

Equal Access for Transgender People: Trump Administration’s Attempt to Eliminate Shelter Protections for Transgender People

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The Trump Administration made a concerted effort to remove the protections and rights of the LGBTQ community since it came into power. This effort began on the day of Trump’s inauguration in 2017 when the Administration removed all mention of LGBTQ people from the White House, Department of State, and Department of Labor websites - the first action in a widespread regulatory onslaught of anti-transgender and anti-LGBTQ actions across many agencies. HUD was one of the first agencies to enact the Trump Administration’s anti-transgender agenda. In March of 2017, it withdrew two Obama-era HUD proposals designed to protect LGBTQ people from experiencing homelessness.

In 2019, HUD announced plans to gut protections for transgender and gender-nonconforming people experiencing homelessness by removing a crucial provision in the Equal Access Rule of 2016. This announcement came a day after HUD Secretary Ben Carson had testified before the House Financial Services Committee and said no such changes would be made to the Equal Access Rule—meaning he either lied to Congress or was seriously uninformed about what was going on in his agency. Nonetheless, the rule was consistent with Secretary Carson’s anti-transgender rhetoric that was made apparent whether he was testifying before Congress or making visits to communities experiencing high-levels of homelessness.

This was an explicit attack on a community that already faced steep barriers to accessing shelter. One in three transgender Americans has been homeless at some point in their lives. When in shelters, the 2015 U.S. Transgender Survey found that 70% of respondents reported mistreatment in shelters due to their gender identity, and 44% reported they had to leave shelters due to poor

or unsafe conditions. HUD’s proposed changes to the Equal Access Rule would allow taxpayer-funded discrimination against transgender people who are seeking emergency shelter amid a global pandemic.

CHANGES TO THE EQUAL ACCESS RULE

Background

In 2012, HUD published its final rule entitled “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity.” The 2012 Equal Access Rule was created to ensure that HUD’s housing programs would be open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. In 2016, HUD published a follow-up rule “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs,” which built upon the Equal Access Rule of 2012 and ensures equal access to HUD’s Office of Community Planning and Development (CPD) programs, specifically shelters, in accordance with a shelter seeker’s gender identity. HUD’s 2016 Equal Access Rule amendments constituted crucial policy to improve the treatment of transgender and gender-nonconforming individuals in securing emergency shelter.

In 2019, HUD Secretary Ben Carson testified before the U.S. House Financial Services Committee and was questioned about the agency’s implementation and enforcement of the Equal Access Rule. When asked by Congresswoman Jennifer Wexton (D-VA) if HUD was planning any changes for the Equal Access Rule, he responded: “I’m not currently anticipating changing the rule.” A day after, May 22, HUD announced its proposal to gut the rule and remove protections for transgender and

gender-nonconforming people seeking shelter and emergency housing services.

On July 24, 2020, HUD published its proposed anti-transgender changes to the Equal Access Rule, “Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs”.

HUD’s Proposed Rule

Features of the harmful proposed changes include:

- Revisions to the definition of gender identity to mean actual or perceived gender-related characteristics (deleting the current rule’s “the gender by which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person’s perceived gender identity”).
- Allowing shelter providers to place and accommodate individuals on the basis of the shelter provider’s policies for determining someone’s sex.
- Allowing shelter providers to deny admission using a range of factors, including the provider’s “good faith belief” that an individual is not of the sex that the shelter serves (e.g., a women’s shelter), an individual’s sex as reflected in official government documents, or the gender with which a person identifies.
- Allowing shelter providers to use physical characteristics as “reasonable considerations” to determine a person’s biological sex. This may include factors such as height, presence of facial hair, the presence of an Adam’s apple, and other physical characteristics that HUD claims “when considered together, are indicative of a person’s biological sex.”

Despite admitting that data was lacking, HUD based its justifications on anecdotal evidence and dangerous stereotypes, undocumented “religious freedom” assertions, and unfounded regulatory burdens on shelters. HUD’s justifications include various false claims.

HUD’s Justifications

CLAIM #1: THE “2016 RULE RESTRICTED SINGLE-SEX FACILITIES IN A WAY NOT SUPPORTED BY CONGRESSIONAL ENACTMENT.”

