the street will be more costly than providing them with shelter.
- **Principle #7: base policy on best available information**
 - The best available information points to the need for the existing rule, not to eliminating it.
 - Documents submitted for the record go into detail on:
 - Housing discrimination experienced by LGBT people;
 - Employment discrimination experienced by LGBT people; and

- Mortgage and lending discrimination experienced by LGBT people.
- All of these lead to higher rates of housing instability and homelessness, especially for transgender people.
- Nearly one-third of transgender and gender non-binary people experience homelessness at some point in their life.
 - About one-half of transgender and non-binary people who identify as Black, Middle Eastern, Multiracial, or undocumented experienced homelessness at some point in their life.
- Before these nondiscrimination protections were put in place, a study by the Center for American Progress and the Equal Rights Center found that only 30% of shelters across 4 states would appropriately house trans women with other women, and one in five shelters would turn them away outright.
- According to the 2015 US Transgender Survey (USTS), over half of transgender survey respondents who stayed in a shelter in the prior year were verbally harassed, physically attacked, and/or sexually assaulted because of their gender identity.
- If anything, it's transgender people in shelters who experience harm and abuse:
 - USTS: 6-30% denied shelter access altogether (rates varied by race)
 - 70% experienced mistreatment due to being trans – harassment and assault
 - 9% evicted for being trans
 - 44% left due to harassment
- Important to note that advocates for survivors of domestic and sexual violence oppose rolling back nondiscrimination protections for transgender shelter seekers.
- In 2016, over 300 domestic violence and sexual violence organizations across the country signed a National Consensus Statement. These leaders agree: transgender women victims being served alongside other women is appropriate and not a safety issue.
- National Task Force to End Sexual & Domestic Violence has sent letter to HUD this year opposing this rollback.

- Similar nondiscrimination protections have been in place for years in over 20 states and over 300 localities and have helped increase fairness and opportunity for vulnerable people, and research shows these protections have not produced any increase in public safety issues.
 - Williams Institute study in Massachusetts (published 2018):
 - Passage of nondiscrimination laws for transgender people resulted in no increase in assault, sex crimes, voyeurism in public spaces
 - Reports of privacy and safety violations in public restrooms, locker rooms and changing rooms exceedingly rare
- EAR already addressed privacy concerns
 - Requires shelters to address privacy and harassment in nondiscriminatory way
 - Misconduct by anyone is already covered
 - Solution to ad hoc issues is not to exclude trans people
- Secretary Carson's comments suggest the policy change is motivated by animus rather than the best available information
 - Sec. Carson misrepresented agency's intentions to Congress
 - May 21: told House Committee on Financial Services no plan to change rule
 - May 22: rule change announced
 - Sec. Carson made offensive comments to HUD staff in San Francisco in September
 - Prompted resolution of condemnation in the House

Conclusion

- NCLR is strongly opposed to the forthcoming policy change from HUD withdrawing life-saving nondiscrimination protections for transgender people seeking shelter in taxpayer-funded facilities.
- The rule addresses nonexistent problems and will cause real harm to real people.