

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7th Street, SW., Room 10276  
Washington, DC 20410-0500

March 25, 2011

RE: A Comment on Proposed Rule FR 5359-P-01, Equal Access to Housing in HUD  
Programs – Regardless of Sexual Orientation or Gender Identity

On behalf of the signatories below, the National Center for Lesbian Rights (NCLR) submits the following comments on the proposed rule regarding “Equal Access to Housing in HUD Programs – Regardless of Sexual Orientation or Gender Identity.”

We would like to begin by thanking HUD on its work and leadership in this area. In addition to this proposed rule, HUD has taken several significant steps that have extended increased protections to the lesbian, gay, bisexual, and transgender (LGBT) community and their families. We are grateful for HUD’s commitment to working toward fair housing for the LGBT community. While the organizations below believe that the only way to fully protect the LGBT community from housing discrimination is through legislation that would add sexual orientation and gender identity to the Fair Housing Act as protected classes, and remain committed to such legislative efforts, we appreciate HUD’s willingness to use its authority to increase equal access to its program areas for the LGBT community.

It is a fundamental American value that people be afforded the freedom live where they want, to walk a path of their own choosing. However, as federal law currently stands, people can be denied this most basic right – to choose a place to live, to make a home for themselves and their families, to pursue the American Dream of homeownership – simply for being who they are.

The impact of housing discrimination on the LGBT community is devastating and accounts for increased instances of homelessness and housing insecurity and lower homeownership rates in the LGBT community. Because of a lack of nationwide data collection, it is difficult to accurately assess the full extent of this discrimination. According to a 2001 study conducted by the Kaiser Family Foundation, 34% of LGB people reported having experienced, or knowing someone who had experienced, housing discrimination on the basis of their sexual orientation.<sup>1</sup> According to a 2006 Michigan housing study, 27% of same-sex test couples inquiring about renting or buying housing in Michigan encountered discrimination on the basis of their sexual orientation.<sup>2</sup>

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<sup>1</sup>*Inside Out: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s Views on Issues and Policies Related to Sexual Orientation*, THE KAISER FAMILY FOUNDATION 31 (2001).

<sup>2</sup> *Sexual Orientation and Housing Discrimination in Michigan: A Report of Michigan’s Fair Housing Centers* 10 (2006).

Research reveals that the transgender community is even more vulnerable to housing discrimination. According to a ground-breaking study prepared by the National Center for Transgender Equality and the National Gay and Lesbian Task Force in February of this year, 19% reported being refused a home or apartment and 11% reported being evicted because of their gender identity or expression.<sup>3</sup> Homeownership in the transgender community is 32%, which is less than half the national rate. A shocking one in five respondents (19%) have experienced homelessness as a result of discrimination or mistreatment because of their gender identity or expression.<sup>4</sup> The survey additionally found that discrimination was particularly pronounced for transgender people of color.<sup>5</sup> Housing discrimination and a lack of access to housing-related services and programs is extremely pervasive in the LGBT community, and we are grateful for this opportunity to provide HUD with any additional information to assist in increasing access for LGBT people and their families to HUD programs.

Discrimination against transgender people is especially serious in homeless shelters and other facilities that serve those experiencing homelessness or housing instability. Nearly one in three transgender respondents (29%) who tried to access a shelter were turned away outright – and again, the rate was even higher for transgender people of color.<sup>6</sup> A majority of respondents (55%) who did access a shelter reported being harassed by staff or other residents there.<sup>7</sup> A disturbing 42% said they'd been forced to live as the wrong gender to be allowed to stay.<sup>8</sup> Being forced to live as the wrong gender can range from being required to alter a hairstyle or make-up to radically altering one's gender presentation from head to toe – a traumatic experience for transgender people and a high price for a roof over one's head. And sadly, one quarter (25%) reported being physically assaulted in a shelter, and nearly as many (22%) reported being sexually assaulted by either another resident or a shelter staff member.<sup>9</sup> Nearly half (47%) of all respondents who accessed shelters left because of the treatment they experienced there – choosing the street over the harassment, discrimination and abuse they faced in the shelter.<sup>10</sup> A state-level survey of transgender Californians made similar findings: transgender people were routinely turned away, harassed, attacked, and left the shelter system to avoid further mistreatment.<sup>11</sup> LGBT youth and young adults represent another particularly vulnerable community and are disproportionately among those aging out of foster care systems, creating a dire need for access to affordable and non-discriminatory housing.<sup>12</sup>

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<sup>3</sup> GRANT, JAIME M., LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN, AND MARA KEISLING. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 116.

