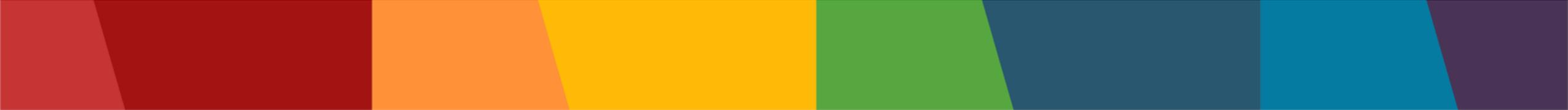


Equal Access to Housing Final Rule

“Equality means more than passing laws. The struggle is really won in the hearts and minds of the community, where it really counts.”

Barbara Gittings



Learning Objectives

- **What is the Equal Access to Housing Final Rule**
- **The 2012 Final Rule**
- **The 2015 Guidance**
- **The 2016 Final Rule**
- **Additional Federal Regulations**



Equal Access to Housing Final Rule

On September 21, 2016, HUD published a final rule entitled "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs." Through this final rule, HUD ensures equal access to individuals in accordance with their gender identity in programs and shelter funded under programs administered by HUD's Office of Community Planning and Development (CPD).

Equal Access to Housing Final Rule

The final rule requires that recipients and subrecipients of CPD funding, as well as owners, operators, and managers of shelters, and other buildings and facilities and providers of services funded in whole or in part by any CPD program to grant equal access to such facilities, and other buildings and facilities, benefits, accommodations and services to individuals in accordance with the individual's gender identity, and in a manner that affords equal access to the individual's family.

2012 Final Rule

The 2016 rule builds upon HUD's February 2012 final rule entitled "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" (2012 Equal Access Rule), which aimed 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.

2012 Final Rule

On February 3, 2012, HUD issued its 2012 Equal Access Rule, which defined the terms “sexual orientation” and “gender identity,” and required that HUD-assisted housing, and housing insured by FHA be made available to individuals and families without regard to actual or perceived sexual orientation, gender identity, or marital status.

2012 Final Rule

The 2012 Equal Access Rule, however, did not address how transgender and gender non-conforming individuals should be accommodated in temporary, emergency shelters, and other buildings and facilities used for shelter, that have physical limitations or configurations that require and that are permitted to have shared sleeping quarters or shared bathing facilities.



2012 Final Rule

- The 2012 Equal Access Rule also generally prohibited inquiries into sexual orientation or gender identity for the purpose of determining eligibility for, or availability of, such housing.
- HUD declined to adopt a national policy on the placement of transgender persons in temporary, emergency shelters with shared sleeping quarters or shared bathing facilities, deciding instead to conduct research and monitor its programs to determine whether additional guidance or national policy was needed to ensure equal access for transgender and gender nonconforming persons.

2012 Final Rule

- As a result of its review, HUD determined that the 2012 Equal Access Rule did not adequately address the significant barriers faced by transgender and gender nonconforming persons when accessing temporary, emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or bathing facilities

2012 Final Rule

- Specifically, HUD found that transgender and gender nonconforming persons continue to experience significant violence, harassment, and discrimination in attempting to access programs, benefits, services, and accommodations.
- For instance, at a listening session on LGBTQI issues conducted with the U.S. Interagency Council on Homelessness, homeless service providers reported that transgender persons were often discriminatorily excluded from shelters or face dangerous conditions in the shelters that correspond to their sex assigned at birth.

2012 Final Rule

It was reported that, if given the choice between a shelter designated for assigned birth sex or sleeping on the streets, many transgender shelter seekers would choose the streets!

2012 Final Rule

- HUD also reviewed national research that revealed that lack of access to shelter for transgender and gender nonconforming persons, particularly those who were also homeless youths, was a pervasive problem
- HUD found that multiple agencies prohibit discrimination based on sexual orientation and gender identity and also require that grant recipients treat transgender persons consistent with their gender identity

2015 Guidance

- On February 20, 2015, CPD issued guidance, entitled “Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities” (CPD–15–02), which applied to the following CPD programs: **Housing Opportunities for Persons With AIDS (HOPWA)**, **Emergency Solutions Grants (ESG)**, and **Continuum of Care (CoC)**.
- This guidance clarified that HUD expected recipients and subrecipients are to base placement decisions based on the gender with which a person identifies—and not on another person’s stereotype — taking into consideration health and safety concerns and giving serious consideration to the transgender or gender nonconforming person’s own personal health and safety concerns. The guidance also outlined best practices for providers.

