FROM: Sarah Parshall Perry, Vice President, Defending Education

TO: U.S. Department of Housing and Urban Development

RE: Public Comment in Support of Proposed Rule, "Equal Access to Housing in HUD Programs Revisions"

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INTRODUCTION

Defending Education (DE) is a national grassroots organization dedicated to securing a high-quality, value-neutral education for every American student. Our organization consists of parents and students in K-12 and higher education programs across the country, all of whom have a vested interest in the outcome of the Department of Housing and Urban Development's (HUD) proposed rule regarding equal access to housing in programs receiving federal financial assistance ("proposed rule" or "NPRM"). While HUD does not directly manage dormitories or on-campus student housing, it oversees several federal housing programs that can, and often do, impact colleges, universities, and their students, including those who are members of DE. Universities often partner with HUD-regulated programs and local housing authorities to address housing shortages affecting students.[1] As a result, our members are keenly interested in the finalization of the HUD NPRM.

We write in strong support of the proposed rule, which would restore sex-based distinctions to HUD's Equal Access regulations by grounding eligibility determinations for single-sex facilities in biological sex rather than self-identified gender identity—something HUD has rightly identified as existing on an "infinite continuum." The restoration of sex-based distinctions will restore fidelity to the plain text and legislative history of equal access provisions in laws like the Fair Housing Act,[2] provide much-needed clarity to recipients of federal financial assistance on their obligations under federal law, and prevent the distortion of civil rights law in such a way as to leave female populations vulnerable to victimization and predation.

DE supports the proposed rule for two main reasons: (1) The rule protects the physical safety of those—especially women and girls—who use shared-sex facilities like emergency shelters, dormitory-style housing, and transitional living programs, and (2) it preserves the privacy and dignity interests that are recognized in law and in the reasonable expectations of vulnerable populations served by HUD-funded programs.

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[1] Baker-Smith, Christine, "Communities and Colleges Partnering to Address the Affordable Housing Shortage," National League of Cities, August 28, 2023, available at: https://www.nlc.org/article/2023/08/28/communities-and-colleges-partnering-to-address-the-affordable-housing-shortage/

[2] 42 U.S.C. §§ 3601-19.

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These interests are not marginal concerns—they are fundamental to the integrity and effectiveness of the federal housing safety net.

COMMENT

I. The Proposed Rule Is Grounded in a Legitimate Regulatory Purpose

The proposed rule has a clear and strong policy justification.[3] The 2016 Equal Access rule required that placement in single-sex facilities be governed exclusively by self-attested gender identity, without any ability to verify an individual's biological sex.[4] That scheme prioritized the interests of those seeking placement based on their internal, subjective, malleable, and often transitory gender identity over the legitimate privacy and safety interests of other residents.

HUD-funded emergency shelters, transitional housing facilities, and supportive housing programs frequently involve shared sleeping quarters, communal bathrooms, and close-proximity living arrangements. In these environments, biological sex is a relevant, material characteristic for purposes of facility assignment. Single-sex facilities exist precisely because there are recognized privacy and safety interests that arise when individuals share intimate spaces. The proposed rule restores HUD's ability to honor those interests.

Further, the proposed rule does not bar transgender individuals from receiving housing assistance or HUD-funded services. Rather, it restores a workable administrative framework for single-sex facility placement—one that accounts for the full range of individuals HUD programs serve, including women who have experienced sexual trauma, domestic violence survivors, and others whose privacy and safety interests are particularly acute.

A. Safety Considerations in Sex-Specific Shelter Facilities

The physical safety of shelter residents is a compelling interest that HUD has long recognized. Emergency shelters and transitional housing programs serve some of the nation's most vulnerable individuals, including women fleeing intimate partner violence, survivors of sexual assault, individuals with trauma histories, and those with serious mental illness.[5] For many of these residents, placement alongside biological males in intimate shared spaces poses genuine safety risks and can re-traumatize those with histories of abuse.

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[3] *See Stilwell v. Off. of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (proposed rules must be "justif[ied] … with a reasoned explanation"); 5 U.S.C. § 553(c).

[4] 24 C.F.R. § 5.100 ("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."); *Id.* § 5.106(b) (requiring placement "in accordance with the gender identity of the individual" and prohibiting "questioning" about or requests for "evidence of the individual's gender identity").