<sup>7</sup> *Id.* at 117.

<sup>8</sup> *Id.* at 118.

<sup>9</sup> *Id.* at 117-18.

<sup>10</sup> *Id.* at 116.

<sup>11</sup> Hartzell, E., Frazer, M. S., Wertz, K. and Davis, M. (2009). *The State of Transgender California: Results from the 2008 California Transgender Economic Health Survey* 13. Transgender Law Center: San Francisco, CA.

<sup>12</sup> See Child Welfare League of Am. & Lambda Legal Def. & Educ. Fund, "LGBTQ Youth Risk Data," in *Getting Down to Basics: Tools to Support LGBTQ Youth in Care* (2006); see also Jill Jacobs & Madelyn Freundlich, *Achieving Permanency for LGBTQ Youth*, 85 Child Welfare 303-05 (2006).

The proposed rule will make a significant impact on the daily lives of LGBT people. We think these changes are positive steps toward ensuring fair housing for the LGBT community. We recognize that HUD's authority to regulate is dictated by statutory confines, and we particularly commend HUD's efforts to provide increased protection while always acting within its authority. Accordingly, while, as advocates, we are constantly seeking more comprehensive protections, we have limited our comments here to areas that squarely fall within HUD's rule-making authority.

As an initial matter, we strongly agree with HUD's decision not to include an exemption in this proposed rule for religious organizations that operate HUD-assisted or HUD-insured housing facilities. Declining to provide such an exemption has absolutely no impact on the operations of any religious organizations that provide wholly private housing services. However, when a religious organization chooses to provide housing services or programs with the aid of federal funds and benefits from HUD, it cannot shield itself from traditional safeguards that protect civil rights and religious liberty in the provision of those services. As President Obama has expressly stated recently in Executive Order 13559, "[a]ll organizations that receive Federal financial assistance under social service programs should be prohibited from discriminating against beneficiaries or prospective beneficiaries of the social service programs on the basis of religion or religious belief" and "should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice."<sup>13</sup> Accordingly, we urge HUD to continue to hold religious organizations providing housing services with the aid of federal funds to the same standards as all other organizations operating with these funds.

#### **A. Definition of Family**

The proposed regulations would create a single definition of family, located at 24 CFR 5.403, to be referenced in several subsequent regulations. We propose the following changes to make the definition more inclusive: 1) moving the phrase "actual or perceived" to explicitly include "marital status;" 2) adding clarification regarding who qualifies as a "child" to the definition of family.

Many LGBT parents lack the ability to create legal relationships with their children and it is important that families be explicitly protected from discrimination on this basis. Including a more explicit definition of who qualifies as a "child" in the definition of "family" in 24 CFR 5.403 would modernize these regulations to reflect the diversity of family constructs that currently exist throughout the United States. With the suggested changes, the proposed regulation would read:

Family includes but is not limited to, regardless of the **actual or perceived marital status**, ~~actual or perceived~~ sexual orientation, or gender identity, the following: (1) A single person, who may be an elderly person, displaced person, disabled person, near-elderly person, or any other single person; or (2) A group of

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<sup>13</sup> Exec. Order No. 13,559 75 FR 71319 (November 22, 2010).

persons residing together, and such group includes, but is not limited to: (i) A family with or without children (**including biological or adopted children, stepchildren, children for whom anyone in the family is standing *in loco parentis*, and foster children; children a child who is** temporarily away from the home because of placement in foster care **is** ~~is~~ **are** considered a members of the family); (ii) An elderly family; (iii) A near-elderly family; (iv) A disabled family; (v) A displaced family; and (vi) The remaining member of a tenant family.<sup>14</sup>