What the 2016 rule did was to allow people to go to a federally funded shelter consistent with their gender identity – a step that is not prohibited by statute. In fact, the “Violence Against Women Act” (VAWA) prohibits discrimination on the basis of gender identity in programs (including shelters) that receive federal funds from programs subject to VAWA. VAWA allows sex-segregated shelters to consider a person’s sex but requires grantees to provide comparable services to individuals who cannot be served by sex-specific programming.

CLAIM #2: THE “2016 RULE MINIMIZED LOCAL CONTROL.”

The 2016 rule established a consistent nationwide policy for HUD and taxpayer-funded shelters. Shelters that do not receive HUD funds are not impacted by the 2016 rule.

CLAIM #3: THE “2016 RULE BURDENED THOSE SHELTERS WITH DEEPLY HELD RELIGIOUS CONVICTIONS.”

HUD cites no evidence that the existing rule places an undue burden on faith-based shelter providers. In fact, the Center for American Progress made a “Freedom of Information Act” (FOIA) request in 2017 to HUD regarding any waivers or accommodations made under the 2012 and 2016 Equal Access Rule. The agency failed to locate any waiver requests or complaints from service providers indicating that any religious exemptions had been requested in the current or prior Administrations. Aside from a single anecdotal account and conjecture about how religious organizations may be discouraged from participating in HUD programs, HUD’s proposal provides no concrete evidence demonstrating that religious providers are unduly burdened by current HUD rules. In fact, the anecdotal account referenced above involved a single shelter that has sued to stop the application of a local anti-discrimination law on religious grounds; the lawsuit does

not even involve the application of the Equal Access Rule itself.

CLAIM #4: THE “2016 RULE HAS MANIFESTED PRIVACY ISSUES.”

HUD’s proposal relies upon harmful stereotypes about transgender people (particularly transgender women) and fails to provide any evidence that HUD’s nondiscrimination policy creates widespread privacy or safety concerns. HUD relied on individual anecdotes without providing data to demonstrate a larger issue. HUD cynically invoked survivors of domestic and sexual violence to attempt to lend credibility to its discriminatory proposal. However, HUD failed to acknowledge the view of domestic and sexual violence advocates, who have repeatedly made their stance clear. In 2016, over 300 domestic violence and sexual violence organizations across the country signed a National Consensus Statement. These leaders agreed: transgender women being served alongside other women is appropriate and not a safety issue. They updated their letter in 2018 reiterating their support. Furthermore, in a statement made July 2, 2020, the National Task Force to End Sexual and Domestic Violence condemned HUD’s anti-transgender proposal. More generally, nondiscrimination protections similar to the 2016 Equal Access Rule have been adopted in over 20 states and over 300 localities. These protections have helped increase fairness and opportunity for vulnerable people.

In response to the proposed rule, the Housing Saves Lives campaign was launched and co- led by over 50 national and local organizations, including NLIHC, to encourage the public to submit comments during the 60-day comment period. Together the campaign worked with members of Congress to urge HUD to rescind the rule, hosted a *Week of Action* with an array of national events led by partner organizations, recruited mayors and other public officials from across the nation to submit a public comment and letter opposing the proposed rule, and

submitted op-eds and contributed to news articles. More than 66,000 public comments were submitted during the 60-day period, becoming the largest comment campaign on a HUD regulation ever.

Legislative Action

In the 116th Congress, Representative David Cicilline (D-RI) and 239 original cosponsors introduced H.R. 5, “The Equality Act” which would amend several existing federal civil rights laws. The bill would prohibit discrimination based on sex, sexual orientation, and gender identity in a wide variety of areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system. Specifically, the bill defines and includes sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation.

Representative Jennifer Wexton introduced H.R. 3018, “Ensuring Equal Access to Shelter Act of 2019,” which would block HUD’s proposed anti-transgender rule modifications to the 2016 Equal Access Rule. Senator Brian Schatz (D-HI) introduced a companion bill in the Senate (S. 2007), and similar language was included in the House version of the FY 20 and FY21 spending bills.

During the public comment campaign, Representatives Jennifer Wexton, Frank Pallone (D-NJ), Joe Kennedy III (D-MA), and Senator Brian Schatz (D-HI) submitted a public comment letter signed by 23 Senators and 122 Representatives to the *Federal Register* opposing HUD’s proposal.

