

1                    **DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

2                                    **24 CFR Part 5**

3                                    **[Docket No. FR-6152-P-01]**

4                                    **RIN 2506-AC53**

5                    **Making Admission or Placement Determinations Based on Sex in Facilities Under**  
6                                    **Community Planning and Development Housing Programs**  
7

8    **AGENCY:** Office of the Secretary, HUD.

9    **ACTION:** Proposed rule.

10    **SUMMARY:** This proposed rule would provide that grant recipients, subrecipients, owners,  
11    operators, managers, and providers under HUD programs that permit single-sex or sex-specific  
12    facilities (such as temporary, emergency shelters or other facilities with physical limitations or  
13    configurations that require and are permitted to have shared sleeping quarters or bathrooms) may  
14    establish a policy, consistent with federal, state, and local law, to accommodate persons based on  
15    sex. The proposed rule would maintain requirements from HUD’s 2012 final rule entitled “Equal  
16    Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity” and  
17    would require shelters to uniformly and consistently apply any such policy the shelter develops.  
18    The proposed rule would require any determination of sex by the shelter provider to be based on  
19    a good faith belief, and require the shelter provider to provide transfer recommendations if a  
20    person is of the sex not accommodated by the shelter and in some other circumstances.

21    **DATES:** *Comment Due Date:* **[Insert date 60 days after date of publication in the *FEDERAL***  
22    ***REGISTER*].**

23    **ADDRESSES:** Interested persons are invited to submit comments regarding this Proposed Rule  
24    to the Regulations Division, Office of General Counsel, Department of Housing and Urban

1 Development, 451 7th Street, SW, Washington, DC 20410-0500. Room 10276, Washington, DC  
2 20410-0500. Communications must refer to the above docket number and title. There are two  
3 methods for submitting public comments. All submissions must refer to the above docket  
4 number and title.

5 **1. Submission of Comments by Mail.** Comments may be submitted by mail to the  
6 Regulations Division, Office of General Counsel, Department of Housing and Urban  
7 Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

8 **2. Electronic Submission of Comments.** Interested persons may submit comments  
9 electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly  
10 encourages commenters to submit comments electronically. Electronic submission of comments  
11 allows the commenter maximum time to prepare and submit a comment, ensures timely receipt  
12 by HUD, and enables HUD to make them immediately available to the public. Comments  
13 submitted electronically through the [www.regulations.gov](http://www.regulations.gov) website can be viewed by other  
14 commenters and interested members of the public. Commenters should follow the instructions  
15 provided on that site to submit comments electronically.

16 *Note:* To receive consideration as public comments, comments must be submitted  
17 through one of the two methods specified above. All submissions must refer to the docket  
18 number and title of the rule.

19 *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

20 **Public Inspection of Public Comments.** All properly submitted comments and  
21 communications submitted to HUD will be available for public inspection and copying between  
22 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD  
23 Headquarters building, an advance appointment to review the public comments must be

1 scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number).  
2 Individuals with speech or hearing impairments may access this number through TTY by calling  
3 the Federal Relay Service at 800-877-8339 (toll-free number). Copies of all comments submitted  
4 are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

5 **FOR FURTHER INFORMATION CONTACT:** David C. Woll, Jr., Principal Deputy  
6 Assistant Secretary, Department of Housing and Urban Development, 451 7th Street, SW, Room  
7 7100, Washington, DC 20410, telephone number 202-708-2690, Department of Housing and  
8 Urban Development, 451 7th Street, SW, Washington DC 20410; telephone 202-708-2690 (this  
9 is not a toll-free number). Persons with hearing or speech impairments may access this number  
10 via TTY by calling the Federal Relay Service at 800-877-8389 (toll-free number).

11 **SUPPLEMENTARY INFORMATION:**

12 **I. HISTORY**

13 HUD has always supported effective models at reducing homelessness and providing  
14 emergency shelter for those in need, including through supporting single-sex shelters.

15 In 2012, HUD published a final rule entitled “Equal Access to Housing in HUD  
16 Programs Regardless of Sexual Orientation or Gender Identity” (2012 Rule) to ensure that its  
17 core housing programs are open to all eligible families and individuals “without regard to actual  
18 or perceived sexual orientation, gender identity, or marital status.”<sup>1</sup> The 2012 Rule defined  
19 “gender identity” as “actual or perceived gender-related characteristics.”<sup>2</sup> The 2012 Rule  
20 generally prohibited inquiries into gender identity in determining eligibility or making housing  
21 available, but permitted inquiries related to an applicant’s or occupant’s sex for the limited

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<sup>1</sup> 77 FR 5662, February 3, 2012.

<sup>2</sup> See § 5.100 at 77 FR 5674. This definition comes from 18 U.S.C. 249.

1 purpose of determining placement in temporary, emergency shelters with shared bedrooms or  
2 bathrooms, or for determining the number of bedrooms to which a household may be entitled.<sup>3</sup>  
3 In promulgating the 2012 Rule, HUD relied on the Secretary’s general rulemaking authority  
4 pursuant to section 7(d) of the Department of HUD Act,<sup>4</sup> rather than the Fair Housing Act<sup>5</sup>, or  
5 other civil rights and nondiscrimination authorities.

6 After the promulgation of the 2012 Rule, HUD determined that the 2012 Rule did not  
7 comprehensively define how shelters must accommodate transgender individuals. On September  
8 21, 2016, HUD expanded on its 2012 Rule and published a final rule entitled, “Equal Access in  
9 Accordance with an Individual’s Gender Identity in Community Planning and Development  
10 Programs” (2016 Rule). HUD mandated that transgender persons and other persons “who do not  
11 identify with the sex they were assigned at birth” be given access to Community Planning and  
12 Development (CPD)-assisted programs, benefits, services, and accommodations, some of which  
13 are permitted to be operated on a single sex or sex-specific basis (collectively, “single sex  
14 facilities”), in accordance with their gender identity. These programs include temporary and  
15 emergency shelter programs, such as the Emergency Solutions Grants<sup>6</sup> program and the Housing  
16 Opportunities for Persons with AIDS (HOPWA) program.<sup>7</sup> The 2016 Rule maintained the  
17 definition of “gender identity” included in the 2012 Rule to mean “the gender with which a  
18 person identifies, regardless of the sex assigned at birth[.]”<sup>8</sup>

19 The 2016 Rule removed paragraph 5.105(a)(2)(ii), the provision of the 2012 Rule that  
20 allowed for lawful inquiries into an occupant’s sex in the case of temporary or emergency

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<sup>3</sup> See § 5.105(a)(2)(ii) at 77 FR 5674.