## **B. Definition of Gender Identity**

The rule currently proposes to define “gender identity” as “actual or perceived gender-related characteristics” consistent with its definition in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Public Law 111–84, Division E, Section 4707(c)(4) (18 U.S.C. 249(c)(4)). We believe that a more precise definition can be found in the Employment Non-Discrimination Act (ENDA), which was introduced in the previous Congress and is expected to be reintroduced again in the current Congress. Accordingly, we urge HUD to define “gender identity” for the purposes of this regulation as, “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”

## **C. Need for a Prohibition on Discrimination Based on Sexual Orientation and Gender Identity**

We urge HUD to replace the prohibition on inquiries regarding LGBT status with a prohibition on discrimination based on LGBT status for all HUD-assisted and HUD-insured housing. Pursuant to 42 U.S.C. 3535(d), the Secretary has authority to “make such rules and regulations as may be necessary to carry out his functions, powers, and duties.” Thus, while HUD clearly cannot amend the Fair Housing Act through its regulatory power, HUD does possess the authority to create regulations surrounding its program areas and make nondiscrimination against vulnerable communities, like the LGBT community, a condition of participation in its programs. Accordingly, creating a nondiscrimination provision falls squarely within HUD’s regulatory authority.

Where a regulatory requirement imposed by HUD on program participants or grant recipients does not contradict any statutory or constitutional requirement, “the only remaining inquiry is whether it is reasonably related to the purposes of the enabling legislation under which it was promulgated.”<sup>15</sup> It is within the sound discretion of the Secretary to promulgate regulations that ensure access to shelter and housing for those who cannot obtain it without governmental aid by preventing individuals from being turned away from housing without justification.<sup>16</sup> In particular, “where HUD determines that local authorities have failed to act or

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<sup>14</sup> We additionally urge HUD to reference the definition of “*in loco parentis*” from the recently issued Family Medical Leave Act (FMLA) guidance expanding leave for LGBT parents found at 5 CFR 630.1202.

<sup>15</sup> *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969).

<sup>16</sup> *Id.*; *King v. Housing Authority of City of Huntsville, Ala.*, 670 F.2d 952, 954-55 (11<sup>th</sup> Cir. 1982); *Brown v. Housing Authority of Milwaukee*, 471 F.2d 63, 65-68 (7<sup>th</sup> Cir. 1972); *Housing Authority of City of Omaha, Neb. v. U.S. Housing Authority*, 468 F.2d 1, 7 (8<sup>th</sup> Cir. 1972).

have acted in an inimical way to the objectives” of HUD programs established by Congress – such as where needy individuals are turned away from shelter or housing because of their sexual orientation or gender identity – “the ultimate authority is vested in HUD to set overall policy.”<sup>17</sup>

Other federal agencies have used their general rulemaking authority over federally-administered programs to prohibit discrimination on grounds not specifically covered by statute. For example, in 1999 the Department of Agriculture amended its nondiscrimination regulation, which covers the administration of all Department programs, to add familial status, marital status, and sexual orientation as prohibited bases of discrimination. The addition of these protections, none of which was protected by relevant statutes, was based on the Department's authority under 5 U.S.C. § 301, which authorizes the head of an Executive department to “prescribe regulations for the government of his or her department, the conduct of its employees, and the distribution and performance of its business.” Department of Health and Human Services regulations dating to 1976 and 1977 prohibit discrimination programs supported by grants for community and migrant health services. These regulations specifically identify grounds of discrimination prohibited by Title VI of the Civil Rights Act and section 504 of the Rehabilitation Act, but also prohibit discrimination on the additional grounds of age, sex, creed and marital status.<sup>18</sup>

