

Materials for Legal Services Caucus at Lavender Law 2018

The facilitators of the Legal Services Caucus at Lavender Law 2018 assembled these readings to provide some background for discussions about legal issues facing low-income LGBTQ clients, and best practices for legal service providers for those clients in the current period.

We intend for these readings to be a starting point only, and not a limit or outline for the caucus. In particular we have included a number of readings on how to conduct intakes that have varied suggestions for asking about sexual orientation and gender identity. We hope that you will come prepared to share your experiences, insights, questions, and concerns based on what is coming up for you in your practice.

List of Readings

1. Matthew Goodwin, "Transgender Man's Treatment Discrimination Claim under ACA Section 1557 Stayed but State Law Claim to Proceed" LGBT Law Notes (March 2017)
2. "HUD LGBT Equal Access Rule," National Center for Lesbian Rights (2012)
3. "HUD Issues Final Rule to Ensure Equal Access to Housing and Services Regardless of Gender Identity" U.S. Department of Housing and Urban Development (September 20, 2016)
4. Equal Access to Housing in HUD's Native American and Native Hawaiian Programs – Regardless of Sexual Orientation or Gender Identity 24 CFR 5, 1000, 1003, 1005, 1006 and 1007 (Nov. 17, 2016)
5. "PFAW Sues DOJ, HUD to Release Information on Secret LGBTQ Policy" People for the American Way (March 1, 2018) available at <http://www.pfaw.org/press-releases/pfaw-sues-doj-hud-to-release-information-on-secret-lgbtq-policy/>
6. Excerpts from Gay & Lesbian Medical Association, "Guidelines for Care of Lesbian, Gay, Bisexual, and Transgender Patients" (2006) available at http://www.glma.org/data/n_0001/resources/live/GLMA%20guidelines%202006%20FINAL.pdf
7. Excerpt from Judith B. Bradford, PhD; Sean Cahill, PhD; Chris Grasso, MPH; and Harvey J. Makadon, MD "How to Gather Data on Sexual Orientation and Gender Identity in Clinical Settings" The Fenway Institute (2012) available at https://www.lgbthealtheducation.org/wp-content/uploads/policy_brief_how_to_gather.pdf
8. Excerpt from Catherine Sakimura, Daniel Torres, and Cole Thaler, "Serving All Communities: Providing Respectful and Competent Services to Low-Income LGBT Clients" Clearinghouse Review Journal of Poverty Law and Policy Vol. 47, Numbers 9-10 (Jan-Feb 2014) available at http://povertylaw.org/files/docs/article/chr_2014_january_february_sakimura.pdf
9. Excerpt from Denny Chan and Vanessa Barrington, "How can Legal Services Better Meet the Needs of Low-Income LGBT Seniors?" Justice in Aging (June 2016) available at <https://www.justiceinaging.org/wp-content/uploads/2016/06/How-Can-Legal-Services-Better-Meet-the-Needs-of-Low-Income-LGBT-Seniors.pdf>
10. N. Y. City Council Int. No. 552-A (2014)

Transgender Man's Treatment Discrimination Claim under ACA Section 1557 Stayed but State Law Claim to Proceed

On January 30, 2017, the U.S. District Court for the District of Minnesota refused to stay a state law discrimination claim brought by Jakob Tiarnan Rumble, a transgender man, against defendant health care providers, but granted a stay of Rumble's federal discrimination claim because of the nationwide preliminary injunction issued by the U.S. District Court for the Northern District of Texas in *Franciscan Alliance Inc. v. Burwell*, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016), and the U.S. Supreme Court's grant of certiorari in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. Apr. 19, 2016), stay granted, 136 S. Ct. 2442, petition for certiorari granted, 137 S. Ct. 369 (Oct. 28, 2016). *Rumble v. Fairview Health Services*, 2017 U.S. Dist. LEXIS 13316; 2017 WL 401940 (D. Minn.) is pending before District Judge Susan Richard Nelson, who was appointed by President Obama in 2010.

Rumble sued defendants Fairview Health Services (Fairview) and Emergency Physicians, P.A. (Emergency Physicians) in June of 2014, alleging that defendants violated both Section 1557 of the Affordable Care Act (Section 1557) and the Minnesota Human Rights Act (MHRA). In pertinent part, Section 1557 bars discrimination "on the basis of sex" in health care treatment and the U.S. Department of Health and Human Services (HHS) in May of 2016 issued a final rule implementing Section 1557 providing that "discrimination on the basis of sex," includes "discrimination on the basis of . . . gender identity." The MHRA prohibits discrimination based on sexual orientation and Minnesota law defines sexual orientation as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness," so it has been construed in the past to extend to gender identity discrimination claims.

In June of 2013, Rumble sought emergency room medical treatment from defendants for inflammation of his reproductive organs, pain urinating, and a high fever. According to Rumble,

at intake he was required to wear a wristband labeling him as female despite his identifying as male, and he was made to wait 4.5 hours before being seen by a doctor despite extreme pain. Rumble further alleges, *inter alia*, that one of the doctors who examined him violently continued jabbing at his painfully swollen genitals despite Rumble crying out for the doctor to stop. Rumble alleges he suffered this mistreatment because he is transgender and the defendants would have treated a non-transgender person differently.