<sup>4</sup> 42 U.S.C. 3535(d).

<sup>5</sup> 42 U.S.C. 3601-3619 (prohibits discrimination in housing because of race, color, national origin, religion, sex, familiar status and disability).

<sup>6</sup> Codified in 24 CFR part 576.

<sup>7</sup> Codified in 24 CFR part 574.

<sup>8</sup> 80 FR 72648.

1 shelters with shared bathroom or bedroom facilities, or for the purpose of determining the  
2 number of bedrooms to which a household may be entitled. Instead, the 2016 Rule contained a  
3 provision that policies and procedures must ensure that individuals are not subject to intrusive  
4 questioning or asked to provide anatomical information or documentary, physical, or medical  
5 evidence of their gender identity.<sup>9</sup>

6 The 2016 Rule, § 5.106(c), requires that individuals seeking access to single-sex facilities  
7 be placed and accommodated in accordance with their self-identified gender identity, expressly  
8 declining to adopt a provision of the proposed rule that provided that in certain cases, an  
9 alternative accommodation for a transgender persons and other persons “who do not identify  
10 with the sex they were assigned at birth” would be appropriate to ensure health and safety.  
11 Section 5.106(c) requires recipients to take nondiscriminatory steps as necessary and appropriate  
12 to address the privacy concerns of all residents and occupants. No funding was specifically  
13 provided for this purpose.

14 Finally, the Housing Trust Fund and Rural Housing Stability Assistance programs were  
15 added explicitly to the non-exclusive list of programs covered, and language was added to  
16 indicate that the 2016 rule applies to both recipients of HUD CPD grants and subrecipients, as  
17 well as those who administer CPD-funded programs and services.

## 18 **II. PROPOSED RULE**

19 HUD has reconsidered its 2016 Rule and determined that providers should be  
20 allowed, as permitted by the Fair Housing Act, to consider biological sex in placement and  
21 accommodation decisions in single-sex facilities. HUD thus proposes to allow shelters that  
22 may already consider sex in admission and accommodation decisions (i.e., facilities that

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<sup>9</sup> Section 5.106(b)(3).

1 are not covered by the Fair Housing Act) to establish a policy that places and  
2 accommodates individuals on the basis of their biological sex, without regard to their  
3 gender identity. This will allow single-sex facilities to regain the flexibility to serve their  
4 unique populations that they have following the 2012 Rule. Nothing in the proposed rule  
5 restricts shelters from maintaining a policy on placing and accommodating an individual  
6 based on gender identity.

7 The proposed rule leaves in place requirements from the 2012 Rule that shelters and  
8 all other participants in HUD programs ensure that their programs are open to all eligible  
9 individuals and families without regard to sexual orientation or gender identity. Thus, a  
10 shelter may place an individual based on his or her biological sex but may not discriminate  
11 against an individual because the person is or is perceived as transgender.

12 For example, under the proposed rule, if a single-sex facility permissibly provides  
13 accommodation for women, and its policy is to serve only biological women, without regard to  
14 gender identity, it may decline to accommodate a person who identifies as female but who is a  
15 biological male. Conversely, the same shelter may not, on the basis of sex, decline to  
16 accommodate a person who identifies as male but who is a biological female. A different shelter  
17 may choose not to make placement decisions or accommodations based on biological sex and  
18 there remains no mandate that shelters take biological sex into account.

### 19 **III. JUSTIFICATION FOR THE RULE CHANGE**

20 HUD believes this proposed rule better resolves the various equities involved within the  
21 shelter context than HUD's 2016 Rule. In particular, HUD believes that the 2016 Rule  
22 impermissibly restricted single-sex facilities in a way not supported by congressional enactment,

1 minimized local control, burdened religious organizations, manifested privacy issues, and  
2 imposed regulatory burdens.

3 *First, the 2016 Rule restricted single-sex facilities in a way not supported by*  
4 *Congressional enactment.* Congress has prohibited discrimination on the basis of sex in  
5 “dwellings under the Fair Housing Act. But it has not acted to prohibit consideration of sex in  
6 temporary and emergency shelters, many of which do offer sex-specific housing or sex-specific  
7 areas of housing (such as facilities with physical limitations or configurations that have shared  
8 sleeping quarters or bathing areas). As the 2016 Rule recognizes, “[a]n emergency shelter and  
9 other building and facility that would not qualify as dwellings under the Fair Housing Act are not  
10 subject to the Act’s prohibition against sex discrimination and thus *may be permitted by statute*  
11 *to be sex segregated.*”<sup>10</sup> But HUD’s 2016 Rule effectively restricts shelters from making this  
12 policy choice permitted by the Fair Housing Act, by – for example – requiring shelters to allow  
13 biological males who self-identify as females to be admitted to female-only shelters. Thus,  
14 under HUD’s 2016 Rule, the female-specific shelters that are permitted under the Fair Housing  
15 Act can be effectively restricted from being female-specific.

16 Moreover, HUD did not rely on explicit statutory authorization, like the prohibition  
17 against “sex” discrimination under the Fair Housing Act, when HUD implemented its 2016 Rule.  
18 Rather, HUD relied on the Secretary’s plenary authority to issue regulations, indicating that  
19 “HUD’s establishment of programmatic requirements for temporary, emergency shelters and  
20 other buildings and facilities funded through HUD programs is well within HUD’s statutory  
21 authority and an important part of HUD’s mission in ensuring access to housing for all  
22 Americans.” But HUD should not reach beyond the authority granted to HUD by Congress. By

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<sup>10</sup> 80 FR 72644 (preamble) (emphasis added).

1 acting under plenary authority instead of a more specific affirmative grant of authority from  
2 Congress, the 2016 Rule violated the basic principle of administrative law that an agency should  
3 not go beyond the scope of the power granted them by duly enacted legislation and imposed a  
4 regulatory burden. Agencies are to “implement the statute according to its text and to apply the  
5 law no further than the text would permit” because “any attempt to do so is a threat to individual  
6 freedom.”<sup>11</sup>

7 *Second, the 2016 Rule minimized local control.* The 2016 Rule also adopted a one-size-  
8 fits-all approach to admission and accommodation by gender identity in temporary shelters,  
9 despite significant variation in State and local law. In just one example, the Rule requires shelters  
10 to admit individuals based on self-identification as the only method of determining a person’s  
11 sex. This approach elevates subjective assertions by persons seeking accommodation and  
12 disallows other factors that could be used to objectively verify sex. Recognizing concerns with  
13 this approach, many states and localities prohibiting transgender discrimination require a  
14 differing bar in enforcing a nondiscrimination claim based on gender identity, as three examples  
15 demonstrate.