Further, a mere prohibition on inquiries regarding sexual orientation and gender identity is insufficient to protect LGBT individuals from the pervasive discrimination in HUD-supported housing and shelters that exists today. Most housing discrimination occurs not as a result of specific inquiries about LGBT status, but because a housing provider believes that a person is LGBT based on observation, inference, or third-party information. For example, same-sex couples frequently face discrimination simply because they appear to be a couple, without any questions being asked. Transgender people are frequently outed to housing providers by personal documents that reflect their birth name and gender. For example, among transgender people whose current driver’s license does not reflect their gender identity and presentation, 32% report being denied a home or apartment, compared to 20% among those who were able to update the gender marker on their license.<sup>19</sup> When providers of HUD-assisted housing turn individuals away on these bases, a prohibition on inquiries relating to sexual orientation and gender identity will provide no protection. The fact that discrimination operates this way is particularly detrimental for LGBT people of color and those from lower socio-economic backgrounds because of the way racism and classism work with homophobia and transphobia to further marginalize these groups. Because of the unfair stereotypes often drawn about LGBT people of color and low-income LGBT people, these groups will remain particularly vulnerable to discrimination that is based only on assumption about LGBT status. Simply put, without a clear prohibition on discrimination based on sexual orientation and gender identity, many people in need of HUD-assisted housing and shelter will continue to be turned away without good reason. Accordingly, we urge HUD to adopt a final rule that prohibits discrimination based on sexual orientation and gender identity in all HUD-assisted and HUD-insured housing.

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<sup>17</sup> *Housing Authority of City of Omaha, Neb. v. U.S. Housing Authority*, 468 F.2d 1, 7 (8<sup>th</sup> Cir. 1972).

<sup>18</sup> 42 C.F.R. §§ 51c.109, 56.110.

<sup>19</sup> GRANT, *supra* note 3 at 154.

#### **D. Prohibition of Inquiries Regarding Sexual Orientation and Gender Identity**

A prohibition on inquiries regarding sexual orientation and gender identity may be a valuable supplement to an express prohibition on discrimination on these grounds. However, the collection of data reflecting the number of LGBT individuals and families seeking housing and access to HUD programs and services is of substantial value for the future development of appropriate programs and policies. A prohibition on inquiries regarding these personal characteristics section must be wary of this potential conflict. We appreciate that the proposed rule does not prohibit voluntary disclosure of information regarding sexual orientation and gender identity, and we urge HUD to continue to work with fair housing organizations and the housing community to find creative ways to collect demographic information on the LGBT community in a way that cannot be used to discriminate and that includes appropriate restrictions on acquisition, retention, and use so as to protect the privacy of those whose data is being collected. This prohibition brings into focus an area of complexity with respect to fair housing in the LGBT community. Because sexual orientation and gender identity are still not explicitly identified in the Fair Housing Act as prohibited bases for discrimination, it is crucial that advocates be able to collect data reflecting the number of LGBT individuals and families seeking housing and access to HUD programs and services. This data collection better enables us to advocate for changing policies and identify geographical areas and services where LGBT people remain particularly vulnerable to discrimination. However, we also recognize that limiting inquiries regarding LGBT-status will help to decrease discrimination based on that status. Thus, this section must balance these two crucial concerns.

Ultimately, we believe that where the need for increased data collection efforts conflict with an effort to limit discrimination that LGBT people and families can face, we must craft a rule that provides the most protections and find other methods to improve our ability to collect data. Accordingly, we are not urging HUD to revise this section of the proposed rule. However, we wanted to make HUD aware of this important concern that the LGBT community be counted and the discrimination people face be documented so that information can be used to help our advocacy efforts. We appreciate that the proposed rule does not prohibit voluntary disclosure of information regarding sexual orientation and gender identity, and we urge HUD to continue to work with fair housing organizations and the housing community to find creative ways to collect demographic information on the LGBT community in a way that cannot be used to discriminate.

#### **E. Exception for Gender Segregated Facilities**

We urge the Department to clarify that a housing provider may inquire only about an individual's gender identity for purposes of placing them in a gender-specific accommodation, but cannot inquire regarding a person's birth sex, anatomy or medical history. Housing individuals according to their gender identity is an accepted best practice for providers of gender-specific accommodations, and has been incorporated in city-wide policies in New York City,<sup>20</sup> the District of Columbia,<sup>21</sup> Boston<sup>22</sup> and San Francisco,<sup>23</sup> and by agencies such as Central

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<sup>20</sup> New York City Department of Homeless Services, Procedure No. 06-1-31, "Transgender/Intersex Clients," Issued January 31, 2006.