Shortly after Fairview and Emergency Physicians had moved for summary judgment in December of 2016, an injunction was issued in *Franciscan Alliance*, barring the government

using the restroom that matches his gender identity. Judge Nelson ordered supplemental briefings on whether a stay of litigation on the federal claims and/or the state claims was warranted in light of these two cases.

Rumble's counsel argued that the *Franciscan Alliance* injunction did not control non-parties or other district courts. Judge Nelson disagreed, and adopted the position of the *Franciscan Alliance* court that "while injunctive relief is generally limited to the party or parties in a particular case, 'when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to individual petitioners is proscribed.'"

Judge Nelson allowed Rumble's state law discrimination claim under the Minnesota Human Rights Act to proceed.

from enforcing the final rule, which was scheduled to go into effect on January 1, 2017. Defense counsel filed a letter with the court arguing that the injunction required either dismissal of Rumble's Section 1577 claim or a stay of the litigation. The *Franciscan Alliance* court's preliminary injunction barred the government from enforcing the HHS rule pending a decision on the merits, and found that the faith-based health care providers and eight states who had brought suit challenging the rule were likely to prevail on their claim that Section 1577 did not extend to gender identity discrimination claims. This preliminary injunction followed the October 2016 decision by the U.S. Supreme Court to grant certiorari in *Gloucester County*, in which Gavin Grimm, a 17-year-old transgender boy in rural Virginia sued his school board for sex discrimination under Title IX after he was prevented from

In any event, Judge Nelson reasoned that "... absent the *Franciscan Alliance* injunction, the Supreme Court's review of *Gloucester County* — involving essentially the same underlying issue of whether Title IX's prohibition against sex-based discrimination includes gender identity discrimination . . . warrants a stay of these proceedings as to Plaintiff's Section 1557 claim." In other words, Rumble's claims "would be directly affected by [the Supreme Court's] interpretation of Title IX addressed to the meaning of 'on the basis of sex,' since that definition is expressly incorporated into the text of section 1557."

However, Judge Nelson allowed Rumble's state law discrimination claim under the MHRA to proceed, rejecting the defendants' argument that doing so would potentially mean two different trials causing an unnecessary expenditure of judicial time and

resources. Judge Nelson observed that “[t]he ACA does not supersede state laws that provide additional protections against discrimination . . . and although the Court has determined that Plaintiff’s federal question claim is stayed, this Court possesses supplemental jurisdiction over the MHRA claim.” As to defendants’ concerns over duplicative trials, Judge Nelson wrote, “[T]he Court finds that the possibility of a subsequent trial on Rumble’s Section 1557 claim would only expend nominally more resources. Both the Section 1557 claim and the MHRA claim are based on the same facts and evidence. The evidence in a later trial could be streamlined and presented in such a way as to alleviate much of the inconvenience The Court finds that Defendants’ concerns about economy are outweighed by competing considerations for the just determination of cases and the hardship or inequity of delay that [Rumble] would be forced to bear.”

At the time of this writing, the Trump administration has withdrawn the Obama administration’s request to have the *Franciscan Alliance* injunction narrowed so it would apply only in the states that are co-plaintiffs with Texas in the challenge to the Section 1557 regulation. The Trump administration asked the 5th Circuit Court of Appeals to cancel the scheduled hearing on that motion, and indicated that the parties would confer about how to proceed. Since the parties (the states and the justice department) are now possibly on the same side concerning interpretation of Section 1557, it is possible that the Trump Administration will drop any opposition to the preliminary injunction. To the extent the injunction continues to stand, it will likely impede the Section 1557 claims of Rumble and other plaintiffs in similar cases for the foreseeable future. However, Judge Nelson’s ruling shows a possible path forward for such transgender plaintiff’s in their respective cases where they have brought federal and state law claims against health care providers. – *Matthew Goodwin*

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NCLR Seeks Supreme Court Review of Arkansas Birth Certificate Decision

The National Center for Lesbian Rights (NCLR) filed a petition for certiorari with the U.S. Supreme Court on February 13, seeking review of the Arkansas Supreme Court’s decision that the state was not required under *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), to extend the presumption of parentage to the same-sex spouse of a birth mother for purposes of recording parentage on a birth certificate. *Smith v. Pavan*, 2016 WL 7156529 (Ark. December 8, 2016), *petition for certiorari filed sub nom. Pavan v. Smith*, No. 16-992.

The Arkansas Supreme Court’s decision, by a sharply divided court with three strong dissenting opinions, was the first ruling on this question to depart from a post-*Obergefell* consensus

the certiorari filings, seeing no need for full briefing and hearing on the merits. That ruling was announced several weeks after the death of Justice Scalia by the eight-member Court, and brought no dissent from any justices, three of whom had dissented in *Obergefell*. They implicitly agreed that with *Obergefell* as a precedent, there was no justification for recognizing any exception to the general rule that adoption decrees are to be recognized when the court granting the adoption clearly had jurisdiction over the parties and the subject matter of the adoption petition. They rejected the Alabama Supreme Court’s reliance on its own interpretation of the Georgia adoption statute as withholding “jurisdiction” from the family court to grant such an adoption.

The due process and equal protection issues raised by the Arkansas court’s decision are stark.

of courts in other jurisdictions that equal marriage rights for same-sex couples necessarily include the equal right to have a spouse recorded as a parent on a birth certificate, despite the lack of a “biological” tie to the child, especially in light of the common practice of automatically recognizing a birth mother’s husband for that purpose, regardless whether he is “biologically related” to the child.