BOSTOCK V. CLAYTON COUNTY RULING

On June 15, 2020, The United States Supreme Court issued a landmark ruling on the civil rights of LGBTQ people. In a 6-3 vote in *Bostock v. Clayton County, Georgia* and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, the court held that Title VII of the “Civil Rights Act” bars discrimination based on gender identity and sexual orientation. This landmark civil rights ruling protects LGBTQ people from discrimination in employment, extending protections for millions of LGBTQ

workers, making it illegal to be fired for simply being LGBTQ. The majority's interpretation is consistent with the Equal Access Rule's 2016 provision to ensure protections for transgender people from discrimination in homeless shelters and HUD-funded services.

Title VIII of the "Civil Rights Act" (the Fair Housing Act) makes it unlawful to sell, rent, or otherwise make unavailable or deny a dwelling to anyone because of race or color, religion, sex, national origin, familial status, or disability. Prohibition of discrimination on the basis of sex was added in 1974. In addition to the Equal Access Rule of 2012 and 2016, HUD has historically enforced the Fair Housing Act's prohibition of sex stereotyping to cover LGBTQ people. The *Bostock* ruling will influence fair housing rulings because the lower courts often rely on Title VII when interpreting the Fair Housing Act. However, HUD had failed to consider the *Bostock* ruling while their proposed rule was under review at Congress and continues to explicitly ignore the Supreme Court's decision.

Chairwoman Maxine Waters (D-CA) and Representative Jennifer Wexton sent a letter to Secretary Ben Carson calling on HUD to reconsider its anti-transgender rule proposal to the Equal Access Rule due to the potential contradictions with the *Bostock v. County* ruling. Secretary Ben Carson responded to this letter, stating "The Supreme Court's ruling in *Bostock* has no impact on the Department's proposed rule" incorrectly stating that "We must not place the rights of one group over another as to diminish the rights of those we are seeking to serve."

120 Members of Congress called on President Trump to direct the federal government to remove all regulations, executive orders, and agency policies that discriminate against the LGBTQ community in light of the *Bostock v. Clayton County* ruling.

President Biden's Executive Order Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation

On his first day in office, President Joe Biden signed an Executive Order directing the federal government to fully implement the U.S. Supreme Court's landmark ruling in *Bostock v. Clayton County, Georgia*. The ruling was made on June 15, 2020 and held that Title VII of the Civil Rights Act bars discrimination based on gender identity and sexual orientation. The order reinforces laws that prohibit sex discrimination, including the Fair Housing Act, which prohibits discrimination on the basis of gender identity or sexual orientation.

This order repudiates the anti-transgender rhetoric that was commonplace in the previous Administration and is contrary to former HUD Secretary Ben Carson's interpretation of the ruling. The Executive Order instructs the head of agencies to review all agency actions relating to sex discrimination and make decisions consistent with the instruction of the order within 100 days. This includes an order to agencies to consider whether to revise, suspend, or rescind such agency action, or new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in the Executive Order.

FORECAST FOR 2021

Due in part to the tremendous success of the Housing Saves Lives campaign and efforts by advocates, the publication of the final rule was delayed and never published by the previous administration. Since the final rule did not get published and President Biden's Executive Order clearly orders agencies to rescind agency action to fully implement *Bostock v. Clayton County, Georgia*, we can expect the head of HUD to rescind this rule.

HOW ADVOCATES CAN TAKE ACTION

Urge Legislators to:

- Encourage Senators to pass H.R. 5, the “Equality Act.”
- Address issues of discrimination and violence against transgender people, especially Black and Latinx transwomen.
- Work immediately to reverse all harmful regulations and anti-transgender and anti-LGBTQ policies made by the Trump Administration.

Urge HUD to:

- Immediately withdraw the proposed changes to the Equal Access Rule.
- Work to address the housing and emergency shelter needs of the LGBTQ community.

Urge the Incoming Biden Administration to:

- Work with Members of Congress to pass H.R. 5, the “Equality Act” and ensure immediate and full enforcement across all federal departments and agencies.
- Work to address the housing and emergency shelter needs of the LGBTQ community.
- Address issues of discrimination and violence against transgender people, especially Black and Latinx transwomen.

FOR MORE INFORMATION

HUD’s “Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs” Proposed Rule: <https://bit.ly/3m2Jr4z>.

Executive Order “Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation”: <https://bit.ly/2Mh4FzC>.

Housing Saves Lives Campaign:
housingsaveslives.org.

National Center for Transgender Equality: <https://transequality.org/>.

True Colors United: <https://truecolorsunited.org/>.