

September 22, 2020

The Honorable Benjamin S. Carson, Sr., MD
Secretary
U.S. Department of Housing and Urban Development
Office of General Counsel
Attention: Regulations Division
451 7th Street, SW
Washington, DC 20410-0500

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

Dear Secretary Carson:

On behalf of the physician and medical student members of the American Medical Association (AMA), I am writing to oppose the regulatory changes in the Notice of Proposed Rulemaking (NPRM) from the U.S. Department of Housing and Urban Development (HUD) related to admitting or placing individuals in single-sex or sex-specific housing facilities. Specifically, HUD seeks to allow grant recipients, subrecipients, owners, operators, managers, and providers under HUD programs (collectively referred to herein as “providers”) that permit single-sex or sex-specific facilities (such as temporary, emergency shelters or other facilities with physical limitations or considerations that require and are permitted to have shared sleeping quarters or bathrooms, collectively referred to herein as “housing facilities”) to establish a policy, consistent with federal, state, and local law, to accommodate persons based on sex.¹ In plain terms, HUD is proposing to allow facilities not covered by the Fair Housing Act and its accompanying non-discrimination provisions to create policies that place and accommodate individuals “on the basis of their biological sex, without regard to their gender identity,” while simultaneously removing existing non-discrimination protections.²

Respect for the diversity of individuals is a fundamental value of the medical profession. There is no basis for the denial to any human being of equal rights or privileges because of an individual’s sex, sexual orientation, gender, gender identity or transgender status, race, religion, disability, ethnic origin, national origin, or age. As advocates for our patients, we strongly support patients’ access to comprehensive social and health care services. According to the National Center for Transgender Equality (NCTE), one in five transgender individuals have experienced homelessness at some point in their lives and an estimated 20-40 percent of the more than 1.6 million homeless youth in this country identify as lesbian, gay, bisexual, transgender, or queer (LGBTQ).³ As HUD’s *Equal Access Expectations Toolkit* (HUD Toolkit) states, “individuals and families seeking services from HUD-funded homeless projects have nowhere else

¹ 85 Fed. Reg. 44811 at 44812 (July 24, 2020).

² 85 Fed. Reg. 44811 at 44812 (July 24, 2020).

³ National Center for Transgender Equality, *Issues: Housing and Homelessness*, available at <https://transequality.org/issues/housing-homelessness>.

to go.”⁴ It recognizes that transgender individuals are particularly at risk of violence and discrimination “in ways that both contribute to their homelessness and keep them from accessing necessary shelter and services,” noting that one in ten transgender individuals report being evicted based on their gender expression and one in five report being denied an apartment or home based on gender expression.⁵ Particularly in light of estimates that “an estimated 30–40 million people in America could be at risk of eviction in the next several months” as a result of COVID-19, the federal government must avoid enacting policies that could drive people away from safe shelter towards homelessness.⁶

Even when placed in a housing facility, the NCTE notes that facilities working with this population “often fail to culturally and appropriately serve transgender homeless people, including denying them shelter based on their gender identity; inappropriately housing them in a gendered space they do not identify with; and failing to address co-occurring issues facing transgender homeless adults and youth.”⁷ Additionally, transgender individuals face a greater risk of violence when using a public facility that does not correspond with their gender identity, including being verbally harassed, physically assaulted, or sexually assaulted.⁸ **Given the AMA’s commitment to advocating for equity and health for all people, we oppose this NPRM, as it strips transgender and non-gender conforming individuals of foundational human and civil rights to access basic human services and public facilities consistent with their gender identity.**

Federal Protections for Transgender and Non-Gender Conforming Populations are Critical to Achieve Optimal Health for All Individuals

For many transgender individuals, social transition is a critically important part of medically necessary treatment. Social transition involves living one’s life fully in accordance with one’s gender identity and typically includes publicly identifying oneself as that gender, adopting a new name, using different pronouns, grooming and dressing in a manner typically associated with one’s gender identity and using single-sex facilities consistent with that identity. Policies excluding transgender individuals from single-sex housing facilities matching their gender identity undermine well-established treatment protocols for gender dysphoria, expose individuals to stigma and discrimination, and increase the potential for harassment and abuse that will impair their social and emotional development, leading to poorer health outcomes throughout life.⁹ **HUD’s proposed policy would interrupt a transgender individual’s social**