The due process and equal protection issues raised by the Arkansas court’s decision are stark, raising the possibility that the Supreme Court might consider this an appropriate case for a summary reversal, similar to its decision last term to summarily reverse the Alabama Supreme Court’s refusal to accord full faith and credit to a same-sex second parent adoption approved by a Georgia family court in *V.L. v. E.L.*, 136 S. Ct. 1017 (March 7, 2016). In *V.L.* the Court moved quickly to reverse the state supreme court ruling based on

NCLR petitioned on behalf of two married same-sex couples – Marisa and Terrah Pavan and Leigh and Jana Jacobs. Each couple had married out of state and then, living in Arkansas, had a child conceived through donor insemination. In both cases, the mothers completed the necessary paper work to get a birth certificate when their children were born. In both cases, the state health department issued a certificate naming only the birth mother and leaving the space for “father” blank on the birth certificate rather than naming the other mother. The state insisted that under its statute the automatic listing was limited to a husband of the birth mother.

The women filed suit against the director of the state health department, Dr. Nathaniel Smith, seeking to compel issuance of appropriate birth certificates, together with another couple who were not married when they had their child but who subsequently married after the *Obergefell* decision and sought an



NATIONAL CENTER FOR LESBIAN RIGHTS

HUD LGBT Equal Access Rule

What does the HUD LGBT Equal Access Rule say?

The new rule makes positive changes to current Department of Housing and Urban Development (HUD) policies and will help the lesbian, gay, bisexual, and transgender (LGBT) community. These changes include prohibiting owners and operators of HUD-assisted or HUD-insured housing from discriminating against an applicant or resident based on sexual orientation or gender identity; prohibiting all lenders offering Federal Housing Administration-insured mortgages from considering sexual orientation or gender identity in determining a borrower's eligibility; and clarifying the definition of "family" to ensure that otherwise eligible participants in any HUD programs will not be excluded based on marital status, sexual orientation, or gender identity.

What type of housing does this apply to?

This rule only applies to HUD affiliated housing, including public housing, HUD-assisted housing, and HUD-insured housing. It does not cover *all* housing the way the Fair Housing Act does.

What does this mean for owners and operators of HUD-assisted housing?

It means that if individuals or family were already eligible for HUD-assisted or HUD-

operated housing, the owners and operators cannot discriminate against them based on gender identity, sexual orientation, or marital status. The owners and operators cannot ask about someone's sexual orientation or gender identity and they cannot exclude one or more family members based on whether they are actually or perceived to be LGBT.

What does this mean for FHA-insured mortgage lenders?

Lenders offering FHA-insured mortgages cannot take an applicant's gender identity, sexual orientation, or marital status into account when considering if the applicant qualifies for a mortgage.

Can my landlord or mortgage lender ask about my sexual orientation or gender identity?

Generally, no. Your landlord or mortgage lender is not allowed to ask about your sexual orientation or gender identity. You are welcome to volunteer this information on your own if you are optionally asked in surveys to collect information for state or local requirements or other federal assistance programs.

The one time that your landlord can ask questions about your gender identity or the gender identity of your family members is to determine the number of bedrooms your household should have.

Who counts as someone's "family" under this rule?

HUD programs should broadly apply the word "family." This means that family members who will be otherwise eligible for HUD housing cannot be excluded because they are LGBT or are perceived to be LGBT. For example, under the rule, HUD will recognize individuals as "family" if they are in same-sex unmarried relationships.

Does this change the Fair Housing Act?

No. Administrative rules cannot replace federal laws, but they add another layer of guidance for agencies like HUD to properly apply federal policy. This rule does not change the Fair Housing Act in any way.

If I've been discriminated against in the past, will this rule help me?

This rule will not help you if you have experienced past discrimination. It will only apply for all acts of discrimination starting on March 5, 2012. If you reapply for housing now or are currently in HUD housing and experience discrimination, you will be protected under the rule.

How does this rule apply to homeless shelters?

If a homeless shelter is HUD-funded, this rule applies. A HUD-funded homeless shelter cannot turn individuals away based on their sexual orientation and gender identity.

Is this the only housing protection for LGBT individuals in housing?

No. There may also be state, city, or county laws that provide more protection than the federal laws and regulations.

Also, individuals might be able to file a complaint under the Fair Housing Act for related reasons. For example, if a landlord discriminates against a gay man because the landlord thinks he will spread AIDS, this may be illegal discrimination based on disability under the FHA because of the perceived disability. Also, if a non-gender conforming individual experiences discrimination based on gender, he or she may qualify under the Fair Housing Act for a claim of discrimination based on sex.

How will HUD-assisted and HUD-operated programs learn about this rule?

HUD has emphasized that it plans to provide education and outreach in order to spread information about this rule.

Will this rule apply if a religious organization is providing the housing or emergency shelter?

Yes. All organizations providing HUD-affiliated housing, whether faith-based or otherwise, must follow this rule.

What if I have a legitimate discrimination complaint?

