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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
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RE: Docket No. FR-6152-P-01

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

On July 24, 2020, the Office of Housing and Urban Development (“HUD”) issued a proposed rule entitled “Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs” (the “Proposed Rule”), requesting public comments thereto. The Proposed Rule would “require any determination of sex by the shelter provider to be based on a good faith belief, and require the shelter provider to provide transfer recommendations if a person is of the sex not accommodated by the shelter and in some other circumstances.”¹

On behalf of the National Homelessness Law Center (“NHLC”), we write to urge HUD to withdraw the Proposed Rule, which we believe conflicts with Subtitle VII-B of the McKinney-Vento Act (“Title VII”) and the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (the “HEARTH Act”). NHLC is a national legal 501(c)(3) organization dedicated to ending and preventing homelessness. The Law Center believes that the human rights to housing, food, and education lie at the heart of human dignity, and we envision a world where these basic needs are met for everyone. The proposed rule directly contradicts these beliefs as it would negatively impact many individuals who rely on safe shelter conforming with their gender identity for housing and educational stability. Furthermore, NHLC’s founder and Executive Director, Maria Foscarinis, was a major architect of the McKinney-Vento Act, and NHLC has zealously advocated for the education rights of children and youth experiencing homelessness since its founding.

The McKinney-Vento Act authorizes the federal Education for Homeless Children and Youth Program,² which provides protections to homeless children and funding to states for educational and education-related services for homeless children. The HEARTH Act reauthorized the McKinney-Vento Act and was designed to improve administrative efficiency in addressing the needs of homeless persons, including homeless youth. ***The Proposed Rule will frustrate the***

¹ Making Admission on Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811 (proposed Jul. 24, 2020) (to be codified 24 C.F.R. pt. 5).

² This program was reauthorized in December 2015 by Title IX, Part A, of the Every Student Succeeds Act.

congressional intent, purpose, and statutory requirements of the McKinney-Vento Act and the HEARTH Act by negatively affecting homeless youth, especially LGBTQ homeless youth.

I. Congressional Intent and Purpose of the McKinney-Vento Act and the HEARTH Act.

The McKinney-Vento Act was originally authorized in 1987 and was most recently reauthorized by the Every Student Succeeds Act (ESSA) in December 2015. The McKinney-Vento Act addresses the challenges that homeless children and youth have faced in enrolling, attending, and succeeding in school—it focuses on providing “critical tools and resources to increase the educational success of homeless children and youth from preschool to higher education.”³ It also emphasizes the importance of school stability for homeless children and youth, acknowledging that frequent changing of schools impedes a student’s academic and social growth.⁴

Accordingly, the McKinney-Vento Act prescribes the following:⁵

- (1) Each State educational agency shall ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youth.
- (2) In any State where compulsory residency requirements or other requirements, in laws, regulations, practices, or policies, may act as a barrier to the identification of, or the enrollment, attendance, or success in school of, homeless children and youth, the State educational agency and local educational agencies in the State will review and undertake steps to revise such laws, regulations, practices, or policies to ensure that homeless children and youth are afforded the same free, appropriate public education as provided to other children and youth.
- (3) Homelessness is not sufficient reason to separate students from the mainstream school environment.
- (4) Homeless children and youth should have access to the education and other services that such children and youth need to ensure that such children and youth have an opportunity to meet the same challenging State academic standards to which all students are held.

The McKinney-Vento Act has continued to evolve since its predecessor was originally introduced. Notably, Congress amended the McKinney-Vento Act in 1990 to improve educational opportunities for homeless children and youth. In response to data showing that homeless children and youth encountered significant obstacles in obtaining education services, Congress prohibited barriers to enrollment of homeless children and youth in public schools. Congress also acknowledged that the challenge was not just increasing enrollment of homeless children and youth, but also promoting their academic success.⁶ During the Senate hearings discussing the plight of homeless children, Senator Fowler observed that “[o]ur treatment of

³ Education Department Releases Guidance on Homeless Children and Youth, U.S. Department of Education (last accessed on September 18, 2020) <https://www.ed.gov/news/press-releases/education-department-releases-guidance-homeless-children-and-youth>.

⁴ Education for Homeless Children and Youths Program Non-Regulatory Guidance (The U.S. Department of Education, July 27, 2016, updated August 2018).

⁵ 42 U.S.C.A. § 11431.

