

FREEDOM FROM RELIGION *foundation*

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August 20, 2020

The Honorable Benjamin Carson
Secretary of Housing and Urban Development
Department of Housing and Urban Development
451 7th St. SW
Washington, D.C. 20410

Re: Comments opposing proposed rule entitled Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs

Document Number: 2020-14718; 24 C.F.R. Parts 5 and 576;
RIN 2506-AC53

Dear Secretary Carson:

We are writing on behalf of the Freedom From Religion Foundation (FFRF) to submit a public comment in strong opposition to the proposed rule, Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs. FFRF is a national nonprofit organization with more than 32,000 members across the country. FFRF protects the constitutional separation between state and church and educates about nontheism.

This proposed rule allows shelters to “establish a policy that places and accommodates individuals on the basis of their biological sex, without regard to their gender identity.” It would allow shelters to explicitly discriminate against transgender individuals. The rule does nothing other than rubber-stamp religious bigotry and jeopardize the health and well-being of transgender homeless Americans—people who already face discrimination on multiple fronts and desperately need government support. This rule disgracefully places the weight of the government in support of oppressors rather than the oppressed, allowing shelters receiving federal funds to turn away an individual simply because they are transgender, or because a shelter worker thinks they *might* be transgender based on their appearance.

This leads to the other glaring problem with this rule: Who determines an individual’s biological sex for the purpose of this rule, and how do they do so? The agency plainly has no good answer, since it specifically asked for comments “on what are good faith considerations that are indicative of a person’s biological sex.” This would require

shelters to theoretically engage in the invasive and often complicated task of determining an individual's biological sex: examining and comparing an individual's external genitalia, internal reproductive organs, gonads, and sex chromosomes, seeking a birth certificate to verify the gender assigned at birth, and then appropriately reconciling when these indicators do not all match. Because this is impossible, not to mention unethical, shelters would be left with a "know it when I see it" standard of discrimination that is wholly unacceptable.

It becomes even more unacceptable when we all know that transgender people are at greater risk of homelessness. [One in five](#) transgender persons in the United States has experienced homelessness at some point in their lives, and one in five has been discriminated against when seeking a home. More than one in ten has been evicted from their homes because of their gender identity. This is because of societal bias, ignorance, family rejection, discrimination and violence, which this cruel rule would only further compound.

Like many historical patterns of discrimination, religion plays a major part in anti-transgender discrimination. Indeed, the voices openly calling for the right to discriminate against transgender individuals almost invariably cite religious freedom as a justification. Catering to these bigoted demands not only endorses such discrimination, but also endorses a particularly vile religious belief in violation of our entirely secular Constitution's requirement that religion and government remain separate.

It's one thing for churches or religious groups running private shelters to discriminate. It becomes an egregious violation of the constitutional rights of transgender individuals for the federal government to fund such discriminatory shelters, and not only to fund them, but to "bless" such heartless and unAmerican treatment of transgender individuals.

Finally, allowing a government-funded shelter to exclude gender identity from its sex discrimination policy seemingly conflicts with the U.S. Supreme Court's recent decision, *Bostock v. Clayton County*. 590 U.S. ___, 140 S. Ct. 1731 (2020). That opinion held that the Civil Rights Act protects gay and transgender workers from workplace discrimination because discriminating against an employee on the basis of their sexual orientation or gender identity necessarily discriminates against that employee, at least in part, on the basis of their sex. If a private workplace cannot discriminate against LGBTQ individuals, clearly a federally funded shelter may not do so. Just this week, a federal court enjoined a Department of Health and Human Services effort to remove transgender protection from their anti-discrimination rules. *Walker v. Azar*, E.D. N.Y. (Aug. 17, 2020). This proposed rule seeks to do the same and must be rescinded.

This rule purports to solve an imaginary problem of men pretending to be transgender so that they may gain admission to a women's shelter. Such a scenario is so far detached from reality that it lays bare the agency's true purpose, which is to allow government-supported religious shelters to deny services to those in need based on sex and gender, or who may not look like people the shelter wants to help. Lying about this obvious discriminatory intent only shows that the agency knows that its action is indefensible. This unconscionable proposal should be immediately withdrawn.

Very truly,

Handwritten signature in blue ink, reading "Annie Laurie Gaylor Dan Barker".

Annie Laurie Gaylor & Dan Barker
Co-presidents

ALG/DB:rdj