⁴ Canavan Associates and The Cloudburst Group, prepared for HUD, *Equal Access for Transgender People: Supporting Inclusive Housing and Shelters*, available at <https://www.transequality.org/sites/default/files/docs/resources/Equal-Access-for-Transgender-People-Supporting-Inclusive-Housing-and-Shelters.pdf>.

⁵ Canavan Associates and The Cloudburst Group, prepared for HUD, *Equal Access for Transgender People: Supporting Inclusive Housing and Shelters*, available at <https://www.transequality.org/sites/default/files/docs/resources/Equal-Access-for-Transgender-People-Supporting-Inclusive-Housing-and-Shelters.pdf>.

⁶ Emily Benfer et al., *The COVID-19 Eviction Crisis: an Estimated 30-40 Million People in America Are at Risk*, The Aspen Institute (Aug. 7, 2020), available at <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/>.

⁷ National Center for Transgender Equality, *Issues: Housing and Homelessness*, available at <https://transequality.org/issues/housing-homelessness>.

⁸ AMA and GLMA: Health Professionals Advancing LGBTQ Equality, *Issue Brief: Transgender individuals’ access to public facilities*, available at <https://www.ama-assn.org/system/files/2019-03/transgender-public-facilities-issue-brief.pdf>.

⁹ AMA and GLMA: Health Professionals Advancing LGBTQ Equality, *Issue Brief: Transgender individuals’ access to public facilities*, available at <https://www.ama-assn.org/system/files/2019-03/transgender-public-facilities-issue-brief.pdf>, citing Jody Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People’s Lives*, 19 J. Pub. Mgmt. & Soc. Pol’y 1, 65-80 (2013); Am. Psychoanalytic Ass’n, Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression (2012).

transition by forcing them to “prove” their gender identity when seeking housing, robbing them of the personal choice of whether and when to reveal their status, and potentially significantly impacting their physical and mental health.

Moreover, HUD’s policy would allow providers to refuse to place a transgender individual in a housing facility corresponding to the individual’s gender identity. This, too, harms health. An amicus brief filed by the AMA and other medical societies supporting school district policies allowing transgender students to use bathrooms and locker rooms that match their gender identities notes, “Exclusionary policies require transgender individuals to live one facet of their lives in contradiction with their gender identity,” and such “policies threaten to exacerbate the risk of anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness and eating disorders, among other adverse outcomes.”¹⁰ These risks are already higher among transgender people. The Report of the 2015 U.S. Transgender Survey from the National Center for Transgender Equality surveyed 27,000 transgender people and found that 40 percent reported a suicide attempt—a rate nine times higher than in the general U.S. population.¹¹ **To help ensure that transgender and non-gender conforming individuals achieve optimal health, HUD should maintain existing anti-discrimination protections that require an individual be placed in accordance with the individual's gender identity.**

While HUD notes in its NPRM that housing facilities would require any determination of sex by the shelter provider to be based on a good faith belief, and require the housing facility provider to provide transfer recommendations if a person is of the sex not accommodated by the facility, this NPRM will inevitably lead to discrimination against transgender individuals seeking placement in single-sex housing facilities conforming with their gender identity. The HUD Toolkit reports that nearly 30 percent of homeless transgender individuals are turned away from a shelter due to their transgender status. Those that are turned away are left to confront an epidemic of violence without shelter.¹² According to available tracking, fatal anti-transgender violence in the U.S. is on the rise.¹³ Most victims are black transgender women, who face dangers stemming from both transphobia and racism.¹⁴ Removal of HUD’s antidiscrimination provisions will certainly increase the number of transgender and non-gender conforming individuals turned away from placement in housing facilities, thereby increasing the exposure of these individuals to violence or placement in housing facilities with members of the opposite sex. **We strongly urge HUD to reconsider implementing a policy that stands to disproportionately impact the transgender population—particularly black transgender women, who have borne the brunt of the violence and discrimination experienced by the community.**

¹⁰ Brief for the AMA et al. as Amicus Curiae, p. 18, *Joel Doe v. Boyertown Area School District et al.*, No. 17-3113 (3d Cir. 2018).