<sup>21</sup> Community Partnership for the Prevention of Homelessness, "Transgender Policy," March 20, 2007 at [http://www.community-partnership.org/docs/HSRA\\_Transgender\\_Policy.pdf](http://www.community-partnership.org/docs/HSRA_Transgender_Policy.pdf)

<sup>22</sup> <http://www.bphc.org/programs/cib/civicengagement/lgbtimmigrantandrefugeehealth/Forms%20%20Documents/ProtocolTrans.pdf>

Arizona Shelter Services, which is the largest shelter provider in Arizona,<sup>24</sup> and the Metro Dallas Homeless Alliance. This approach is also supported by leading national experts, including the National Alliance to End Homeless<sup>25</sup> and the National Coalition for the Homeless.<sup>26</sup>

In light of HUD's July 2010 clarification that HUD would interpret the Fair Housing Act's prohibition against discrimination based on sex to include a prohibition against discrimination based on gender identity, denying a transgender person access to a gender-specific facility that is consistent with their gender identity would likely violate the Fair Housing Act. We conclude that any housing situation in which a person is asked to disclose their sex, they are required only to disclose the gender they identify as regardless of sex assigned at birth. However, in order to avoid any potential confusion, we recommend that the proposed rule be amended to make clear that a provider may only inquire as only to the gender they as an individual identify as, and they may not be asked to provide proof of that identity, or of their birth sex, anatomy, or medical history.

#### **F. Enforcement and Notification of Rights**

We additionally urge HUD to include in the final rule explicit mention of how this rule will be enforced and how community members will be informed of these protections and their rights. Because these protections will only be valuable to the community in so far as people are aware of them, we urge HUD to require as a condition of compliance with this new rule for affected housing providers and lenders to post the requirements of this rule and the method for filing a complaint if people think their rights have been violated where applicants and occupants can see them. We would also like to see the final rule contain an explanation of the mechanism for enforcing this rule, including but not limited to, defunding housing and housing-related service programs and refusing to work with lenders who do not comply.

Finally, we are aware of other federal housing programs that will not be affected by these regulations. For example, programs such as Rural Development, under the United States Department of Agriculture, and the Low Income Housing Tax Credit program, under the Internal Revenue Service are not subject to HUD authority. However, they have huge reaches in rural and urban areas, and right now, LIHTC programs are a substantial part of low-income housing. Accordingly, in order to fully protect low-income LGBT people and families from discrimination, we encourage HUD to work with those programs to create analogous rules.

In conclusion, we again thank HUD for the careful thought and obvious effort that went into crafting this proposed rule. We are confident that it will ultimately produce meaningful and significant improvements in the daily life of LGBT people. We are grateful for this opportunity to help inform the process, and are happy to provide any assistance HUD may need as it considers these and other submitted comments and formulates the final rule.

Sincerely,

American Civil Liberties Union

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<sup>23</sup> S.F. Comm'n on Human Rights, *Transgender Policy for City Funded Shelters* (2003).

<sup>24</sup> <http://www.transgenderlaw.org/resources/azshelter.pdf>

<sup>25</sup> <http://www.nyaeyouth.org/docs/uploads/Recommended-Best-Practices-for-LGBT-Homeless-Youth-040909.pdf>

<sup>26</sup> <http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf>

American Association of University Women (AAUW)  
Anti-Defamation League  
Basic Rights Oregon & Basic Rights Education Fund  
California LGBT Health and Human Services Network  
California Rural Legal Assistance, Inc.  
Center for American Progress  
CHRIS Kids, Atlanta, GA  
Family Equality Council  
Gay & Lesbian Advocates & Defenders (GLAD)  
Global Justice Institute  
Housing and Economic Rights Advocates (HERA)  
Human Rights Campaign  
Immigration Equality Action Fund  
L.A. Gay & Lesbian Center  
Lambda Legal  
Larkin Street Youth Services, San Francisco, CA  
Legal Aid Foundation of Los Angeles  
MCCNY Charities, New York, NY  
Mental Health America of Northern California  
Metropolitan Community Churches  
National Black Justice Coalition  
National Center for Transgender Equality  
National Fair Housing Alliance  
National Gay & Lesbian Chamber of Commerce  
National Gay and Lesbian Task Force  
National Housing Law Project  
Parents, Families and Friends of Lesbians and Gays (PFLAG) National  
Poverty Matters  
The Trevor Project  
Transgender Law Center  
Transgender Legal Defense & Education Fund, Inc.  
YouthCare, Seattle, WA