[5] The most recent data from the National Center for Education Statistics indicates that among these vulnerable populations are an estimated 8% of undergraduate and 5% of graduate students who are experiencing homelessness, translating to more than 1.5 million students. U.S. Dep't of Educ., National Center for Education Statistics, "2019–20 National Postsecondary Student Aid Study (NPSAS:20)," July 2023, NCES 2023-466, available at: https://nces.ed.gov/pubs2023/2023466.pdf.

Research on shelter populations documents elevated rates of victimization among women experiencing homelessness. Studies conducted by researchers at the University of California, San Francisco,[6] and published in peer-reviewed literature have found that women in shelter settings experience sexual harassment and assault at significant rates, and that many women avoid shelter systems altogether due to safety concerns. Allowing facility operators to make placement determinations based on biological sex strengthens the safety framework that protects these individuals.

The proposed rule appropriately confers on grantees, subrecipients, owners, and operators the ability to require reasonable assurances and evidence to confirm the sex of an individual seeking placement in a single-sex facility. This provision enables evidence-based placement decisions while providing operational flexibility, consistent with HUD's stated intent to give grantees maximum deference. This is a measured, proportionate response to legitimate safety concerns, not a categorical exclusion of any class of individuals.

B. Privacy Interests in Shared Intimate Facilities

Beyond physical safety, individuals in shared-sex housing facilities have a privacy interest in not being exposed to persons of the opposite biological sex in spaces involving nudity, bathing, changing, or sleeping. These privacy interests have long been recognized by federal courts, including in cases applying Title IX of the Education Amendments of 1972 and the U.S. Constitution's Fourth Amendment. These courts have consistently acknowledged that sex-separated facilities reflect legitimate privacy interests tied to bodily exposure and the distinction between male and female anatomy.

These concerns are not mere abstractions. Many individuals in HUD-funded shelters have specifically sought out single-sex facilities because of prior experiences with abuse, exploitation, or trauma involving persons of the opposite sex.[7] For these individuals, biological sex is the relevant variable. The 2016 Rule's requirement that placement decisions be based solely on self-identified gender identity—and that residents have no recourse when those placements conflict with their safety and privacy expectations—did not adequately weigh these competing interests.

The proposed rule corrects this imbalance by restoring sex-based placement authority to facility operators while preserving the core principle that HUD-funded programs must remain accessible to all eligible individuals. Facility operators are best positioned to make individualized determinations about appropriate placement given the specific configuration of their facilities, the needs of their resident populations, and the safety considerations present in each context.

II. The Proposed Rule Is Consistent with HUD's Statutory Authority

[6] Hargrave, A., Moore, T., Adhiningrat, S., Perry, E., Kushel, M. (2024). *Toward Safety: Understanding Intimate Partner Violence and Homelessness in the California Statewide Study of People Experiencing Homelessness*, University of California, San Francisco, available at: https://homelessness.ucsf.edu/sites/default/files/2024-01/IPV%20Report%202024.pdf.

[7] Laura Rogers, *Transitional Housing Programs and Empowering Survivors of Domestic Violence*, Dep't of Justice Office on Violence Against Women (Nov. 1, 2019), perma.cc/5RJK-NWJG.

HUD promulgated the 2012 and 2016 Equal Access rules pursuant to the Secretary's general rulemaking authority under Section 7(d) of the HUD Act of 1965,[8] rather than under the Fair Housing Act or other specific civil rights statutes. If that use of general rulemaking authority to define the terms of access to HUD-funded programs was a permissible exercise of agency discretion, it is equally within HUD's authority to revise those definitions.

The proposed rule is accompanied by a reasoned explanation of HUD's policy judgment that the 2016 Rule's approach did not adequately protect the safety and privacy of other shelter residents and failed to provide facility operators with workable tools to manage placements responsibly. This explanation, grounded in the operational realities of shelter administration and the vulnerability of the populations served, satisfies the requirement for reasoned agency decision-making established in the Administrative Procedure Act and articulated by the U.S. Supreme Court in *FCC v. Fox Television Stations, Inc.*,[9] and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*[10]

III. Title IX Expressly Permits Sex-Based Separation in Housing, Bathrooms, and Intimate Facilities—And Federal Courts Have Affirmed the Bodily Privacy Interests That Underlie That Permission

The proposed rule's approach to sex-based facility distinctions finds parallel support in the structure and judicial interpretation of Title IX of the Education Amendments of 1972.[11] Although Title IX applies specifically to federally funded education programs, its statutory framework and subsequent privacy jurisprudence are instructive for HUD's analogous housing programs. Title IX expressly allows for sex-based separation in living facilities, bathrooms, and similar intimate spaces, reflecting the same governmental interests that underlie the proposed HUD rule, and federal courts have repeatedly confirmed the substantial nature of those interests.