¹¹ S.E. James, et al., Nat’l Ctr. for Transgender Equality, *Report Of The 2015 U.S. Transgender Survey* (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹² Dawn Ennis, *American Medical Association Responds To 'Epidemic' Of Violence Against Transgender Community*, Forbes (June 15, 2019), available at <https://www.forbes.com/sites/dawnstaceyennis/2019/06/15/american-medical-association-responds-to-epidemic-of-violence-against-transgender-community/>.

¹³ Mark Lee, *A National Epidemic: Fatal Anti-Transgender Violence in America in 2018*, Human Rights Campaign, available at <https://www.hrc.org/resources/a-national-epidemic-fatal-anti-transgender-violence-in-america-in-2018>.

¹⁴ Katy Steinmetz, *Why Transgender People Are Being Murdered at a Historic Rate*, TIME (Aug. 17, 2015), available at <https://time.com/3999348/transgender-murders-2015/>.

HUD Regulatory History is Instructive When Evaluating Whether the NPRM's Proposed Changes Will Improve Individuals' Health and Safety

In 2012, HUD promulgated a final rule intended to ensure that all eligible individuals and families seeking placement in a housing facility were placed without regard to actual or perceived sexual orientation, gender identity, or marital status.¹⁵ This rule did not explicitly state how facilities must accommodate transgender individuals, but did provide “a limited exception for inquiries about the sex of an individual to determine eligibility for [facilities],” but noted that it would “monitor its programs to determine whether additional guidance or setting a national policy may be necessary or appropriate.”¹⁶ In early 2015, HUD issued guidance to providers entitled, “Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities” (2015 Guidance), which provides guidance on appropriate and inappropriate inquiries related to an individual’s sex for the purposes of placing transgender persons in facilities. The 2015 Guidance states:

HUD assumes that a recipient or subrecipient (“provider”) that makes decisions about eligibility for or placement into single-sex emergency shelters or other facilities will place a potential client (or current client seeking a new assignment) in a shelter or facility that corresponds to the gender with which the person identifies, taking health and safety concerns into consideration. A client’s or potential client’s own views with respect to personal health and safety should be given serious consideration in making the placement. For instance, if the potential client requests to be placed based on his or her sex assigned at birth, HUD assumes that the provider will place the individual in accordance with that request, consistent with health, safety, and privacy concerns.

The 2015 Guidance notes that the 2012 regulations permit providers to ask individuals about their sex, but reiterates that “[b]est practices suggest that where the provider is uncertain of the client’s sex or gender identity, the provider simply informs the client or potential client that the agency provides shelter based on the gender with which the individual identifies.”¹⁷ In short, **HUD’s own guidance makes clear that individuals—not housing facility providers—are in the best position to determine their own gender.**

Finally, in 2016, HUD revised its regulations to require that individuals seeking access to single-sex facilities be placed and accommodated in accordance with their self-identified gender identity, expressly declining to finalize an aspect of the rule that would have allowed for alternative placement of transgender individuals and other non-gender conforming individuals.¹⁸ These regulations removed the provision from the 2102 rule that permitted providers to inquire about an individual’s sex, and added explicit anti-discrimination protections intended to ensure an individual was “not subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity.”¹⁹

¹⁵ 77 Fed. Reg. 5662 (Feb. 3, 2012).

¹⁶ HUD, *Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities*, Notice CPD-15-02 (Feb. 20, 2015), available at <https://www.hud.gov/sites/documents/15-02CPDN.PDF>; see also 77 Fed. Reg. 5662 at 5666, 5669 (Feb. 3, 2012).