If you have experienced discrimination, you have the right to file a complaint with your local HUD program. If your HUD program decides that your complaint is legitimate, then it will fix your situation based on the program-specific remedies for rule violations. These remedies might include withholding HUD financial assistance for the landlord or organization that discriminated against you. HUD will also look into seeing if there is a possible Fair Housing Act claim, which may produce greater remedies under the law.

This rule does not give you the right to sue HUD or get any sort of money reward.

When does this rule apply?

The rule is effective on March 5, 2012.

What is the actual name of the rule if I want to look it up?

The rule can be found in the Code of Federal Regulations, under:

24 CFR Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982

HUD has also made it available on its website at

<http://portal.hud.gov/hudportal/documents/huddoc?id=5359-F-02EqAccessFinalRule.pdf>

How can I file a complaint with HUD if I experienced discrimination?

If you have experienced housing discrimination, you can report it to HUD for free, by phone, mail, or online. You can:

- Call 1 (800) 669-9777
- Print a form from http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination and mail it to the regional office as indicated on the website
- Submit an online form at http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination



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HUD ISSUES FINAL RULE TO ENSURE EQUAL ACCESS TO HOUSING AND SERVICES REGARDLESS OF GENDER IDENTITY

WASHINGTON - The U.S. Department of Housing and Urban Development (HUD) today published a final rule to ensure that all individuals have equal access to many of the Department's core shelter programs in accordance with their gender identity. Read HUD's new 'Gender Identity Rule' (<https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-22589.pdf>).

Following what had previously been a practice encouraged by HUD, providers that operate single-sex projects using funds awarded through the Department's Office of Community Planning and Development (CPD) will now be required to provide all individuals, including transgender individuals and other individuals who do not identify with the sex they were assigned at birth, with access to programs, benefits, services, and accommodations in accordance with their gender identity without being subjected to intrusive questioning or being asked to provide documentation.

"Today, we take another important step to ensure full acceptance of transgender and gender non-conforming individuals in the programs HUD supports," said HUD Secretary Julián Castro. "This new rule will ensure equal access to the very programs that help to prevent homelessness for persons who are routinely forced to choose between being placed in facilities against their gender identity or living on our streets."

HUD's new rule will require a recipient, subrecipient, or provider to establish, amend, or maintain program admissions, occupancy, and operating policies and procedures (including policies and procedures to protect individuals' privacy and security), so that equal access is provided to individuals based on their gender identity. This requirement includes tenant selection and admission preferences.

HUD's mission is to create inclusive communities and quality affordable housing for all. Excluding any eligible person from HUD-funded temporary, emergency shelters, buildings, facilities, housing or programs because of that person's gender identity or nonconformance with gender stereotypes would contravene this responsibility.

Background

In February of 2012, HUD published an [Equal Access Rule](#) to make certain that housing assisted or insured by HUD is open to all eligible individuals and families without regard to actual or perceived sexual orientation, gender identity or

marital status. That rule provided a limited exception in cases involving single-sex emergency shelters with shared sleeping areas or bathrooms. At that time, HUD decided not to set national policy regarding how transgender persons would be accommodated in these facilities, but instead decided to monitor and review its programs to determine if additional guidance or a national policy was warranted.

Since the publication of the Equal Access Rule, HUD conducted further review on transgender individuals' ability to access single-sex facilities. 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 single-sex facilities, and that transgender and gender nonconforming persons continue to experience significant violence, harassment, and discrimination in attempting to access programs, benefits, services, and accommodations. Homeless service providers reported that, if given the choice between a shelter designated for their assigned birth sex or sleeping on the streets, many transgender shelter-seekers would choose the streets.

Transgender women in particular reported that they are excluded from women's shelters, forcing them to live on the streets or to seek shelter in male-only facilities where they're forced to disguise their gender identity or face abuse or violence. In January 2016, the Center for American Progress released the results of a discrimination telephone test 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.^[1] The study found that only 30 percent of the shelters contacted by the testers were willing to house the transgender women with other women.

HUD also reviewed national research which revealed that lack of access to shelter for transgender and gender nonconforming persons, particularly those who were also homeless youths, was a pervasive problem. National research indicates that these denials of access based upon an individual's gender identity are commonplace. According to a national survey by the National Center for Transgender Equality, nearly half (47 percent) of all transgender respondents who accessed shelters left those shelters because of the treatment they received there—choosing life on the street over the abuse and indignity they experienced in a shelter. This survey further reported that 25 percent of transgender individuals who stayed in shelters were physically assaulted, and 22 percent were sexually assaulted, by another resident or shelter staff. Read HUD's guidance to single-sex shelter operators (<https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-22589.pdf>).

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HUD's mission is to create strong, sustainable, inclusive communities and quality affordable homes for all. More information about HUD and its programs is available on the Internet at www.hud.gov and <http://espanol.hud.gov>.

You can also connect with HUD on social media and follow Secretary Castro on Twitter and Facebook or sign up for news alerts on HUD's Email List.

[1]Caitlin Rooney, et al., Center for American Progress & the Equal Rights Center *Discrimination Against Transgender Women Seeking Access to Homeless Shelters* January 7, 2016, available at: <https://cdn.americanprogress.org/wp-content/uploads/2016/01/06113001/HomelessTransgender.pdf>.

