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September 22, 2020

Office of General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

Re: Docket No. FR-6152-P-01
Making Admission or Placement Determinations Based on Sex in
Facilities Under Community Planning and Development Housing Programs

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") are pleased to submit comments to HUD's proposed rule titled "Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs" (the "Proposed Rule").

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities ("PHAs") own and manage nearly half of the nation's public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households in the country.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country. The firm was founded in 1977, and over the past three decades has developed a national practice that encompasses the entire real estate, affordable housing, and community development industries. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh's original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

CLPHA and Reno & Cavanaugh submit these comments out of concern that the Proposed Rule will encourage discrimination against transgender and other gender non-conforming ("GNC") people seeking shelter and confusion for emergency services personnel and volunteers providing

shelter. It may also result in a decline in services provided to transgender and other GNC individuals. Our work is dedicated primarily to PHAs and those seeking affordable long-term housing; however, we feel a kinship with organizations providing safe accommodations to those in need, and a responsibility to ensure fair housing choice to all seeking refuge. It is out of this sense of solidarity with all those seeking and providing housing that we urge HUD to withdraw its Proposed Rule.

The Proposed Rule relies upon the same stereotypes, fear-mongering, and animus that created the vulnerabilities transgender people face in the first place. Transgender people of color experience an especially high rate of homelessness, abuse, and sex- and race-related violence. Regulation limiting housing and shelter choice for a population susceptible to such violence, particularly during peak economic and housing insecurity brought on by the coronavirus pandemic, cannot be legally or morally justified. We agree with HUD that "shelters must take special care to address the mental health and safety needs of transgender individuals." However, the Proposed Rule is not only antithetical to achieving this goal, but is blatantly transphobic in its reliance upon disproven assumptions and negative stereotypes about GNC individuals.

The ostensible impetus for the Proposed Rule is to protect the health and safety of those seeking shelter, perhaps especially "biological women" fleeing intimate partner violence, from being in mixed company. However, there is no evidence that transgender individuals present a health and safety risk as compared to cisgender people, as the Proposed Rule acknowledges.[1] Any risk that bad actors pose to the health of women should not be mitigated at the expense of the transgender community. Further, when shelter admission is determined by the subjective determination of a person's biological sex, all shelter applicants—biological women included—may be subject to additional questioning, scrutiny, and denial of services. The Proposed Rule does not provide additional protections to any population; it only adds another barrier to all those seeking shelter.

A policy that authorizes shelters to limit admission based upon a service-provider's inherently subjective perception of an individual's biological sex serves only to limit shelter choice for transgender and GNC individuals, a population that HUD acknowledges experiences homelessness and violence at high rates.[2] Further, the Proposed Rule's requirement that shelters denying admission based on biological sex facilitate a transfer to another shelter naïvely assumes that another shelter is available in the first place. Some cities, but especially rural areas, may only have one homeless shelter or emergency housing facility in the region, rendering transfers infeasible.

It is clear that HUD should be aware of the infeasibility of such transfers. When discussing the lack of funding for single occupancy bathrooms, the Proposed Rule acknowledges the lack of resources typical of emergency services shelters. Therefore, HUD's assumption that transgender individuals denied access to one shelter can easily be transferred to another with available beds—and a less limiting admissions policy—is absurd. Similarly, while HUD seems to decry the

[1] "While HUD is not aware of data suggesting that transgender individuals pose an inherent risk to biological women, there is anecdotal evidence that some women may fear that non-transgender, biological men may exploit the process of self-identification under the current rule in order to gain access to women's shelters."
[2] "HUD is aware that transgender individuals experience poverty, housing instability, mental health issues, domestic violence, and homelessness at high rates."

regulatory burden of the 2016 Rule, it nevertheless imposes a so-called "good faith" examination into a GNC person's biological sex onto shelter providers. Such an examination into a person's physical characteristics, such as facial hair or presence of an "Adam's apple," not only amounts to a callous and invasive experience for all parties, but imposes a further administrative burden on shelter personnel.

This lack of clarity is compounded by the interplay between the Proposed Rule and the Supreme Court's recent decision in *Bostock v. Clayton County, Georgia.*, 140 S. Ct. 1731 (2020), which held that sexual orientation and gender identity discrimination is included in the definition of sex with respect to Title VII of the Civil Rights Act of 1964. While this ruling was in the context of Title VII, it represents an important trend toward protecting the LGBTQ+ community against discrimination. If HUD is committed to ensuring its regulations are consistent with Supreme Court precedent, it should consider the Proposed Rule's changes in light of *Bostock* with the same fervor it used in proposing its "Implementation of the Fair Housing Act's Disparate Impact Standard" after the decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities.*[3]

The Proposed Rule gives lip service to HUD's moral and legal responsibilities to the transgender population while stripping legal protections and rubber-stamping discrimination towards this vulnerable population. The Proposed Rule erects an unnecessary barrier to shelter during a worldwide pandemic, is inconsistent with Supreme Court precedent, and is contrary to HUD's mission to create strong, sustainable, and inclusive communities for all. Therefore, we urge HUD to withdraw the Proposed Rule.

Thank you for the opportunity to comment on the Proposed Rule. If you have any questions, please do not hesitate to contact us.

Sincerely,

Sunia Zaterman
Executive Director
CLPHA

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Member
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[3] 135 S. Ct. 2507 (2015). While we do not agree with HUD's conclusions regarding what disparate impact standard the Supreme Court would require in light of *Inclusive Communities*, we agree that HUD should continue to analyze its regulations in light of Supreme Court precedent.