Comparison of the texts of the proposed anti-transgender rule changes and the 2016 rule

National Low Income Housing Coalition

July 24, 2020

The proposed rule removes all six uses of the term "individual's gender identity" from the current rule. That scrubbing begins with the proposed change to the very definition of "gender identity" by altering the first sentence to read "Gender identity means actual or perceived gender–related characteristics." The 2016 definition is "Gender identity means 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." [24 CFR 5.100]

All of the other proposed changes are at Section 5.106 of the rule. Paragraph (b) is substantially altered starting with the title, shortened to "Access" by deleting "Equal access in accordance with gender identity." Subparagraphs (1) through (3) are eliminated. The first two required equal access, placement, services, and accommodation in accordance with an individual's gender identity. The third required that a person not be subjected to intrusive questioning or be asked to provide anatomical information or medical evidence of their gender identity.

Subparagraph (c) is fundamentally rewritten. Instead of requiring facilities with shared sleeping quarters or shared bathing facilities to place and accommodate people in accord with the individual's gender identity, HUD would allow facilities to establish their own policies for determining an individual's sex and deny them admission or accommodation if "in good faith" the facility staff thought that the individual was not of the sex that the facility serves (for example a shelter for women). Of course that "good faith" decision could be a cover for bigotry. In addition to "good faith" the proposed rule would allow a facility staff person to ask someone for documentary evidence of their sex, except that is cannot intrude on someone's privacy. The preamble to the proposed rule gives medical records or birth certificate as examples of the type of information that could be requested.

If a facility denies someone access and services the proposed rule would require use an area's Continuum of Care (CoC) centralized or coordinated entry system to provide a transfer recommendation to an alternative facility. Of course this places a considerable burden on the individual desperately seeking shelter and services, especially if there are no or few alternatives, or if alternatives are distant from the individual's familiar surroundings, workplace, or school. The transfer could also be an additional burden on the CoC system.

Finally, the proposed rule would delete subparagraph (d) which required facilities to document and maintain records showing that they complied with the nondiscriminatory requirements of paragraph (b) that requires equal access, placement, services, and accommodation in accordance with an individual's gender identity without intrusive questioning. The preamble to the proposed rule claims that this provision was too burdensome.