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Rules and Regulations

Federal Register

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR 5, 1000, 1003, 1005, 1006 and 1007

[Docket No. FR-5861-F-03]

RIN 2506-AC40

Equal Access to Housing in HUD's Native American and Native Hawaiian Programs—Regardless of Sexual Orientation or Gender Identity

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: As the Nation's housing agency, HUD has the unique charge to promote the Federal goal of providing decent housing and a suitable living environment for all. In February 2012, HUD issued a final rule requiring HUD programs to make eligibility determinations for individuals seeking admission to HUD-assisted or -insured housing without regard to sexual orientation, gender identity, or marital status. The 2012 rule did not, however, cover HUD's Native American and Native Hawaiian programs. Through this final rule, HUD revises its Native American and Native Hawaiian program regulations to ensure all eligible individuals and families, regardless of sexual orientation, gender identity, or marital status, have access to these programs. This final rule seeks to provide consistency across HUD programs and restates the Department's commitment that eligibility for admission and continued occupancy in HUD-assisted and -insured housing is not based on sexual orientation, gender identity, or marital status.

DATES: *Effective:* December 19, 2016.

FOR FURTHER INFORMATION CONTACT: Heidi J. Frechette, Deputy Assistant Secretary, Office of Native American Housing Programs, Office of Public and Indian Housing, 451 7th Street SW.,

Room 4126, Washington, DC 20410-4000; telephone number 202-402-6321 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background—Tribal Consultation and the May 9, 2016, Proposed Rule

On February 3, 2012, at 77 FR 5662, HUD issued a final rule entitled "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity," which required that HUD-assisted and -insured housing be made available in accordance with program eligibility requirements and without regard to sexual orientation, gender identity, or marital status, but excluded HUD's Native American and Native Hawaiian programs. HUD committed in the 2012 rule's preamble to engage in tribal consultation before applying these same requirements to its Native American and Native Hawaiian programs. HUD engaged in tribal consultation, in the form of a "Dear Tribal Leader Letter," before proceeding with this rulemaking.

On May 9, 2016, HUD published a proposed rule, at 81 FR 28037, to amend its Native American and Native Hawaiian program regulations to require that access be provided without regard to actual or perceived sexual orientation, gender identity, or marital status in housing assisted or insured under these programs. The proposed rule sought to add the equal access provisions in 24 CFR 5.105(a)(2) and adopt the definitions of "sexual orientation" and "gender identity" provided in § 5.100 to the Native American and Native Hawaiian programs. Specifically, the proposed rule sought to amend regulations for the following: Native American Housing Activities, at 24 CFR part 1000; Community Development Block Grants for Indian Tribes and Alaska Native Villages, at 24 CFR part 1003; the Section 184 Indian Home Loan Guarantee Program, at 24 CFR part 1005; the Native Hawaiian Housing Block Grant Program, at 24 CFR part 1006; and Section 184A Loan Guarantees For Native Hawaiian Housing, at 24 CFR part 1007. HUD also proposed to make conforming amendments to § 5.105(a)(2) to make explicit that the requirements

in § 5.105(a)(2) apply to housing with loans guaranteed or insured under one of HUD's Native American or Native Hawaiian housing programs, and not solely to loans insured by the Federal Housing Administration (FHA). A detailed description of the proposed amendments can be found in the preamble to the proposed rule available at <https://www.gpo.gov/fdsys/granule/FR-2016-05-09/2016-10753>.

II. Final Rule

This final rule follows publication of the May 9, 2016, proposed rule and takes into consideration the public comments received. The public comment period closed on July 8, 2016, and HUD received 13 distinct comments relating to the proposed rule. HUD received public comments from individuals, tribal nations, housing authorities, nonprofit social service providers, and lesbian, gay, bisexual and transgender (LGBT) advocacy organizations. Section III of this preamble responds to the comments received on the proposed rule. HUD has decided to adopt the proposed rule and makes a minor change to § 5.105(a)(2) to clarify that all loans insured by HUD are subject to the equal access provisions, not only loans insured by FHA. This final rule ensures that eligibility determinations for housing-assisted or -insured under HUD's Native American or Native Hawaiian housing programs are made without regard to actual or perceived sexual orientation, gender identity, or marital status.

HUD notes that in adopting this final rule with the cross-references to § 5.105(a)(2), the changes to § 5.105(a) that were adopted in HUD's final rule entitled "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs" (the CPD Equal Access Rule), at 81 FR 64763, will apply to HUD's Native American or Native Hawaiian housing programs. Those changes include amended definitions of "gender identity" and "sexual orientation" and the removal of the prohibition of inquiries provision that was previously at § 5.105(a)(2)(ii). The amended "gender identity" definition states that 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. 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, or sex assigned to the individual at birth or identified in documents." The amended "sexual orientation" definition states that sexual orientation "means one's emotional or physical attraction to the same and/or opposite sex (e.g., homosexuality, heterosexuality, or bisexuality)." See 81 FR 64763 for further information.

III. Public Comments Submitted on Proposed Rule and HUD's Responses

HUD received 13 distinct comments relating to the proposed rule. Most commenters were very supportive and appreciative of HUD's efforts to ensure access in HUD's Native American and Native Hawaiian programs for LGBT individuals. Although the majority of commenters supported the rule as important to protect the rights of LGBT individuals, some expressed different opinions on the way the rule could be improved to ensure that vulnerable populations are protected. Many of the commenters stated that the rule's language needed to be clarified to ensure greater protections for the LGBT population. Commenters provided their overall views regarding the rule, as well as specific comments on HUD's regulatory text. All comments can be viewed at <https://www.regulations.gov/>.¹

HUD appreciates all of the comments offered in response to HUD's proposed rule.