⁶ “History of the McKinney Act,” William & Mary School of Education (last accessed September 17, 2020) <https://education.wm.edu/centers/hope/specialtopics/mckinneyact/index.php#:~:text=The%20McKinney%2DVento%20Homeless%20Assistance,no%20child%20is%20left%20behind>

children... has already relegated them to second-class citizenship in many, many times and cases, and that should not be tolerable in a free and democratic society.”⁷

The HEARTH Act, which amended the McKinney-Vento Act in May 2009, (i) consolidated three former grant programs into a single program called the Continuum of Care (the “CoC”), (ii) renamed the former Emergency Shelter Grant program to Emergency Solutions Grant program (the “ESG Program”), (iii) revised to broaden existing emergency shelter and homelessness prevention activities and to add rapid rehousing activities and (iv) codified in law and enhanced the CoC planning process, the coordinated response to addressing the needs of homelessness established administratively by HUD in 1995.⁸

According to the HEARTH Act, the purpose of the CoC program is to: (i) promote communitywide commitment to the goal of ending homelessness; (ii) provide funding for efforts by nonprofit providers, States, and local governments to quickly rehouse homeless individuals (including unaccompanied youth) and families, while minimizing the trauma and dislocation caused to homeless individuals, families, and communities by homelessness; (iii) promote access to and effective utilization of mainstream programs by homeless individuals and families; and (iv) optimize self-sufficiency among individuals and families experiencing homelessness.⁹

The McKinney-Vento Act and the HEARTH Act are based on the findings by the Congress that “the Nation faces an immediate and unprecedented crisis due to the lack of shelter for a growing number of individuals and families” and “the problem of homelessness has become more severe and, in the absence of more effective efforts, is expected to become dramatically worse, endangering the lives and safety of the homeless.”¹⁰ Their objective was to “use public resources and programs in a more coordinated manner to meet the critically urgent needs of the homeless of the Nation.”¹¹

II. Statutory Requirements Under the McKinney-Vento Act and the HEARTH Act.

In order to receive funding under the McKinney-Vento Act, states must assure that “local educational agencies will designate an appropriate staff person... as a local educational agency liaison for homeless children and youths.”¹² The Local Educational Agency Liaison (“Liaison”) is responsible for ensuring, among other things, that:

- (1) homeless children and youth enroll in, and have a full and equal opportunity to succeed in, schools of that local educational agency;
- (2) homeless families, children, and youth receive educational services for which such families, children, and youth are eligible, including Head Start and Even Start programs and preschool programs administered by the local educational agency, and referrals to health care services, dental services, mental health services, and other appropriate services; and

⁷ “Homeless Children: Are We Losing a Generation” hearing before the Subcom. On Children, Family, Drugs, and Alcoholism, Comm. On Labor and Human Resources. Senate, Oct. 4, 1989.

⁸ 24 C.F.R. 578.1

⁹ 42 U.S.C.A. § 11381.

¹⁰ 42 U.S.C.A. § 11301.

¹¹ *Id.*

¹² 42 U.S.C.A. §11432(g)(1)(J)(ii).

- (3) homeless families and homeless children and youth receive referrals to health care services, dental services, mental health and substance abuse services, housing services, and other appropriate services.¹³

Additionally, in line with the congressional intent and purpose, the McKinney-Vento Act requires, among others:

- (1) Identification of homeless children and youth;
- (2) Collaboration and coordination with other service providers, including public and private child welfare and social services agencies; public housing agencies, shelter operators, and operators of transitional housing facilities and others;
- (3) Removal of enrollment barriers, including barriers related to missed application or enrollment deadlines, fines or fees;
- (4) School stability for homeless youth;
- (5) Privacy of student records, including information about a homeless child or youth's living situation; and
- (6) Review by the Liaisons to implement steps to revise laws, regulations, practices, or policies that may act as barriers to the identification, enrollment, attendance, or success in school of homeless youth.¹⁴

Finally, in order to “ensure that homeless children and youths have access and reasonable proximity to available education and related support services” the McKinney-Vento Act explicitly requires coordination between local and state education agencies and “service providers including services and programs funded under the Runaway and Homeless Youth Act” and “agencies responsible for developing the comprehensive housing affordability strategy described in section 105 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12705) to minimize educational disruption for children and youths who become homeless.”¹⁵

The HEARTH Act requires recipients of grant under its programs to certify to the Secretary of Housing and Urban Development that they will “assist homeless individuals in obtaining appropriate supportive services, including permanent housing, medical and mental health treatment, counseling, supervision, and other services essential for achieving independent living, and other federal, state, local and private assistance available for such individuals.”¹⁶ Further, the grant recipients must demonstrate “coordination with the other federal, state, local, private, and other entities serving individuals and families experiencing homelessness and at risk of homelessness in the planning and operation of projects.”¹⁷ To this end, there must be a uniform and standardized system to coordinate intake assessment and provision of referrals for people experiencing homelessness.¹⁸

¹³ 42 U.S.C.A. §11432(g)(6)(A).

¹⁴ Education for Homeless Children and Youths Program Non-Regulatory Guidance (The U.S. Department of Education, July 27, 2016, updated August 2018).