16 Anchorage, Alaska, for example, requires evidence that “the gender identity is sincerely  
17 held, core to a person's gender-related self-identity, and not being asserted for an improper  
18 purpose.”<sup>12</sup> HUD’s definition does not require such evidence. In a second example, New York  
19 City’s code prohibits discrimination on the basis an individual’s gender identity, including for

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<sup>11</sup> White House memorandum “Legal Principles for All Administrative Action,” by Donald F. McGahn II to General Counsels and Chief Legal Officers of All Executive Branch Agencies (May 10, 2018).

<sup>12</sup> Anchorage Municipal Code § 5.020.010, available at [https://library.municode.com/ak/anchorage/codes/code\\_of\\_ordinances?nodeId=TIT5EQRI\\_CH5.20UNDIPR\\_5.20.010DE](https://library.municode.com/ak/anchorage/codes/code_of_ordinances?nodeId=TIT5EQRI_CH5.20UNDIPR_5.20.010DE); see also <https://www.adn.com/alaska-news/anchorage/2018/03/14/discrimination-complaint-against-downtown-anchorage-womens-shelter-opens-up-political-front/> (“The law requires the person to prove, through medical history and evidence of care or treatment of their gender identity, that their gender identity is “sincerely held, core to a person's gender-related self identity, and not being asserted for an improper purpose.”)



1 housing accommodations. New York City’s code defines gender to encompass perceived gender  
2 identity.<sup>13</sup> In contrast, HUD’s current regulations define gender identity to ignore an individual’s  
3 perceived gender identity. More notably, directly contrary to HUD’s regulations, New York  
4 City’s code explicitly *excludes* “shelters for the homeless where such distinctions are intended to  
5 recognize generally accepted values of personal modesty and privacy or to protect the health,  
6 safety or welfare of families with children.”<sup>14</sup> In a third example, Massachusetts public  
7 accommodations must accommodate individuals based upon their gender identity. Unlike HUD’s  
8 current regulations, Massachusetts law does not contain a reference to the gender with which an  
9 individual identifies. Instead, it defines gender identity to mean “a person’s gender-related  
10 identity, appearance or behavior, whether or not that gender-related identity, appearance or  
11 behavior is different from that traditionally associated with the person’s physiology or assigned  
12 sex at birth.”<sup>15</sup> Thus, this definition contains more objective factors than HUD’s current, purely  
13 self-identified regime. Further, unlike HUD’s current regulations, Massachusetts law provides  
14 that “gender-related identity may be shown by providing evidence including, but not limited to,  
15 medical history, care or treatment of the gender-related identity, consistent and uniform assertion  
16 of the gender-related identity or any other evidence that the gender-related identity is sincerely  
17 held as part of a person’s core identity...” Finally, in Massachusetts, “gender-related identity  
18 shall not be asserted for any improper purpose...”<sup>16</sup> while HUD’s regulations contain no

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<sup>13</sup>See [https://www1.nyc.gov/assets/cchr/downloads/pdf/TITLE\\_8\\_Human%20Rights%20Law\\_May%202019.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/TITLE_8_Human%20Rights%20Law_May%202019.pdf). (Gender identity “include[] actual or perceived sex, gender identity and gender expression, including a person’s actual or perceived gender-related self-image, appearance, behavior, expression or other gender-related characteristic, regardless of the sex assigned to that person at birth.”)

<sup>14</sup> [https://www1.nyc.gov/assets/cchr/downloads/pdf/TITLE\\_8\\_Human%20Rights%20Law\\_May%202019.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/TITLE_8_Human%20Rights%20Law_May%202019.pdf). New York City’s Department of Homeless Services has recently issued binding guidance to require placement of individuals based on their self-professed gender identity. See [https://www1.nyc.gov/assets/dhs/downloads/pdf/dhs\\_policy\\_on\\_serving\\_transgender\\_non\\_binary\\_and\\_intersex\\_clients.pdf](https://www1.nyc.gov/assets/dhs/downloads/pdf/dhs_policy_on_serving_transgender_non_binary_and_intersex_clients.pdf). However, this guidance only applies to locally-funded shelters.

<sup>15</sup> <https://malegislature.gov/laws/general/laws/partI/titleII/chapter22c/section32>.

<sup>16</sup> <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleI/Chapter4/section7>

1 reference to improper purposes. Given this wide policy variation, HUD believes that shelters are  
2 best able to serve their beneficiaries when they can develop their own policies on  
3 accommodating those whose gender identity conflicts with their biological sex and that the  
4 issuance of the 2016 prescriptive rule was not appropriate.

5 By adopting a less prescriptive approach, HUD's new proposed rule better reflects  
6 constitutional principles of democracy and federalism. The current approach requires that  
7 shelters admit and accommodate individuals on the basis of their gender identity, even though  
8 more than 30 states do not have such a requirement. It also prescribed the means by which  
9 shelters had to determine an individual's gender identity (self-identification), even though states  
10 have differing approaches to this issue, not to mention localities. As this President's Executive  
11 Order 13132, "Federalism," explains, "issues that are not national in scope or significance are  
12 most appropriately addressed by the level of government closest to the people," and that the  
13 "national government should be deferential to the States when taking action that affects the  
14 policymaking of the States..."<sup>17</sup> HUD believes the best way to fulfill this federalism mandate –  
15 particularly in a difficult issue like this with a lack of clear national consensus – is to refrain from  
16 enforcing a national solution.

17 *Third, the 2016 Rule burdened those shelters with deeply held religious convictions.*<sup>18</sup>  
18 Although not discussed in the 2016 Rule, the prescriptive approach to admission and  
19 accommodation on the basis of gender identity raises concerns about burdens on faith-based  
20 shelter providers. In some faith traditions, sex is viewed as an immutable characteristic

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<sup>17</sup> Executive Order 13132, "Federalism," 64 FR 43255, August 10, 1999.