Comment: Applying this rule to Native American and Native Hawaiian communities promotes consistent policies throughout all of HUD's programs. Commenters stated that it is important to ensure consistency where there is overlap between HUD's Native American and Native Hawaiian programs and other HUD programs, which are already subject to the requirements of the Equal Access Rule. Many commenters wrote that the rule is a strong step in the direction of alleviating discrimination against LGBT persons in Native American and Native Hawaiian populations and promoting the Federal goal of providing decent housing and a suitable living environment for all.

HUD Response: As the Nation's housing agency, it is important that HUD maintain consistent policies across its programs, inclusive of Native

American and Native Hawaiian programs. HUD issued guidance to assist LGBT individuals and families facing housing discrimination. (See http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination). In addition to the guidance, HUD initiated Equal Access rule rulemaking to make clear that HUD's rental housing and homeownership programs are open to all eligible persons regardless of sexual orientation, gender identity, or marital status. This rule furthers HUD's goal of equal treatment for all individuals who are eligible for HUD-assisted or -insured housing.

Comment: The rule is aligned with traditional Native tribal beliefs. Commenters stated that Native nations have not historically discriminated against those who are LGBT. Commenters stated that Native nations believe in acceptance of all persons, no matter their differences, and that traditional practices teach them that no one is to be excluded or homeless because of their sexual orientation. Another commenter stated that promulgating the rule demonstrates respect for the values of the Native American and Native Hawaiian communities and American society as a whole. A commenter provided sources that demonstrate that Native American tribes "respected" and "highly revered" LGBT people historically and that Native Hawaiians likely accepted LGBT individuals prior to colonization by Western and Christian influences. Commenters described their own and others' experiences with Native cultures and how inclusion of all, including the LGBT community, was not in violation of Native values.

HUD Response: HUD appreciates the comments stating that the Equal Access rule, as applied to Native American and Native Hawaiian HUD-assisted or -insured housing, is consistent with Native tribal beliefs.

Comment: Social stigma against LGBT individuals is not uncommon and has caused disparities in housing access for LGBT Native members. Commenters cited statistics that indicated access to safe housing for members of the LGBT communities may be hard to find—citing that between 20 and 40 percent of youth experiencing homelessness identify as LGBT, questioning, intersex, or two spirit; and 26 percent of LGBT youth were forced from their home upon revealing their sexual identity to their parents. Commenters also noted that it is difficult to fully assess the impact of housing discrimination in the LGBT community because of a lack of

nationwide data collection. Commenters cited general statistics outside of Native communities from a 2001 Kaiser Family Foundation study that shows that 34 percent of LGB people reported having experienced, or knowing someone who had experienced, housing discrimination on the basis of their sexual orientation. Further, commenters cited a 2006 Michigan housing study showing that 27 percent of same-sex test couples inquiring about renting or buying housing in Michigan encountered discrimination on the basis of their sexual orientation.

HUD Response: The exclusion of an individual or family from HUD housing due to that individual's sexual orientation or gender identity is inconsistent with HUD's mission to ensure decent housing and a suitable living environment for all. The housing discrimination, harassment, and homelessness that LGBT persons face in the United States is part of what precipitated HUD's rulemaking in this area. Accordingly, it is incumbent on HUD to ensure that the regulations governing its Native American and Native Hawaiian housing programs provide the same protections for LGBT persons as HUD's other programs.

Comment: Research reveals that the transgender community is even more vulnerable to housing discrimination. Commenters cited the National Transgender Discrimination Survey, which found that 47 percent of American Indians and American Natives reported having been denied a home or apartment because they were transgender or gender nonconforming. The survey also found that 19 percent of transgender respondents reported being refused a home or apartment due to their sexual orientation and 11 percent of transgender respondents reported being evicted because of their gender identity or expression. The commenters further said that one in five respondents (19 percent) have experienced homelessness as a result of discrimination or mistreatment because of their gender identity or expression, and that discrimination was particularly pronounced for transgender people of color.

HUD Response: HUD is aware of the significant challenges that transgender persons face in Native American and Native Hawaiian communities when attempting to access housing and shelter. HUD understands that housing discrimination and equal access are critical issues for transgender and gender nonconforming individuals, as they are for everyone, and HUD's rulemaking in this area is in direct response. HUD believes that by

¹ Please note, www.regulations.gov assigns numbers to the comments starting with 0002. The number 0001 is reserved for the Federal Register publication (the November 20, 2015, proposed rule).

requiring equal access for LGBT individuals, including gender nonconforming persons, in this regulation, HUD will be better able to address concerns of access to HUD-assisted and -insured housing in its Native American and Hawaiian Native programs.