A. Title IX's Statutory Text Expressly Permits Sex-Separated Living Facilities, Bathrooms, and Related Spaces

Title IX's prohibition on sex discrimination is not unlimited. The statute itself provides that nothing in it "shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes."[12] The Department of Education's implementing regulations make the carve-out more specific: schools may provide "separate toilet, locker room, and shower facilities on the basis of sex," so long as those facilities are comparable.[13]

The legislative history confirms that these carve-outs were deliberate and principled. During congressional debate on Title IX, Senator Birch Bayh—the statute's principal sponsor—explained that sex-based differential treatment was permissible "where personal privacy must be

[8] 42 U.S.C. § 3535(d).
[9] 556 U.S. 502 (2009).
[10] 463 U.S. 29 (1983).
[11] 20 U.S.C. § 1681 et seq.
[12] 20 U.S.C. § 1686.
[13] 34 C.F.R. § 106.33.

preserved."[14] This recognition that biological sex is relevant to privacy in intimate spaces was not incidental to Title IX; it was built into the statute's foundations.

As the Congressional Research Service has summarized, "[a]s a threshold matter, schools do not violate Title IX when they distinguish between men and women (or boys and girls) by operating sex-segregated bathrooms."[15] HUD's proposed rule applies the same logic to federally assisted housing programs—programs that, like schools, involve intimate shared spaces and the care of vulnerable individuals.

B. The Eleventh Circuit: Separating Facilities by Biological Sex Is Constitutionally Sound and Consistent with Title IX

The most authoritative federal appellate decision on this question is *Adams ex rel. Kasper v. School Board of St. Johns County, Florida*.[16] The Eleventh Circuit, sitting en banc, determined that a school district's policy of separating bathrooms and locker rooms by biological sex did not violate either the Equal Protection Clause of the Fourteenth Amendment or Title IX. The majority opinion, authored by Judge Barbara Lagoa, confirmed that "separating school bathrooms based on biological sex passes constitutional muster and comports with Title IX."[17]

The *Adams* court grounded its reasoning in part on the substantial and widely recognized privacy interests in sex-separated facilities. As the court explained, the privacy interests motivating sex-segregated restrooms are "widely recognized throughout American history and jurisprudence."[18] "The protection of students' privacy interests in using the bathroom away from the opposite sex and in shielding their bodies from the opposite sex is," in turn, "obviously an important governmental objective."[19] Separation by biological sex, the court explained, accomplishes that goal.[20]

The Eleventh Circuit also explained why the Supreme Court's Title VII decision in *Bostock v. Clayton County* does not compel a different conclusion.[21] *Bostock*, the Eleventh Circuit explained, explicitly declined to resolve any questions about "'bathrooms, locker rooms, or anything else of the kind.'"[22] At bottom, *Adams* is the leading en banc decision holding that a biological-sex-based facility separation policy is lawful under both the Constitution and Title IX.

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[14] 118 Cong. Rec. 5,807 (statement of Sen. Bayh).
[15] See, *Transgender Students and School Bathroom Policies: Title IX Challenges Divide Appellate Courts*, CRS Legal Sidebar LSB10953 (Apr. 25, 2023).
[16] 57 F.4th 791 (11th Cir. 2022) (en banc).
[17] *Id.* at 803.
[18] *Id*. at 805.
[19] *Id.* at 804.
[20] *Id.* at 805 ("The [sex-separated] bathroom policy is clearly related to—indeed, is almost a mirror of—its objective of protecting the privacy interests of students to use the bathroom away from the opposite sex and to shield their bodies from the opposite sex in the bathroom, which, like a locker room or shower facility, is one of the spaces in a school where such bodily exposure is most likely to occur.").
[21] *Id.* at 808 (citing *Bostock v. Clayton County*, 590 U.S. 644 (2020)). The Biden Administration and federal agencies, including HUD, erroneously utilized *Bostock* as the putative basis for the unilateral expansion of federal law and regulations prohibiting sex discrimination to include prohibitions on gender identity discrimination.
[22] *Id.* (quoting *Bostock*, 590 U.S. at 681). The *Bostock* Court held that employment discrimination based on sexual orientation or gender identity were forms of prohibited sex discrimination for purposes of Title VII of the Civil