<sup>18</sup> See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

("The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment. The freedoms asserted here are both the freedom of speech and the free exercise of religion.").

1 determined at birth. Thus, legally compelled accommodation determined on a basis in conflict  
2 with the provider's beliefs could violate religious freedom precepts. For example, Hope Center  
3 in Alaska, a faith-based homeless shelter for women, sued in Federal District Court to prevent  
4 the application of a local law that would require them to serve biological males who identify as  
5 females.<sup>19</sup> Hope Center believes that doing so would violate their sincerely held religious belief  
6 that the Bible teaches that God creates people male or female and "that it should care for women  
7 who lack shelter," thus excluding men.<sup>20</sup> Hope Center believes that the application of laws like  
8 HUD's 2016 Rule violate the First Amendment's Free Exercise Clause. HUD's 2016 Rule raises  
9 the same potential issue of coercing ministries like Hope to "abandon [their] mission and  
10 message..."<sup>21</sup> in order to participate in government-funded programs.

11 The lack of attention in HUD's 2016 Rule to religious liberty is problematic because the  
12 Department of Justice has emphasized that "to the greatest extent practicable and permitted by  
13 law, religious observance and practice should be reasonably accommodated in all government  
14 activity."<sup>22</sup> In some instances, accommodations of religious objections are necessitated by  
15 protections in the First Amendment's Free Exercise Clause.<sup>23</sup> In other instances, religious

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<sup>19</sup> <https://www.adn.com/alaska-news/anchorage/2019/10/01/municipality-of-anchorage-will-pay-100001-to-settle-transgender-discrimination-lawsuit-involving-homeless-shelter/>

<sup>20</sup> For a full discussion of their religious beliefs, see: [https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/the-downtown-soup-kitchen-dba-downtown-hope-center-v.-municipality-of-anchorage---complaint.pdf?sfvrsn=9536cb21\\_4](https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/the-downtown-soup-kitchen-dba-downtown-hope-center-v.-municipality-of-anchorage---complaint.pdf?sfvrsn=9536cb21_4) pp. 8-10; see also: [https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/resources/media-resources/cases/the-downtown-soup-kitchen-d-b-a-downtown-hope-center-v.-municipality-of-anchorage/hope-center-v-anchorage---one-page-summary.pdf?sfvrsn=fa9b07be\\_6](https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/resources/media-resources/cases/the-downtown-soup-kitchen-d-b-a-downtown-hope-center-v.-municipality-of-anchorage/hope-center-v-anchorage---one-page-summary.pdf?sfvrsn=fa9b07be_6).

<sup>21</sup> [https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/the-downtown-soup-kitchen-dba-downtown-hope-center-v.-municipality-of-anchorage/hope-center-v-anchorage---complaint.pdf?sfvrsn=9536cb21\\_4](https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/the-downtown-soup-kitchen-dba-downtown-hope-center-v.-municipality-of-anchorage/hope-center-v-anchorage---complaint.pdf?sfvrsn=9536cb21_4)

<sup>22</sup> Federal Law Protections for Religious Liberty, 82 Fed. Reg. 206 (October 6, 2017).

<sup>23</sup> The protection of the Free Exercise Clause extends to acts undertaken in accordance with sincerely held beliefs. The First Amendment guarantees the freedom to "exercise" religion, not just the freedom to "believe" in religion. Jurisprudence concerning this important area of law is complex and continues to develop. See *Fulton v. City of Phila.*, 922 F.3d 140 (3rd Cir.), cert. granted, 2020 U.S. LEXIS 961 (U.S. Feb. 24, 2020) (No. 19-123). HUD believes it is appropriate to take steps to ensure that rights under the Free Exercise Clause are not infringed.

1 accommodations may be undertaken in furtherance of a secular governmental goal that is not  
2 designed to advance or further religion.<sup>24</sup> And yet, to protect their religious practice, shelters  
3 currently must seek individual, specific waivers under the Religious Freedom Restoration Act or  
4 potentially under the Secretary’s general waiver authority,<sup>25</sup> which can be both time consuming  
5 and burdensome. Further, the 2016 Rule’s approach discourages some religious providers from  
6 accepting HUD funding at all, to avoid being forced to either comply with the rule or the need to  
7 request a waiver. The large percentage of single sex shelters sponsored by religious organizations  
8 that do not participate in HUD programs may reflect the burden or perceived burden of both  
9 current HUD requirements and the waiver process. Instead of continuing a piecemeal and  
10 ineffective way of accounting for religious beliefs, HUD proposes a policy that will respect the  
11 religious beliefs of shelters as they develop the admissions and accommodations policy, provided  
12 that each policy is consistent with state and local law. By respecting the religious beliefs of  
13 shelters, HUD, can better provide wide availability of shelters to participate in the program.

14 *Fourth, the 2016 Rule has manifested privacy issues.* The current rule gives little  
15 consideration to the shelter’s need to take care of the mental health and privacy concerns of at-  
16 risk clients, particularly “the special needs of program residents that are victims of domestic  
17 violence” along with “dating violence, sexual assault, and stalking.”<sup>26</sup> A shelter may want to  
18 reduce unwelcome or accidental exposure to, or by, persons of the opposite biological sex where  
19 either party may be in a state of undress—such as in changing rooms, shared living quarters,  
20 showers, or other shared intimate facilities—to address privacy concerns which must be

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<sup>24</sup> The Supreme Court has said that “‘there is room for play in the joints’ between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.” Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (internal quotation and citation omitted).

<sup>25</sup> 42 U.S.C. 3535(q).

<sup>26</sup> NAHRO Comment Letter available at <https://www.regulations.gov/document?D=HUD-2015-0104-0083>.

1 considered and respected.<sup>27</sup> Such a desire, which is critical in providing care for vulnerable  
2 populations, currently requires shelters to forego HUD assistance.

3         This need for privacy is especially strong among women who have “deeper psychological  
4 issues that prevent them from cohabitating with those of the opposite sex.”<sup>28</sup> Homeless women  
5 have all too often been the subject of sexual abuse and assault. One study found that “92% of a  
6 racially diverse sample of homeless mothers had experienced severe physical and/or sexual  
7 violence at some point in their lives ...” and another found that “13% of homeless women  
8 reported having been raped in *the past 12 months* and half of these were raped at least twice...”<sup>29</sup>  
9 Further, between 22% and 55% of women are homeless because of intimate partner violence.<sup>30</sup>  
10 Given these jarring statistics, some homeless women would be expected to distrust and feel  
11 unsafe around biological men, even though they self-identify as women.

