



Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

Filed Electronically

September 11, 2020

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410-0500

Subj: Making Admission or Placement Determinations Based on Sex in Facilities
Under Community Planning and Development Housing Programs,
Docket No. FR-6152-P-01, RIN 2506-AC53

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (USCCB), we submit the following comments on the proposed rule, published in 85 Fed. Reg. 44811 (July 24, 2020), in the above-captioned matter.

We are grateful to the Department of Housing and Urban Development (HUD) for the flexibility that the proposed rule provides on placement determinations in facilities that provide emergency shelter and other housing. This is important in fulfilling the basic need for, and human right to, shelter. We have a suggested change to the proposed regulation, which we discuss below, and several questions that we pose for the Department's consideration.

Our Catholic faith teaches that housing is a universal and inviolable right of all persons because it is necessary to live a genuinely human life. This right must be available to all

people.¹ Housing is more than a market commodity, it is a basic social good.² “This conviction is grounded in our view of the human person and the responsibility of society to protect the life and dignity of every human person by providing the conditions where human life and human dignity are not undermined, but enhanced.”³

People who identify as transgender experience homelessness, specifically unsheltered homelessness, at disproportionately high rates. These individuals are especially vulnerable and must not be denied shelter. The USCCB has consistently advocated for the right to shelter for all, with a particular concern for those who are most vulnerable. We will continue this advocacy just as Catholic service providers will continue endeavoring to meet the needs of all who come to their doors. We are steadfast in our commitment to protect human dignity and live out the call of the Gospel (*see* Matthew 25:31-46) to care for those most in need, because Jesus tells us “whatever you did for one of these least brothers of mine, you did for me.”

I. Background

In 2016, HUD published a regulation that required placements, services, and accommodations by emergency shelters and other housing to be made in accordance with an individual’s “gender identity.” 81 Fed. Reg. 64763, 64782 (Sept. 21, 2016). The 2016 regulation was flawed for at least three reasons. First, HUD’s decision to make “gender identity” a protected classification for relevant federal housing programs had no support in any Act of Congress. Second, the regulation posed problems for the privacy and safety of residents, particularly women in single-sex facilities. Third, the regulation created a burden on the religious liberty of faith-based providers, a burden that, particularly in the absence of an Act of Congress supporting it, was not justified by any compelling government interest.

HUD now acknowledges these defects (85 Fed Reg. at 44812) and has proposed a regulation that would restore the flexibility of organizations, including faith-based organizations, to make placement decisions with regard to sex. As we have long maintained,⁴ no person should be denied or excluded from housing for any reason. Catholic teaching compels us to work so that *all* may have access to safe, decent, and affordable housing. The 2016 rule, however, impeded the ability of organizations participating in HUD programs to make housing placements appropriate to persons on the basis of their sex. By removing these impediments and by restoring the flexibility of organizations that provide housing to make

¹ Second Vatican Council, *Gaudium et Spes: Pastoral Constitution on the Church in the Modern World*, promulgated by Pope Paul VI, no. 26 (Dec. 7, 1965).

² *What Have You Done to Your Homeless Brother?: The Church and the Housing Problem*, Document of the Pontifical Commission “Justitia et Pax” on the Occasion of the International Year of Shelter for the Homeless, no. 2.3 (Dec. 27, 1987).

³ *Homelessness and Housing: A Human Tragedy, A Moral Challenge*, A Statement Issued by the Administrative Board of the United States Catholic Conference, no. 5 (Mar. 24, 1988).

⁴ See our 2010 comments to HUD [here](#).

admissions and accommodations decisions, the proposed rule furthers the laudable objective of enabling everyone to receive needed housing.

II. Analysis

A. Overall Assessment

Under the proposed regulation, organizations that provide shelters and other housing may “consider biological sex in placement and accommodation decisions in single-sex facilities.” 85 Fed. Reg. at 44812. They also “may make admission and accommodation decisions based on [their] own policy for determining sex...” *Id.* at 44818. Thus, an organization that operates a shelter for women may choose to admit only persons who are biological females. *Id.* at 44812. Such organizations may also decline to admit to shared sleeping quarters or shared bathing facilities based on a good faith belief that an individual seeking such accommodations is not of the sex which the shelter’s policy accommodates. *Id.* at 44818. More generally, the proposed regulations also provide that organizations that operate shelters “may consider privacy, safety, and any other relevant factors” in making placement and accommodation decisions. *Id.* For those individuals who are not admissible, the need for housing still aims to be met, as a facility must provide a transfer recommendation to an alternative shelter. A similar recommendation is required for persons who do not assent to be housed with the opposite sex in a single-sex shelter. *Id.*

These changes are laudable and give organizations that operate emergency shelters and other forms of housing the flexibility to make placements in a way that serves everyone. Notably, they do so without regard to “transgender status,” since those who identify as transgender are explicitly protected from differential treatment simply because they are transgender (e.g., a woman cannot be denied admission to a women’s shelter merely because she identifies as male). The proposed changes, in offering flexibility rather than a new mandate, also do not make any impositions on shelters that wish to operate as generally single-sex yet accommodate persons in accord with their asserted “gender identity.”