¹⁵ 42 U.S.C.A. §11432(g)(5).

¹⁶ 42 U.S.C.A. §11375.

¹⁷ 42 U.S.C.A. §11386(a).

¹⁸ The CoC and ESG Program interim rules use the terms “centralized or coordinated assessment” or “centralized or coordinated assessment system,” which are defined as a centralized or coordinated process designed to coordinate program participant intake assessment and provision of referrals. A centralized or coordinated assessment system covers the geographic area, is easily accessed by individuals and families seeking housing or services, is well advertised, and includes a comprehensive and standardized assessment tool. 24 C.F.R. 578.3.

III. Conflicts Between the Proposed Rule and the McKinney-Vento Act/the HEARTH Act and Negative Impact on LGBTQ Youth.

A. The Proposed Rule conflicts with the congressional intent of the McKinney-Vento Act by depriving the affected students of having a full and equal opportunity to succeed in school.

The Proposed Rule will disproportionately impact LGBTQ homeless youth by (1) reducing the housing options available to LGBTQ homeless youth and (2) negatively impacting their mental health. The Proposed Rule would affect not only transgender homeless youth, but also cisgender homeless youth who may not conform to the gender assessment policies and norms set by a particular shelter. It also provides a basis for discrimination against any LGBTQ homeless youth who may lack sufficient “evidence” of their biological gender.

Providing homeless youth with a full and equal opportunity to succeed in school requires ensuring their access to basic necessities including food and shelter. The federal government has acknowledged that fulfilling the basic need of shelter is more difficult for LGBTQ youth— “[LGBTQ] youth may have difficulty finding housing and may be asked to leave shelters after revealing their sexual or transgender identity.”¹⁹ By allowing shelter providers to establish subjective policies governing determinations of a homeless individual’s gender identity, the Proposed Rule would further limit LGBTQ youth’s admissions and access to the limited housing and related services available.

Moreover, the Proposed Rule is not sensitive to the life experiences and choices of the affected youth—especially LGBTQ youth—in making decisions regarding the type of housing and services provided to such youth.²⁰ It introduces assessment protocols that are *not* trauma-informed and that *do not* minimize risk and harm or address potential psychological impacts on the youth.

The Proposed Rule would therefore disproportionately affect LGBTQ youth, who are already more vulnerable in terms of housing instability and mental health.²¹ For instance, in 2020, about 29% of LGBTQ youth experienced housing instability.²² Transgender and non-binary youth disproportionately experience housing instability compared to their cisgender peers, with 38% of transgender and non-binary youth experiencing housing instability compared to 25% of cisgender youth.²³ Of those experiencing housing instability, 34% of transgender and non-binary youth attempted suicide.²⁴ In the same survey, transgender youth reported significantly increased rates of depression, suicidality and victimization compared to their cisgender peers—more than 50% of transgender and non-binary youth have seriously considered suicide, and 21% of transgender and non-binary respondents had attempted suicide.²⁵ Youth suffering from housing

¹⁹ See “Homelessness & Runaway: LGBT” Youth.gov, <https://youth.gov/youth-topics/lgbt-0> (last accessed September 17, 2020).

²⁰ See National Survey on LGBTQ Youth Mental Health 2020, The Trevor Project, <https://www.thetrevorproject.org/survey-2020/?section=Introduction> (last accessed September 18, 2020) (Less than half of LGBTQ respondents were out to an adult at school. Additionally, LGBTQ youth identify with multiple gender identities—in one survey, LGBTQ youth responded with more than 100 gender identities).

²¹ See <https://www.thetrevorproject.org/survey-2020/?section=Introduction> and https://suicidepreventionlifeline.org/wp-content/uploads/2017/07/LGBTQ_MentalHealth_OnePager.pdf

²² See <https://www.thetrevorproject.org/survey-2020/?section=Housing-Instability>

²³ *Id.*

²⁴ *Id.*

²⁵ See National Survey on LGBTQ Youth Mental Health 2020, The Trevor Project, <https://www.thetrevorproject.org/survey-2020/?section=Introduction> (last accessed September 18, 2020); *see also* Mental Health and the LGBTQ Community: LGTBQ Youth & Mental Health, Human Rights Campaign

and mental health instability are not likely to succeed in school, and the Proposed Rule would only exacerbate this problem, in direct opposition to the purpose and intent of the McKinney-Vento Act.