Comment: The current definition of gender identity under § 5.100, providing that gender identity means “actual or perceived gender-related characteristics” is unclear. Commenters stated that this definition could cause difficulty in enforcement of the proposed rule and that HUD should specify how it intends to determine “the gender with which a person identifies,” in order to prevent misinterpretation by agency employees. One commenter stated the rule’s language needs to be unequivocally clear and that the difference between “actual” and “perceived” characteristics is ambiguous. The commenter stated that the definition of gender identity must be clear, so that programs are able to refrain from discriminatory practices when making placement decisions and not be in violation of the Equal Access Rule. Many commenters supported the adoption of the revised definitions of gender identity and perceived gender identity set forth in the CPD Equal Access Rule and use of the definitions in all applications of HUD’s Equal Access Rules.

A commenter stated that the current “gender identity” language under § 5.100 states that gender identity refers to “actual or perceived gender-related characteristics,” and proposed a change to the language to state that gender identity is “the gender with which a person identifies, regardless of the sex assigned to that person at birth or perceived gender identity.”

HUD Response: HUD appreciates the suggested revisions to the definition of “gender identity” offered by the commenters, and HUD agrees that a consistent definition across its programs makes sense. Therefore, as noted above, HUD will apply the amended definition of “gender identity” as provided in the CPD Equal Access Rule to HUD’s Native American and Native Hawaiian programs.

Comment: HUD should expressly reinforce the broad definition of “family” that was included in the final version of the Equal Access Rule adopted in 2012. Commenters stated that the provision in the Equal Access Rule of 2012 that an eligible family, including an individual, may not be excluded from housing programs because of actual or perceived sexual orientation, gender identity, or marital

status was one of the core advancements of that critically important rule, and it should apply equally to the extension of the rule to HUD’s Native American and Native Hawaiian programs. Commenters noted that despite the Supreme Court’s affirmation of marriage equality nationwide, key challenges for two spirit and LGBT families remain, including impediments to two spirit and LGBT people creating legal relationships with their children, which makes the application of a broad and inclusive definition of “family” essential. Commenters stated that the final rule should be updated to make the definition of “family” in HUD’s Native American and Native Hawaiian programs consistent with the definition of family currently provided in § 5.403, including clarifying that the definition applies “regardless of actual or perceived sexual orientation, gender identity, or marital status.”

HUD Response: Certain regulations governing the Native American and Native Hawaiian housing programs covered by this rule already include a definition of the term “family.” The regulatory definitions are derived directly from corresponding statutory definitions of the term “family.” For instance, section 4(6) of the Native American Housing Assistance and Self-Determination Act (NAHASDA) (25 U.S.C. 4101 *et seq.*) provides a definition of family. The definition in the implementing program regulation at § 1000.10 mirrors that statutory definition. Although the Native American and Native Hawaiian housing programs’ statutory and regulatory definitions of family vary from the definition of family in § 5.403, the substantive rights and protections in § 5.105(a)(2) apply without regard to actual or perceived sexual orientation, gender identity, or marital status. Therefore, HUD does not believe it is necessary to amend the definition of family in the regulations governing these programs in order to provide these substantive rights and protections.

Comment: This rule encroaches upon sovereignty and self-determination of Indian tribes. A commenter stated that the final rule encroaches upon the sovereignty and self-determination of Indian tribes, which the Federal Government has committed to uphold, which is in violation of Executive Order 13175. The commenter stated that the final rule is adverse to Indian tribes’ ability to self-govern their own internal affairs, including the governance of domestic relations. The same commenter also stated that some tribes require cohabiting couples to be married, other tribes consider it a

criminal offense for cohabiting couples not to be married, other tribes do not have a preference, and that due to differing beliefs tribes should have the right to govern domestic relations and not be forced to adopt the Equal Access in Native American and Native Hawaiian final rule.

HUD Response: HUD’s rule does not violate of Executive Order 13175 entitled “Consultation with Indian Tribal Governments.” HUD’s rule only pertains to the administration of HUD’s housing programs and does not regulate domestic relations and the recognition of marriage. The rule simply establishes program requirements that ensure that Native American and Native Hawaiian families receiving assistance under these programs are afforded the same protections as all other families receiving assistance under HUD’s other programs. A tribe that participates in HUD’s programs, and a lender that chooses to become an approved lender under HUD’s loan guarantee programs, must comply with all program requirements established by HUD. HUD reaffirms its commitment to ensure the furtherance of tribal sovereignty and self-determination, and HUD emphasizes that this rule ensures that Native American families are afforded equal access to its Native American housing programs.

Comment: HUD must follow Executive Order 13175. Some commenters stated that HUD did not follow the requirements of Executive Order 13175, which requires that agencies consult and coordinate with Indian tribes in the development of policies that impact Indian communities, when implementing this proposed rule. Commenters stated that HUD’s attempt to engage tribes regarding the proposed rule via comments, in response to **Federal Register** notices, and letters does not translate to a collaborative effort between HUD and tribal communities, nor do HUD’s actions exemplify a good faith effort to consult with tribes. One commenter stated HUD should have engaged in more meaningful government-to-government consultations with tribal entities that commented on HUD’s January 2015 letter about their concerns. The same commenter wrote that HUD does not know how to engage in meaningful consultation within Native communities, citing that HUD’s January 2015 letter was addressed to tribal leaders, while HUD’s May 2016 letter was addressed to Native American & Native Hawaiian Leaders. In contrast, other commenters stated that HUD’s consultation was fully adequate and reached the necessary standard level of

“consultation” under Executive Order 13175.