As HUD correctly acknowledges, the 2016 rule “impermissibly restricted single-sex facilities in a way not supported by congressional enactment, minimized local control, burdened religious organizations, manifested privacy issues, and imposed regulatory burdens.” *Id.* at 44812. We are grateful for HUD’s acknowledgement that the 2016 rule created these problems, and its proposal of a rule that would help eliminate them.

We are especially grateful for HUD’s acknowledgment of the need to remove unnecessary burdens on the practices of faith-based providers of housing, whose religious beliefs include both the call to shelter the homeless and recognition of the immutable difference and dignity of men and women. By allowing greater flexibility, the proposed regulations alleviate those burdens, thus facilitating their participation in HUD programs.

Ensuring the continued participation of faith-based organizations is especially critical because of the vital role that such organizations play in providing needed housing and related services. See, e.g., National Alliance to End Homelessness, *Faith-Based Organizations: Fundamental Partners in Ending Homelessness*, p. 1 (May 2017) (noting that faith-based organizations provide more than 40% of the beds available for emergency shelter for single adults and have the capacity to house more than 150,000 people on any given night in a variety of housing types). Last year, for example, Catholic Charities in the United States served 172,000 clients in need of emergency housing services, and an additional 309,000 clients in need of related services such as case management, food and clothing distribution, and emergency financial assistance. Catholic Charities USA, *Living Our Faith through Actions: 2019 Annual Report*, p. 8 (listing figures for emergency housing). Clearly no one—least of all persons who suffer from homelessness—would be served by creating or allowing unnecessary regulatory obstacles that would impede this important work.

Some may argue that the proposed regulations should be changed in light of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), but that misses the point of the proposed regulation and misreads *Bostock*. *Bostock* held that an employer who fires an individual merely for identifying as gay or transgender violates the prohibition on employment discrimination on the basis of sex in Title VII of the Civil Rights Act of 1964. The Fair Housing Act forbids discrimination based on sex, 42 U.S.C. § 3604, but as both the 2020 proposed rule and the 2016 regulation recognize, emergency shelters and other buildings that do not qualify as dwellings under the Fair Housing Act are not subject to that prohibition. 85 Fed. Reg. at 44812-13 (noting that emergency shelters and other buildings that do not qualify as dwellings “are not subject to the Act’s prohibition against sex discrimination and thus *may be permitted by statute to be sex segregated*”) (original emphasis), quoting 80 Fed. Reg. 72642, 72644 n.2 (Nov. 20, 2015) (proposed rule) (emphasis added). Thus, even assuming for argument’s sake that *Bostock* were persuasive authority as to the meaning of the Fair Housing Act’s prohibition against sex discrimination,⁵ that prohibition is simply inapplicable here. Nor in the present context is there any statutory authority relating expressly to gender identity. Indeed, it is in large part because of the absence of any statutory authority that HUD, appropriately, decided to reconsider the 2016 rule. 85 Fed. Reg. at 44812-13.

B. A Proposed Change

The proposed rule states that, despite the new flexibility, a shelter’s policy must be in accord with “federal, state, and local law.” 85 Fed. Reg. at 44818. This may be, in part, to recognize and leave room for the variation in states’ approaches to accommodating, defining, evidencing, and limiting “gender identity.” See *id.* at 44813. Though it may make sense for the

⁵ Dissenting in *Bostock*, Justice Alito posed questions about the consequences of the majority’s opinion for other federal nondiscrimination statutes, including the Fair Housing Act, 140 S. Ct. at 1778, 1780 (Alito, J., dissenting), but the majority did not take up those questions.

federal government under principles of federalism to not *require* states to allow shelters to accommodate based on biological sex, it makes less sense for this proposed rule to condition federal assistance on following state and local laws that can contradict its very own goals of flexibility. The federal government should lead by persuasive example here, on the flexibility to define sex biologically, and not require adherence to state and local law with respect to shelters' policies for determining sex and related decision-making.

In fact, in the proposed rule, HUD even mentions the Hope Center in Alaska (*id.* at 44814) as an example of a shelter in need of flexibility, similar to what is offered in the proposed rule, because it was encountering encroachments on its religious liberty under a local ordinance requiring it to accommodate based on "gender identity." Yet, on the same page, HUD says the policy under the proposed rule will respect religion but that shelters' policies must abide by state and local law. This means that, despite using the Hope Center as an example to justify the proposed rule, the proposed rule would actually reinforce the local ordinance against the Hope Center.

In this particular context, we do not think the federal government should be the indirect enforcer of state law, particularly when that law burdens religious liberty and its application and constitutionality are disputed, as in the Hope Center case. For these reasons, we recommend that the Department encourage states and localities to provide managerial flexibilities for "health and safety" reasons, and promote referrals as needed, in order for funded agencies to meet the unique needs of individual clients.