12         HUD does not believe it is beneficial to institute a national policy that may force  
13 homeless women to sleep alongside and interact with men in intimate settings—even though  
14 those women may have just been beaten, raped, and sexually assaulted by a man the day before.  
15 The 2016 Rule minimized the shelter’s ability to protect the privacy interest of shelter seekers,  
16 not so that the shelter can better serve transgender individuals, but so that the shelter is forced to  
17 admit any individual who claims to be the gender the shelter serves.

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<sup>27</sup> United States v. Virginia, 518 U.S. 515, 550 n.19 (1996) (“Admitting women to [an all-male school] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements”); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) (“[M]ost people have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning or humiliating.”); Fair Housing Council v. Roommate. Com, LLC, 666 F.3d 1216, 1221 (9th Cir. 2012) (“As roommates often share bathrooms and common areas, a girl may not want to walk around in her towel in front of a boy.”).

<sup>28</sup> NAHRO Comment Letter available at <https://www.regulations.gov/document?D=HUD-2015-0104-0083>.

<sup>29</sup> [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_SAHomelessness.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SAHomelessness.pdf).

<sup>30</sup> U.S. Department of Health & Human Services, Administration for Children & Families, Family & Youth Services Bureau. “Domestic Violence and Homelessness: Statistics (2016).” Published, June 24, 2016, accessed March 21, 2017. <https://www.acf.hhs.gov/fysb/resource/dvhomelessnessstats2016> (cited by [http://womensliberationfront.org/wp-content/uploads/2019/04/MAILED-Copy-of-Hands-Across-the-Aisle-Letter-to-HUD\\_dated-5-1-17.pdf](http://womensliberationfront.org/wp-content/uploads/2019/04/MAILED-Copy-of-Hands-Across-the-Aisle-Letter-to-HUD_dated-5-1-17.pdf)).

1           While HUD is not aware of data suggesting that transgender individuals pose an  
2 inherent risk to biological women, there is anecdotal evidence that some women may fear that  
3 non-transgender, biological men may exploit the process of self-identification under the current  
4 rule in order to gain access to women’s shelters. This could harm individuals in need of shelter  
5 by chilling their participation in HUD programs. For example, in Alaska, “women have told  
6 shelter officials that if biological men are allowed to spend the night alongside them, ‘they would  
7 rather sleep in the woods,’ even in extreme cold...with temperatures hovering around zero.”<sup>31</sup>  
8 HUD is also aware of a pending civil complaint in Fresno, California from nine homeless women  
9 against Naomi’s House, a homeless shelter that receives HUD funding. These women allege that  
10 the shelter enabled sexual harassment because a biological male who self-identified as a female  
11 entered a homeless shelter and showered with females. This individual would “repeatedly make  
12 lewd and sexually inappropriate comments to some of the Plaintiffs,” “stare and leer at Plaintiffs  
13 while naked and make sexually harassing comments about their bodies,” and show “sexual  
14 pictures and/or videos of [the individual] and mak[e] sexual advances on some of the  
15 Plaintiffs.”<sup>32</sup>

16           The 2016 Rule attempted to address privacy and security through post-admission  
17 accommodations and procedures, but this has proven unworkable for too many shelters without  
18 alternative options to address practical and privacy concerns. Shelters operate in difficult  
19 conditions, often with troubled clientele, through overburdened and sometimes volunteer staff,  
20 and the current rule makes it impracticable for some shelters to, after admitting a biological  
21 male, adequately protect the privacy interests of their biological female clientele who do not  
22 want to shower, undress, and sleep in the same facilities as biological men. While HUD argued

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<sup>31</sup> <https://www.apnews.com/85494d367c2d4a38b1749f76a89f49c3>.

<sup>32</sup> <https://casetext.com/case/mcgee-v-poverello-house>.

1 in 2016 that shelters could address privacy concerns through “schedules that provide equal  
2 access to bathing facilities, and modifications to facilities, such as the use of privacy screens and,  
3 where feasible, the installation of single occupant restrooms and bathing facilities,”<sup>33</sup> HUD  
4 believes that this is not an option for many shelters, whose budgets, staff, and space are already  
5 limited.

6 HUD recognizes that shelters must also take special care to address the mental health and  
7 safety needs of transgender individuals. HUD is aware that transgender individuals experience  
8 poverty, housing instability, mental health issues, domestic violence, and homelessness at high  
9 rates. Given the rates of violence and mistreatment that homeless transgender persons  
10 experience, HUD recognizes that shelter access for transgender persons is critical. Thus, the  
11 proposed rule requires that if a shelter denies access to a person based on a determination of sex,  
12 the shelter must utilize the CoC’s centralized or coordinated assessment system to provide a  
13 transfer recommendation to an alternative shelter or accommodation.

14 Shelters may also choose to admit individuals on criteria other than biological sex. For  
15 example, under the proposed rule, a single-sex facility could continue to operate under the policy  
16 set forth in the 2016 Rule. Under that policy, an intake worker at a single-sex homelessness  
17 facility would ask an individual their gender identity, and if the person identified themselves  
18 with the gender served by the facility, they would be admitted. Under the proposed rule, a single-  
19 sex facility for women could have a policy that they only admits biological women. A shelter  
20 would have the flexibility to implement this policy as they feel appropriate, provided that they  
21 only deny an individual seeking accommodation or access to the temporary, emergency shelters  
22 when they have a good faith belief that individual is not of the sex which the shelter’s policy

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<sup>33</sup> 81 FR 64763, September 21, 2016.

1 accommodates and they provide a transfer recommendation as required under the regulation.  
2 Denial of accommodation solely because of a person's gender identity that differs from  
3 biological sex is not permitted.

4 Shelters could also have policies that follow state or local law, such as perceived gender  
5 identity, that varies from the HUD definition of self-identified gender identity. Other possible  
6 policies could be based on medical transition status, active hormone therapy or state recognized  
7 gender status. The key test for such policies is whether if another shelter adopted a "mirror"  
8 policy (that is, the same policy but directed at the other sex), any person not accommodated at  
9 one shelter would be accommodated at the other shelter.