2015 Proposed Rule

- On November 20, 2015, following careful review of information about the treatment of transgender persons in temporary, emergency shelters, HUD proposed a second Equal Access rule, entitled “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs” (CPD Equal Access).
- In this rulemaking, HUD proposed to add a new section to its regulations in 24 CFR part 5 that would require recipients and subrecipients as well as owners, operators, and managers of shelters and other buildings and facilities and providers of services funded in whole or in part by CPD programs—to provide equal access to programs, benefits, services, and accommodations in accordance with an individual’s gender identity

2015 Proposed Rule

- Specifically, the rule proposed to add to 24 CFR part 5 a new § 5.106, which would contain equal access provisions tailored to CPD programs.
- CPD recipients, subrecipients, owners, operators, managers, and providers were to establish or amend, as necessary, and administer program admissions, occupancy, and operating policies and procedures, including policies and procedures to protect individuals' privacy and security, so that equal access to programs, shelters, other buildings and facilities, benefits, services, and accommodations are provided to individuals in accordance with their gender identity. That section also proposed to require that such equal access be provided in a manner that affords equal access to the individual's family

2015 Proposed Rule

- The proposed rule required that the placement and accommodation of individuals in facilities that are permitted to be single-sex must be made in accordance with the individual's gender identity.
- The proposed rule provided that, under narrow circumstances, a written case-by-case determination could be made as to whether an alternative accommodation is necessary to ensure health and safety.
- The proposed rule contained a prohibition for such a determination to be based solely on a person's actual or perceived gender identity or on complaints of other shelter residents when those complaints are based on actual or perceived gender identity

2015 Proposed Rule

- It also proposed to prohibit the denial of appropriate placement based on a perceived threat to health or safety that can be mitigated some other, less burdensome way (e.g., by providing the transgender shelter seeker the option to use single occupant bathing facilities).
- The rule also proposed that, to avoid unwarranted denials of placement in accordance with an individual's gender identity, decisions to provide accommodations based on concern for the health and safety of the individual seeking accommodations should be based on the individual's own request to be otherwise accommodated.

2015 Proposed Rule

Section 5.106(e) proposed to require recipients, subrecipients, or providers to keep records of compliance with paragraphs (b) and the case-by-case determinations under paragraph (c) of this section, including the facts, circumstances, and reasoning relied upon that lead to any alternative admission, accommodation, benefit, or service to an individual and the individual's family; the facts and circumstances regarding the opportunities to access alternative accommodations provided to an individual and the individual's family; and the outcomes regarding referral to an alternative program of an individual and the individual's family.

2015 Proposed Rule

- In addition, the rule proposed to amend the definition of “gender identity” to separate the definitions of “Actual” and “Perceived” gender identity.
- The rule proposed to replace HUD’s current definition, which mirrored the definition in the Matthew Shepard/ James Byrd Hate Crimes Prevention Act of 2009 (Public Law 114–38, approved October 28, 2009) and instead adopt a definition that clarified the difference between actual and perceived gender identity

2015 Proposed Rule

Lastly, the proposed rule sought to remove the prohibition on inquiries provision at § 5.105(a)(2)(ii), which prohibited providers in most circumstances from asking individuals their sexual orientation or gender identity. HUD reasoned that the provision raised several legitimate questions about implementation, and its removal would allow temporary, emergency shelters or other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities to ask an individual's gender identity for nondiscriminatory purposes, such as to determine the appropriate placement for the individual or the number of bedrooms to which a household is entitled.

January 7, 2016

The Center for American Progress released the results of a discrimination telephone test, carried out across four States, that measured the degree to which transgender homeless women can access a shelter in accordance with their gender identity, as well as the types of discrimination and mistreatment they face in the process.

January 7, 2016 Phone Test

- The study consisted of 100 phone calls to homeless shelters in four States, over 3 months, by testers who identified themselves as transgender women seeking access to both women's shelters and general shelters.
- The study found that only 30 percent of the shelters contacted by the testers were willing to house the transgender women with other women,
- 13 percent offered to house the transgender women in isolation or with men,
- 21 percent refused service altogether, and another 21 percent were unsure or unclear as to whether they could house transgender women with other women

January 7, 2016

Phone Test

- The survey results also found that women's shelters were more likely to provide services consistent with an individual's gender identity than were mixed gender shelters
- During interactions on the phone with shelter employees, testers experienced the following: they were often referred to using the wrong gender or shelter employees made other statements to discredit their gender identity, shelter employees made references to the testers' genitalia or to surgery as requirements for appropriate housing, and shelter employees stated that other residents would be made uncomfortable or unsafe by the tester.
- Of the shelters called, 27 percent had received HUD funds at some point.