C. Questions

The proposed rule says that shelters are allowed to use their "own policy for determining sex," yet must apply their policy in a "uniform and consistent manner." *Id.* at 44818 (proposed new 5.106(c)). Such a requirement is likely well intentioned to prevent arbitrary or malicious behavior and to protect the vulnerable, which we commend. We have a concern, however, that the proposed requirement of uniformity and consistency may also prevent the very flexibility that the Department has endorsed.

For example, under the proposed rule, may a shelter make admissions and placement decisions based on individual needs and circumstances, in accord with the contours of their policy? Must the shelters choose how they want to define and assess the term "sex" and then be bound by that choice in all circumstances without protocols for exception? For that matter, does "determine" mean how a shelter wants to *define* "sex," or how it wants to conduct observations and make assessments for admissions that are based on its definition of "sex"?

Suppose a shelter in general accommodates based on asserted "gender identity," but wants to decline to admit one particular client who seems insincere. In such a case, can the shelter make an individualized determination, in accord with its own prescribed standards?

Alternatively, if a shelter accommodates only one biological sex but is approached by a person of the opposite sex who has unique circumstances that shelter personnel believe warrants an exception, can the shelter plan to provide for a way to admit that person or does such an accommodation mean that the shelter will now be liable for all the other people who they do *not* admit to the shelter on the theory that the shelter's policy is not uniform and consistent?

If a shelter endeavors to make a single policy that draws a line somewhere through a continuum of factors indicating one's degree of gender "transition," would that method of "determining sex" be permissible under this proposed rule, or must the shelter choose to either proceed completely based on asserted "gender identity" or completely based on biological sex, in which case the proposed flexibility is only to choose and examine for the latter? What if a single-sex shelter determines the meaning of the term "sex" itself one way but wants to craft related admissions policies in a somewhat different way?

Relatedly, the ability to consider "privacy and safety," *id.* at 44818 (proposed section 5.106(c)(2)), seems to be not individualized but bound up in informing a uniform policy on how to define "sex" for the shelters' purposes. Would this not in turn pose a problem for faith-based shelters that may define "sex" biologically but nevertheless have a practice of occasionally admitting transgender-identifying persons of the opposite sex who are very heavily "transitioned" because, in the shelter's view, it may be more detrimental to place the person in another shelter?

On balance, if these questions do not have clear answers or are insoluble under the proposed rule, then the prudent course may be to simply delete the requirement that admission decisions be uniform and consistent in order to avoid hamstringing shelters and preventing them from making what they regard as appropriate exceptions.

We also have questions about the obligation to make a "transfer recommendation," i.e. a referral. Is that obligation satisfied if a single-sex shelter refers a transgender-identifying person of the opposite sex to a shelter that serves people of that biological sex in accordance with that biological sex, or is it only satisfied if the person is referred to a shelter that will treat them in accord with their "gender identity" (potentially a single-sex shelter for the sex opposite that of the person who identifies as it)? Also, how may the referral rights for those not wanting to be housed with the opposite sex under a shelter's "gender identity" policy, on account of their sincere beliefs, be fulfilled if a state or local law requires housing in accord with "gender identity" regardless? (This points to yet another reason for not requiring conformance to state and local law as a condition of receiving federal funds.) Additionally, we have concerns that requiring a shelter to use the centralized or coordinated assessment system to provide transfer recommendations may not guarantee alternative shelter in a timely manner. We must take this opportunity to raise the issue that in many communities, additional resources for the Continuum of Care program may be needed to ensure safe shelter and assist with transportation needs to that shelter.

Finally, it is not entirely clear to us whether the proposed rule only affects shelters that accommodate one sex, or if it also affects shelters that accommodate both sexes but in separate sleeping and bathing quarters. It would seem, on the one hand, that the proposed rule applies to both, especially as it replaces the 2016 rule that applies to both. On the other hand, there are places throughout the proposed rule where the language around “single-sex facilities” and accommodations appears potentially limited, as if only referring to single-sex shelters.

These are areas that, to us, are unclear and therefore in need of further clarification, preferably in the text of the rule but, at a minimum, in the preamble to the final rule.

III. Conclusion

We again express our appreciation to the Department for this proposed regulation. We support the proposal, as it would offer needed flexibility to temporary and emergency shelters in making placement determinations based on sex. This flexibility will help service providers respond to the unique circumstances and needs of those in their care so they can continue to work towards the goal of ensuring everyone has access to safe, decent, and affordable shelter. We respectfully ask that the Department delete the language in the proposed rule that conditions eligibility for federal funds on compliance with state or local law. We urge the Department to consider the areas where we believe there may be a need for further clarification, either in the preamble to the final rule or the rule itself. Finally, we hope that these comments will improve the proposal as you move toward finalizing it.

Thank you for the opportunity to comment.

Respectfully submitted,

Anthony R. Picarello, Jr.
Associate General Secretary and General Counsel

Michael F. Moses
Associate General Counsel