Furthermore, because the Proposed Rule would prevent LGBTQ youth from accessing shelter conforming with their gender identity—either because a shelter refuses to house them or because they do not feel safe where a shelter places them—these youth will have a harder time finding shelter and may resort to living unsheltered or regularly moving, e.g., from couch to couch or shelter to shelter as they try to find one that conforms with their identity. High rates of mobility and lack of consistent services are factors in high rates of chronic absenteeism;²⁶ chronic absenteeism, in turn, leads to lower graduation rates.²⁷ Thus, youth subjected to the instability inflicted by the Proposed Rule will have worse educational outcomes, explicitly frustrating the purpose of the McKinney-Vento Act.

B. The Proposed Rule frustrates the statutory requirements under the McKinney-Vento Act, specifically the ability of the Liaisons to provide housing referrals to LGBTQ homeless youth.

The McKinney-Vento Act requires states to appoint the dedicated Liaisons through local educational agencies. Liaisons are responsible for ensuring that homeless youth enroll in, and have a full and equal opportunity to succeed in, schools, and have access and reasonable proximity to available education and related support services. Changing schools multiple times is disruptive to children’s education and their chance of succeeding in school—Liaisons are therefore tasked with assuring that homeless youth receive appropriate, proximate referrals to housing services, mental health services and other services needed, so that they can stay in school. And even when the McKinney-Vento Act allows that a child can remain in their origin school despite a change in housing, these changes in housing and living situations are still incredibly disruptive to a child’s success both in school and out. By decreasing available, accessible shelters for LGBTQ homeless youth, the Proposed Rule conflicts with the Liaisons’ ability to provide proximate referral services to their homeless students, frustrating the objective and the statutory requirements under the McKinney-Vento Act.

C. The Proposed Rule frustrates the objectives and statutory requirements of the HEARTH Act, which was designed to improve administrative efficiency and enhance response coordination and effectiveness in addressing the needs of homeless persons, including homeless youth.

The HEARTH Act mandates, among other things, the promotion of access to and effective utilization of assistance programs by homeless individuals and families.²⁸ To that end, grant recipients under the HEARTH Act must establish a uniform and standardized system to coordinate intake assessment and provision of referrals to people experiencing homelessness.²⁹

Foundation, https://suicidepreventionlifeline.org/wp-content/uploads/2017/07/LGBTQ_MentalHealth_OnePager.pdf (last accessed September 18, 2020).

²⁶ See “Missing School, Missing a Home: The Link Between Chronic Absenteeism, Economic Instability and Homelessness in Michigan”, <https://poverty.umich.edu/10/files/2018/11/PovertySolutions-MissingSchoolMissingHome-PolicyBrief-r4.pdf>

²⁷ See Chronic Absenteeism in the Nation’s Schools: A Hidden Educational Crisis, Dept. of Education, <https://www2.ed.gov/datastory/chronicabsenteeism.html> (last accessed September 22, 2020).

²⁸ 42 U.S.C.A. § 11381.

²⁹ 24 C.F.R. 576; see also 24 C.F.R. 578.

Such “uniform and standardized system” must increase the efficiency of local crisis response and improve fairness and ease of access to resources by homeless.³⁰

The Proposed Rule, however, conflicts with such objective by allowing shelter providers to implement their own subjective admissions policies. Moreover, it frustrates the requirements under the HEARTH Act, which include:

- (1) a uniform and coordinated referral process for all beds, units and services available at participating projects;
- (2) a coordinated entry process that offers the same assessment approach at all “access points”;
- (3) a coordinated entry process that allows participants to freely refuse to answer assessment questions and to refuse housing and service options without retribution or limiting their access to assistance;
- (4) assessment and referrals of people experiencing homelessness without regard to actual or perceived sexual orientation, gender identity or marital status; and
- (5) written standards that prohibit the coordinated entry process from screening people out due to perceived barriers related to housing or services (including too little or no income, active or history of substance use or domestic violence history).³¹

IV. Conclusion.

The Proposed Rule would frustrate the congressional intent, purpose, and statutory requirements of the McKinney-Vento Act and the HEARTH Act by negatively affecting homeless youth, especially LGBTQ homeless youth. It threatens HUD’s ability to advance its congressional directives under such Acts to assist and protect homeless families and youth through dedicated Liaisons, referral services and efficient local crisis response systems. We therefore urge HUD not to adopt the Proposed Rule.

Thank you for considering our comments.

If you have any questions or concerns, please contact Brandy Ryan, staff attorney at the National Homelessness Law Center at bryan@nlchp.org or 202-638-2535.

Respectfully submitted,

National Homelessness Law Center

³⁰ Notice Establishing Additional Requirements for a Continuum of Care Centralized or Coordinated Assessment System, U.S. Department of Housing and Urban Development, Office of Community Planning and Development (Jan. 23, 2017).

³¹ Notice Establishing Additional Requirements for a Continuum of Care Centralized or Coordinated Assessment System, U.S. Department of Housing and Urban Development, Office of Community Planning and Development (Jan. 23, 2017).