¹⁷ HUD, *Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities*, Notice CPD-15-02 (Feb. 20, 2015), available at <https://www.hud.gov/sites/documents/15-02CPDN.PDF>.

¹⁸ 85 Fed. Reg. 44811 at 44812 (July 24, 2020).

¹⁹ 24 CFR § 5.106(b)(3).

We include this regulatory history to demonstrate that HUD’s reversal of policy, which it has had in place for over five years, suggests a political motivation rather than one based on the health and safety of facility residents. HUD does not provide any evidence in its NPRM that a directive to place individuals in a facility that conforms with their gender identity is harmful to other facility residents or somehow violates federal law; in fact, the agency states, “HUD is not aware of data suggesting that transgender individuals pose an inherent risk to biological women” and that it “is not aware of any relevant party that has raised any material concerns about the 2012 rule.”²⁰ **Given the lack of evidence that the current rules are a threat to the health and safety of the individuals HUD serves, compounded by the evidence that placing individuals based on their biological sex negatively impacts health of transgender and non-gender conforming populations, we urge the agency to maintain its current regulations and regulatory anti-discrimination protections.**

Government Identifications

HUD seeks comment on how, if at all, government identifications (IDs) should be considered with respect to determining an individual’s biological sex. For transgender and intersex communities, having a gender identity that does not match the sex designation on their birth certificate or driver’s license can result in confusion and possibly discrimination. Applying for jobs and governmental benefits often requires an individual to produce a copy of their birth certificate or driver’s license. If one’s appearance does not match the listed sex designation, the individual is forced to “out” oneself, which can be humiliating and traumatic. While some states are beginning to utilize nonbinary birth certificates, these options are not widely available across all government documents. For example, the U.S. Department of State does not currently offer an option for nonbinary designation on U.S. passports. Even within states there is inconsistency; for example, a state’s Department of Health may offer nonbinary birth certificates even as the state’s Department of Motor Vehicles does not offer nonbinary driver’s licenses.

Furthermore, HUD states in its 2015 Guidance that “[t]here generally is no legitimate reason in this context for the provider to request documentation of a person’s sex in order to determine appropriate placement, nor should the provider have any basis to deny access to a single-sex emergency shelter or facility solely because the provider possesses identity documents indicating a sex different than the gender with which the client or potential client identifies. The provider may not ask questions or otherwise seek information or documentation concerning the person’s anatomy or medical history. Nor may the provider consider the client or potential client ineligible for an emergency shelter or other facility because his or her appearance or behavior does not conform to gender stereotypes.”²¹ HUD has not provided sufficient evidence in its rule that use of government IDs will lead to more appropriate placement of individuals in housing facilities. **In sum, we believe that an individual’s determination about their own gender identity—not what may be reflected by a government ID—should be used to assign or place individuals into housing facilities.**

²⁰ Recall that the 2105 Guidance, stating that individuals seeking shelter in single-sex facilities should be placed in a facility corresponding with their gender identity, was based on the 2012 regulations.

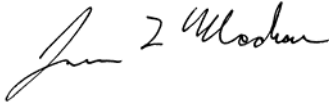
²¹ HUD, *Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities*, Notice CPD-15-02 (Feb. 20, 2015), available at <https://www.hud.gov/sites/documents/15-02CPDN.PDF>.

Conclusion

The AMA strongly opposes any discrimination based on an individual's sex, sexual orientation, gender identity, or transgender status. Physicians are expected to provide care in emergencies, respect basic civil liberties, and not discriminate against individuals in deciding whether to enter into a professional relationship with a new patient. We expect the same of the federal government's social welfare programs.

Thank you for the opportunity to submit comments on the proposed rule. Should you have any questions or wish to discuss these issues, please contact Laura Hoffman, Assistant Director of Federal Affairs, at laura.hoffman@ama-assn.org or 202-789-7414.

Sincerely,

A handwritten signature in black ink, appearing to read "James L. Madara". The signature is written in a cursive style with a large initial "J" and "M".

James L. Madara, MD