Changes Made at the Final Rule Stage

- The proposed definition of “perceived gender identity” is modified so that the definition states that “perceived gender identity” means: The gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender-related characteristics, sex assigned at birth, or identification in documents.
- The words “identified in documents” were added to the definition to make clear that the identification of gender or sex on an individual’s identity document may be different than a person’s actual gender identity.

Changes Made at the Final Rule Stage

- **Gender Identity:** means the gender with which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person's perceived gender identity. Reading these definitions together, "gender identity" is therefore determined regardless of the gender identified on an individual's identity documents
- **Sexual Orientation:** means one's emotional or physical attraction to the same and/or opposite sex.
 - (See [https:// www.opm.gov/policy-data-oversight/ diversity-and-inclusion/referencematerials/addressing-sexualorientation-and-gender-identitydiscrimination-in-federal-civilianemployment.pdf](https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/referencematerials/addressing-sexualorientation-and-gender-identitydiscrimination-in-federal-civilianemployment.pdf).)

Changes Made at the Final Rule Stage

Section 5.106(a) is revised at the final rule stage to clarify that § 5.106 applies to recipients and subrecipients of assistance from CPD, which include the specific programs identified at the proposed rule stage (HOME, CDBG, HOPWA, ESG, and CoC), as well as to the Housing Trust Fund program (with regulations at 24 CFR part 93) and the Rural Housing Stability Assistance Program (with regulations to be codified in 24 CFR part 579).

Changes at the Final Rule Stage

- **Section 5.106(b)** addresses the admissions, occupancy, and operating policies and procedures of recipients, subrecipients, owners, operators, managers, and providers covered by this rule. Revised paragraph (b) adds that policies and procedures to protect health and safety, as well as privacy and security noted in the proposed rule, must be established, maintained, or amended, as necessary, and provides that all policies must be administered in a nondiscriminatory manner.
- HUD also revises paragraph (b) to add a provision that the policies and procedures must ensure that individuals are not subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity

Changes made at the Final Rule Stage

- Lastly, revised paragraph (b) also requires that such revisions ensure that amendments to CPD programs policies and procedures continue to include the existing requirement in § 5.105(a)(2) that individuals are provided equal access to housing in CPD programs without regard to actual or perceived gender identity. While this rule's focus is on programs, owners, operators, and managers of shelters, buildings, and other facilities and providers of CPD funded services that were not covered under HUD's 2012 Equal Access Rule, housing under CPD programs has already been required to ensure equal access to individuals based on their gender identity. HUD adds this provision to clarify that, when amending CPD program policies and procedures, they should continue to reflect the existing 2012 Equal Access Rule requirement that housing be made available without regard to gender identity

Changes Made at the Final Rule Stage

- **In § 5.106(c)**, which addresses placement and accommodation in temporary, emergency shelters and other buildings and facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities
- HUD removes the proposed rule language that under narrow circumstances, a written case-by-case determination could be made on whether an alternative accommodation for a transgender individual would be necessary to ensure health and safety.

Changes Made at the Final Rule Stage

- **5.106(c)** is revised to provide that placement and accommodation of individuals shall be made in accordance with an individual's gender identity, and it removes language that permits an exception to this rule where a provider makes a written case-by-case determination on whether an alternative accommodation for a transgender individual would be necessary to ensure health and safety.
- This final rule removes from § **5.105(d)** in the proposed rule the language relating to referrals, HUD has removed the provision from the proposed rule that permitted housing providers to make a written case-by-case determination that a transgender individual should receive an alternative accommodation for health and safety reasons.

Changes Made at the Final Rule Stage

- This final rule redesignates the recordkeeping requirements from § 5.106(e) to 5.106(d) and states that providers must document and maintain, for a period of 5 years, records of compliance with the requirements of this rule regarding establishing or amending policies and procedures. This rule also removes the more specific requirements related to case-by-case determinations and referrals.

Additional Federal Regulations

- Obama Executive Orders: 12866, 13563, 13132,
- Regulatory Flexibility Act
- Unfunded Mandates Reform Act
- Biden June 15, 2022 Executive Order on Advancing Equality for LGBTQI Individuals
 - <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/>

Learning Objectives

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Questions & Answers

Place Questions in the Chat