10 In practice, where people seeking shelter are asked their sex at intake into the facility, and  
11 if they identify themselves as the sex that is served by the shelter, they are admitted unless the  
12 shelter has a good faith basis to doubt the consistency of the sex asserted with the sex served by  
13 the shelter, determined in accordance with its own policy. Where such doubt exists, the shelter  
14 could also have a list of possible sources of evidence the shelter seeker could provide such as a  
15 birth certificate, other identification, or medical records. This could occur at intake or  
16 subsequently, if the shelter resident is unable to verify their sex, the shelter would work through  
17 the centralized or coordinated assessment system to provide a transfer recommendation for  
18 another shelter.

19 This approach would better protect shelter clients as well. Under HUD's 2016 Rule,  
20 while privacy accommodations may sometimes be available for individuals who need additional  
21 privacy, "alternative accommodations can only be offered when an individual requests it, and  
22 under these proposed regulations, housing providers are likely only left with the option of  
23 moving the domestic violence victim resident." But some individuals may hesitate to raise their



1 concerns, for fear of retaliation by the service provider or because they do not know whether  
2 privacy accommodation is an available option. HUD believes the easier approach would be to  
3 let shelters accommodate privacy concerns in a manner that causes the least overall disruption to  
4 residents.

5 *Finally, the 2016 Rule imposed regulatory burdens.* The rule imposes several different  
6 types of regulatory burdens. It imposes a special document retention requirement applicable to  
7 determinations of “sex” that is burdensome and not supported either by statute or practice. This  
8 burden is inconsistent with Executive Orders directing agencies to “alleviate unnecessary  
9 regulatory burdens placed on the American people,”<sup>34</sup> and “manage the costs associated with the  
10 governmental imposition of private expenditures required to comply with Federal regulations.”<sup>35</sup>  
11 Additionally, as discussed above in the fourth point, shelters may not have the resources to build  
12 individual privacy screens or single occupant restrooms and bathing facilities to address any  
13 privacy concerns that may arise.

14 These regulatory burdens could have a material impact on the availability of  
15 homelessness services. HUD’s Emergency Solutions Grants program and other CPD programs  
16 provide a small share of the funding that is used for emergency shelters. For example, in fiscal  
17 year 2019, HUD’s Emergency Solutions Grants program provided \$290 million in funding. In  
18 contrast, with nearly 300,000 emergency shelter beds and costs ranging from \$14 to \$61 per bed-  
19 night for individuals and more for families, overall spending for emergency shelter is several  
20 billion dollars per year.

21 The lack of shelter capacity in many communities contributes to high numbers of people  
22 who experience unsheltered homelessness. Local governments and nonprofit organizations

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<sup>34</sup> Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” 82 FR 12285, March 1, 2017.

<sup>35</sup> Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” 82 F.R. 9339, Feb. 3, 2017.

1 utilize any potential space to use as shelter, and many times, these shelters operate under severe  
2 financial constraints. Providing additional options for operating single-sex shelters as proposed  
3 by this rule may encourage more emergency shelters to participate in HUD's programs and  
4 prevent the loss of emergency shelter capacity. The additional funding could be used to upgrade  
5 facilities and services, improving the quality of assistance for people experiencing homelessness.

#### 6 **IV. SUMMARY OF PROPOSED RULE**

7 This proposed rule would revise § 5.106(c)(1) to expressly allow a recipient,  
8 subrecipient, owner, operator, manager, or provider to establish its own policies for determining  
9 whether to restrict access based on an individual's sex for the purposes of determining  
10 admissions and accommodation within a single-sex facility. Such a policy could align with, or  
11 borrow from, a state or local government's policy for determining an individual's sex,<sup>36</sup> but is  
12 not required to do so. The rule also provides in paragraph (c)(1) that such policies must be  
13 consistent with federal, state, and local law. Under paragraph (c)(2) a recipient, subrecipient,  
14 owner, operator, manager, or provider is permitted to take into account a wide variety of factors  
15 in issuing a policy, including privacy, safety, and similar concerns.

16 Proposed paragraph (c)(3) would restrict how a single-sex facility would apply the policy  
17 drafted under paragraph (c)(1) and require the single-sex facility to apply its policy uniformly  
18 and consistently. It would also provide that a recipient, subrecipient, owner, operator, manager,  
19 or provider may determine an individual's sex based on a good faith belief that an individual  
20 seeking access to the temporary, emergency shelters is not of the sex, as defined in the single sex  
21 facility's policy, which the facility accommodates. HUD would consider this good faith  
22 sufficient to show that a decisionmaker was not discriminating for purposes of determining

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<sup>36</sup> See, e.g., Iowa state law for determining sex designation change. Iowa Code Ann. 144.23.

1 compliance based on an individual's actual or perceived gender identity in § 5.105(a)(2). HUD  
2 believes that reasonable considerations may include, but are not limited to a combination of  
3 factors such as height, the presence (but not the absence) of facial hair, the presence of an  
4 Adam's apple, and other physical characteristics which, when considered together, are indicative  
5 of a person's biological sex. A good faith determination could also be made if a person  
6 voluntarily self-identifies as the biological sex that is opposite that served by the single sex  
7 facility if that is a part of its policy. In cases where a recipient, subrecipient, owner, operator,  
8 manager, or provider has a good faith belief that the individual is not of the biological sex served  
9 by the single sex facility, the recipient, subrecipient, owner, operator, manager, or provider may  
10 request evidence of the individual's biological sex. Evidence requested must not be unduly  
11 intrusive of privacy, such as private physical anatomical evidence. Evidence requested could  
12 include government identification, but lack of government identification alone cannot be the sole  
13 basis for denying admittance on the basis of sex.

14 Continuum of Care (CoC) is a regional or local planning group that coordinates  
15 homelessness services and is generally composed of representatives from governments and  
16 organizations that focus on fighting homelessness. CoCs are responsible for ensuring that people  
17 experiencing homelessness receive assistance in a coordinated and timely fashion. Specifically,  
18 CoCs are required to create and implement a plan that coordinates implementation of housing  
19 and service system that meets the needs of people experiencing homelessness (§ 578.7(c)(1)),  
20 and the requirement for CoCs, in consultation with a local recipient of Emergency Solutions  
21 Grants funds to operate a coordinated entry system that provides an initial, comprehensive  
22 assessment of needs for housing and services (§ 578.7(a)(8)). To help promote these objectives,  
23 HUD provides in this proposed rule in paragraph (d)(4) that if a single sex facility denies access

1 to a person under this rule based on a good faith belief that a person seeking access to the single  
2 sex facility is not of the biological sex which the shelter accommodates, a shelter must use the  
3 coordinated entry system to provide a transfer recommendation to an alternative facility. In  
4 addition, the rule more broadly provides that if a person objects to the provider's policy for  
5 determining sex because of the person's sincerely held beliefs then the shelter must also  
6 provide a transfer recommendation to an alternative shelter.