Even the courts that have come out the other way on the school bathrooms question have acknowledged that individuals have strong sex-based privacy interests in intimate spaces and that the government has an important interest in protecting that privacy. In *Grimm v. Gloucester County School Board*, for example, the Fourth Circuit noted that "[n]o one questions that students have a privacy interest in their body when they go to the bathroom," though it ultimately found that students' privacy interests were not compromised by transgender bathroom access in the particular circumstances of that case.[23] Judge Niemeyer, in dissent, expounded the privacy interests that sex-separated facilities exist to protect. "[S]eparate public restrooms, locker rooms, and shower facilities," he explained, have been "universally accepted" "across societies and throughout history" precisely "in order to address privacy and safety concerns arising from the biological differences between males and females."[24] Why? Because "to state the obvious, what [these spaces] all have in common is that they are places where people are, at some point, in a state of partial or complete undress to engage in matters of highly personal hygiene."[25]

From that observation, Judge Niemeyer derived the core privacy principle directly applicable to HUD's proposed rule: "An individual has a legitimate and important interest in bodily privacy that is implicated when his or her nude or partially nude body is exposed to others. And this privacy interest is significantly heightened when persons of the opposite biological sex are present."[26] "Bodily privacy is historically one of the most basic elements of human dignity and individual freedom. And forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom."[27]

C. Application to HUD-Funded Housing Programs

These Title IX cases confirm that sex-based distinctions in intimate shared spaces—living facilities, bathrooms, shower rooms, and similar areas—are legally cognizable, historically grounded, and responsive to genuine privacy and dignity interests. The same underlying principle is true here: where individuals share intimate spaces involving partial or complete undress, biological sex is a material, relevant characteristic that the law has long recognized as justifying separate facilities.

HUD-funded emergency shelters, transitional housing, and supportive housing facilities present the same essential features that motivated Congress's decision to create carve-outs for bathrooms, housing, and similar facilities in Title IX: they are spaces where residents are in stages of undress, engaged in intimate personal hygiene, sleeping, and other private acts—often in communal settings they did not individually choose. Many shelter residents, like students, are particularly vulnerable. The proposed rule's restoration of sex-based placement authority conforms to this well-established body of law.

Rights Act of 1964. But the Court also confirmed that "sex" referred only to biological distinctions between male and female. Id. at 655. And to the extent *Bostock* could be read to confuse gender identity with biological sex, its logic is confined to Title VII alone.

[23] 972 F.3d 586, 613 (4th Cir. 2020).

[24] Id. at 632 (Niemeyer, J., dissenting).

[25] Id.

[26] Id.

[27] Id. at 633.

RECOMMENDED CLARIFICATIONS AND IMPLEMENTATION GUIDANCE

While DE supports the proposed rule, we offer the following recommendations to the agency to strengthen its implementation:

1. HUD should issue clear guidance on what constitutes "reasonable assurances and evidence" for purposes of verifying biological sex, to provide facility operators with sufficient certainty to implement the rule consistently and to avoid both over-restriction and under-enforcement.

2. HUD should clarify that the rule does not require facility operators to deny service to individuals—it permits sex-based placement decisions and continues to allow placement in alternative, non-sex-specific facilities where available and appropriate.

3. HUD should consider providing model policies for grantees on intake procedures and placement determinations to assist smaller providers who may lack legal counsel or policy staff to develop compliant procedures independently.

4. HUD should confirm in the final rule's preamble that, in the face of conflicting state or local nondiscrimination provisions (that may implicate gender identity and vitiate the concerns of biologically female residents), the rule will have preemptive force and effect.

CONCLUSION

The proposed rule represents a reasoned and lawful exercise of HUD's regulatory authority to protect the safety and privacy of vulnerable individuals in federally funded single-sex housing facilities. By restoring sex-based placement criteria grounded in biological sex and empowering facility operators to seek reasonable verification of an individual's sex, the rule better serves the populations HUD programs are designed to assist—particularly women who have survived violence and trauma and who rely on sex-separated shelters for their safety.

DE respectfully urges HUD to finalize this rule, with the clarifications and implementation guidance described above, to provide a durable and workable regulatory framework that protects all individuals served by HUD-funded programs.

Respectfully submitted,

Sarah Parshall Perry
Vice President
Defending Education