7 Finally, HUD proposes to remove paragraphs (b)(1) through (b)(4), inclusively, which  
8 currently enumerates the applications of the antidiscrimination provision, in favor of a  
9 streamlined reference to § 5.105(a)(2). Section 105(a)(2) entitles equal access to HUD-assisted  
10 housing by prohibiting determinations for housing eligibility from being based on actual or  
11 perceived sexual orientation, gender identity, or marital status.

12 The proposed rule would also eliminate the previously discussed burdensome special  
13 document retention requirement in the current rule applicable to determinations of "sex." This  
14 proposed rule does not prohibit any individual from voluntarily self-identifying sexual  
15 orientation or gender identity, as it does not prohibit a shelter, under its own policy, from  
16 recognizing such self-identification.

17 Other than these specified changes, the current regulations would remain in effect. HUD  
18 believes that a combination of strong anti-discrimination protections and affording grantees a  
19 large measure of discretion in an area with divergent, deeply held and substantially supported  
20 views offers the broadest workable protection for individuals, including transgender individuals.

21 This proposed rule would also amend § 576.400(e)(3)(iii) to add language allowing for  
22 exceptions as authorized under § 5.106 to written standards for HUD's Emergency Solutions  
23 Grant Program.

## 1 Request for Comments

2 1. HUD is maintaining the nondiscrimination protections from its 2012 rule, even  
3 though they lack an explicit statutory authorization, because HUD is not aware of any  
4 relevant party that has raised any material concerns about the 2012 rule. HUD believes all  
5 federally supported housing opportunities should be provided to all in a nondiscriminatory  
6 manner, including for sexual orientation and gender identity. HUD specifically seeks  
7 comments on whether HUD should maintain the anti-discrimination protections?

8 2. HUD requests comments on what are good faith considerations that are indicative of a  
9 person's biological sex. Should HUD define what constitutes a good faith belief for determining  
10 biological sex and what type of evidence would be helpful for determining an individual's  
11 biological sex? How, if at all, should government IDs be considered?

12 3. CoCs are responsible for creating and implementing a plan that coordinates the  
13 housing and service system that meets the needs of people experiencing homelessness (including  
14 unaccompanied youth) and families and includes, shelter, housing, and supportive services (§  
15 578.7(c)(1)). HUD is proposing that for people who are denied access to shelter because of a  
16 policy regarding admission or placement in single sex facilities, the shelter must provide a  
17 transfer recommendation for individuals to the Coordinated Entry provider for the Continuum of  
18 Care. HUD is also seeking comment on what requirements, if any, HUD should include in the  
19 final rule to ensure that shelter policies are coordinated and implemented in a way that allows all  
20 persons experiencing homelessness in the geographic area (including persons with disabilities) to  
21 be served timely and in a non-discriminatory manner? Is the requirement of providing a transfer  
22 recommendation unduly burdensome or does it otherwise pose operational challenges?

## 23 **V. FINDINGS AND CERTIFICATIONS**

24 Regulatory Review – Executive Orders 12866 and 13563

1 Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of  
2 available regulatory alternatives and, if regulation is necessary, to select regulatory approaches  
3 that maximize net benefits (including potential economic, environmental, public health, and  
4 safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the  
5 importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and  
6 of promoting flexibility. Under Executive Order 12866 (Regulatory Planning and Review), a  
7 determination must be made whether a regulatory action is significant and, therefore, subject to  
8 review by the Office of Management and Budget (OMB) in accordance with the requirements of  
9 the order.

10 The proposed rule has been determined to be a “significant regulatory action,” as defined  
11 in section 3(f) of the Order, but not economically significant under section 3(f)(1) of the Order.  
12 The docket file is available for public inspection in the Regulations Division, Office of General  
13 Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276,  
14 Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building,  
15 please schedule an appointment to review the docket file by calling the Regulations Division at  
16 202-402-3055 (this is not a toll-free number). Individuals who are deaf or hard of hearing and  
17 individuals with speech impairments may access this number via TTY by calling the Federal  
18 Relay Service at 800-877-8339 (this is a toll-free number).

#### 19 Executive Order 13771

20 Executive Order 13771, entitled “Reducing Regulation and Controlling Regulatory  
21 Costs,” was issued on January 30, 2017. Section 2(a) of Executive Order 13771 requires an  
22 Agency, unless prohibited by law, to identify at least two existing regulations to be repealed  
23 when the Agency publicly proposes for notice and comment or otherwise promulgates a new

1 regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires  
2 that the new incremental costs associated with new regulations shall, to the extent permitted by  
3 law, be offset by the elimination of existing costs associated with at least two prior regulations.  
4 This proposed rule is expected to be a deregulatory action under Executive Order 13771 by  
5 providing flexibility for grantees in determining their policies.

#### 6 Unfunded Mandates Reform Act

7 Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March  
8 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their  
9 regulatory actions on state, local, and tribal governments, and on the private sector. This  
10 proposed rule does not impose any Federal mandates on any state, local, or tribal government, or  
11 on the private sector, within the meaning of the UMRA.

#### 12 Environmental Review

13 This proposed rule sets forth nondiscrimination standards. Accordingly, under 24 CFR  
14 50.19(c)(3), this proposed rule is categorically excluded from environmental review under the  
15 National Environmental Policy Act of 1969 (42 U.S.C. 4321).

#### 16 Regulatory Flexibility Act

17 The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), generally requires an  
18 agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment  
19 rulemaking requirements unless the agency certifies that the rule will not have a significant  
20 economic impact on a substantial number of small entities. The number of entities that would be  
21 affected by this rule is limited to entities who can legally operate single sex or sex-specific  
22 facilities and would change or establish policy as a result of the accommodation needs addressed  
23 by this rule. HUD does not have the exact number of entities that would be affected. However, as

1 an example, approximately out of the 1,900 emergency shelters are funded by HUD programs.  
2 Out of this 1,900, HUD does not know how many of those would issue a new policy. Nor does  
3 HUD know how many of those are small entities. HUD specifically requests from the public any  
4 information about the number of small entities that might be impacted.

5 Furthermore, HUD anticipates that entities who develop a policy as a result of this rule  
6 will generally face only a small burden in determining and establishing an organizational policy.  
7 Accordingly, for the foregoing reasons, the undersigned certifies that this rule will not have a  
8 significant economic impact on a substantial number of small entities. Notwithstanding HUD's  
9 determination that this proposed rule would not have a significant effect on a substantial number  
10 of small entities, HUD specifically invites comments on whether it will not have a significant  
11 effect and regarding any less burdensome alternatives to this rule that will meet HUD's  
12 objectives.

### 13 Executive Order 13132, Federalism

14 Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any  
15 rule that has Federalism implications if the rule either imposes substantial direct compliance  
16 costs on state and local governments or is not required by statute, or the rule preempts state law,  
17 unless the agency meets the consultation and funding requirements of section 6 of the Executive  
18 Order. This rule would not have Federalism implications and would not impose substantial direct  
19 compliance costs on state and local governments or preempt state law within the meaning of the  
20 Executive Order.

21

### 22 **List of Subjects in 24 CFR Part 5**



1 Administrative practice and procedure, Aged, Claims, Drug abuse, Drug traffic control,  
 2 Grant programs—housing and community development, Grant programs—Indians, Individuals  
 3 with disabilities, Loan programs—housing and community development, Low and moderate  
 4 income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, Reporting and  
 5 recordkeeping requirements.

6 **List of Subjects in 24 CFR Part 576**

7 Community facilities, Grant programs-housing and community development, Grant  
 8 programs-social programs, Homeless, Reporting and recordkeeping requirements

9

10 Accordingly, for the reasons stated above, HUD proposes to amend 24 CFR part 5 as follows:

11

12

**PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS**

13 1. The authority citation for part 5 continues to read as follows:

14 **Authority:** 29 U.S.C. 794, 42 U.S.C. 1437a, 1437c, 1437c-1(d), 1437d, 1437f, 1437n,  
 15 3535(d), and Sec. 327, Pub. L. 109-115, 119 Stat. 2936; 42 U.S.C. 3600-3620; 42 U.S.C.  
 16 5304(b); 42 U.S.C. 12101 et seq.; 42 U.S.C. 12704-12708; E.O. 11063, 27 FR 11527, 3 CFR,  
 17 1958-1963 Comp., p. 652; E.O. 12892, 59 FR 2939, 3 CFR, 1994 Comp., p. 849.

18

19 2. In § 5.100, revise the first sentence of the definition of “*Gender identity*” to read as follows:

20 **§ 5.100 Definitions**

21 \* \* \* \* \*

22 *Gender identity* means actual or perceived gender-related characteristics. \* \* \*

23 \* \* \* \* \*

24

1 3. In § 5.106, revise paragraphs (b) and (c), and remove paragraph (d) to read as follows:

2 **§ 5.106 Access in community planning and development programs.**

3 \* \* \* \* \*

4 (b) *Access.* The admissions, occupancy, and operating policies and procedures of  
5 recipients, subrecipients, owners, operators, managers, and providers identified in paragraph (a)  
6 of this section shall be established or amended, as necessary, and administered in a  
7 nondiscriminatory manner to ensure that eligibility determinations are made, and assisted  
8 housing is made available in CPD programs as required by § 5.105(a)(2).

9 (c) *Admission and accommodation in temporary, emergency shelters and other buildings*  
10 *and facilities with shared sleeping quarters or shared bathing facilities.*

11 (1) *Admission and accommodation policies.* Recipients, subrecipients, owners, operators,  
12 managers, or providers of temporary, emergency shelters or other buildings and facilities with  
13 physical limitations or configurations may make admission and accommodation decisions based  
14 on its own policy for determining sex if the policy is consistent with paragraphs (c)(2)-(4) of this  
15 section. Any such policy must be consistent with federal, state, and local law.

16 (2) *Privacy and safety considerations.* The policy of a recipient, subrecipient, owner,  
17 operator, manager, or provider established pursuant to paragraph (c)(1) of this section may  
18 consider privacy, safety, and any other relevant factors.

19 (3) *Application of the policy.* A recipient, subrecipient, owner, operator, manager, or  
20 provider must apply any policy established pursuant to paragraph (c)(1) in a uniform and  
21 consistent manner. A recipient, subrecipient, owner, operator, manager, or provider may deny  
22 admission or accommodation in temporary, emergency shelters and other buildings and facilities  
23 with physical limitations or configurations that require and are permitted to have shared sleeping

1 quarters or shared bathing facilities based on a good faith belief that an individual seeking  
2 accommodation or access to the temporary, emergency shelters is not of the sex which the  
3 shelter's policy accommodates. If a temporary, emergency shelter has a good faith belief that a  
4 person seeking access to the shelter is not of the sex which the shelter accommodates, the shelter  
5 may request information or documentary evidence of the person's sex, except that the shelter  
6 may not request evidence which is unduly intrusive of privacy.

7 (4) *Transfer recommendation.* If a temporary, emergency shelter denies admission or  
8 accommodations based on a good faith belief that a person seeking access to the shelter is not of  
9 the sex which the shelter accommodates as determined under its policy, the shelter must use the  
10 centralized or coordinated assessment system, as defined in § 578.3 of this title, to provide a  
11 transfer recommendation to an alternative shelter. If a person states to the temporary, emergency  
12 shelter that the provider's policy for determining sex is inconsistent with the person's sincerely  
13 held beliefs, including privacy or safety concerns, then the shelter must use the centralized or  
14 coordinated assessment system, as defined in § 578.3 of this title, to provide a transfer  
15 recommendation to an alternative shelter.

16

#### 17 **PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM**

18

19 4. The authority for 24 CFR part 576 continues to read as follows:

20 **Authority:** 12 U.S.C. 1701x, 1701 x-1; 42 U.S.C. 11371 et seq., 42 U.S.C. 3535(d).

21

22

1 5. In § 576.400, add at the end of paragraph (e)(3)(iii) the parenthetical, “(these policies must  
2 allow for the exceptions as authorized under the Equal Access Rule, 24 CFR § 5.106)”.

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Dated: \_\_\_\_\_

\_\_\_\_\_  
Benjamin S. Carson, Sr.  
Secretary

**[FR-6152-P-01]**