HUD Response: HUD’s tribal consultation policy (81 FR 40893) is to consult with Indian tribes early in the rulemaking process on matters that have tribal implications. HUD uses a wide variety of methods to conduct tribal consultation with Indian tribes, including sending letters to tribal leaders requesting feedback on proposed policies. Accordingly, on January 28, 2015, HUD sent letters to tribal leaders informing them that HUD was considering whether to revise the regulations governing HUD’s Native American housing programs to provide Native American families participating in these programs with the same equal access protections as families receiving assistance under HUD’s other programs. HUD requested the opinions of tribal leaders in order to inform its decision to proceed with the rulemaking. HUD received two comments and considered these comments before proceeding with this rulemaking. The same day that HUD published the proposed rule in the **Federal Register**, May 9, 2016, HUD sent a second letter to inform tribal leaders of the rule’s publication and strongly encouraged tribal leaders to provide feedback through the public comment period. HUD believes that the process it has undertaken meets the requirements of Executive Order 13175.

Comment: HUD must use negotiated rulemaking to make regulatory changes. A commenter stated that HUD is incorrect in asserting that the agency is not required to undergo negotiated rulemaking under section 106(b)(2)(A) of NAHASDA (25 U.S.C. 4166(b)(2)(A)) to implement this final rule. Specifically, the commenter stated that HUD’s regulations at § 1000.12 provide that other nondiscrimination requirements do not apply to actions under NAHASDA by federally recognized tribes and their tribally designated housing entities (TDHEs) and that HUD should follow the same course that it pursued in the past, when dealing with issues of nondiscrimination, by initiating negotiated rulemaking to consider whether § 5.105(a)(2)(i) should be applicable to federally recognized tribes and their TDHEs. The commenter also wrote that this provision will impact how other NAHASDA statutory requirements are impacted and how the rights of participants are protected.

HUD Response: As HUD stated in the proposed rule, the requirement to undertake negotiated rulemaking pertains to regulations that are required to implement NAHASDA statutory requirements. See 25 U.S.C.

4116(b)(2)(A). This rule pertains to HUD’s general cross-cutting nondiscrimination requirements that apply across HUD and does not pertain to regulations that are required to implement NAHASDA statutory requirements. Therefore, HUD asserts that such requirements are not subject to negotiated rulemaking under NAHASDA. The commenter cited § 1000.12 as supporting the reason why nondiscrimination requirements should be implemented through negotiated rulemaking. However, the requirements at § 1000.12 either mirror the nondiscrimination requirements in section 201 of NAHASDA, or restate the applicability of Federal nondiscrimination statutes that apply on their face to programs authorized under NAHASDA. HUD finds the reference to the manner in which § 1000.12 was issued to be unpersuasive here.

IV. Findings and Certifications

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This final rule does not impose any new costs, or modify existing costs, applicable to HUD grantees. Rather, the purpose of this final rule is to ensure equal access to HUD’s Native American and Native Hawaiian programs, regardless of sexual orientation or gender identity. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

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

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either: (i) Imposes substantial direct compliance costs on State and local governments and is not required by statute or (ii) preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the

Executive order. This final rule would not have federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This final rule would not impose any Federal mandates on any State, local, or tribal governments or on the private sector within the meaning of the UMRA.

List of Subjects

24 CFR Part 5

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

24 CFR Part 1000

Aged, Community development block grants, Grant programs—housing and community development, Grant programs—Indians, Indians, Individuals with disabilities, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 1003

Alaska, Community development block grants, Grant programs—housing and community development, Grant programs—Indians, Indians, Reporting and recordkeeping requirements.

24 CFR Part 1005

Indians, Loan programs—Indians, Reporting and recordkeeping requirements.

24 CFR Part 1006

Community development block grants, Grant programs—housing and community development, Grant programs—Indians, Hawaiian Natives, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 1007

Hawaiian Natives, Loan programs—housing and community development,

Loan programs—Indians, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR parts 5, 1000, 1003, 1005, 1006, and 1007, as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, 3535(d), Sec. 327, Pub. L. 109–115, 119 Stat. 2936, and Sec. 607, Pub. L. 109–162, 119 Stat. 3051.

■ 2. In § 5.105, revise paragraph (a)(2) to read as follows:

§ 5.105 Other Federal requirements.

* * * * *

(a) * * *

(2) *Equal access to HUD-assisted or -insured housing.* A determination of eligibility for housing that is assisted by HUD or subject to a mortgage insured by HUD shall be made in accordance with the eligibility requirements provided for such program by HUD, and such housing shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status.

* * * * *

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

■ 3. The authority citation for part 1000 continues to read as follows:

Authority: 25 U.S.C. 4101 *et seq.*; 42 U.S.C. 3535(d).

■ 4. In § 1000.12, add paragraph (e) to read as follows:

§ 1000.12 What nondiscrimination requirements are applicable?

* * * * *

(e) The equal access to HUD-assisted or -insured housing requirements in 24 CFR 5.105(a)(2).

PART 1003—COMMUNITY DEVELOPMENT BLOCK GRANTS FOR INDIAN TRIBES AND ALASKA NATIVE VILLAGES

■ 5. The authority citation for part 1003 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301 *et seq.*

■ 6. In § 1003.601, add paragraph (c) to read as follows:

§ 1003.601 Nondiscrimination.

* * * * *

(c) A grantee shall comply with the equal access to HUD-assisted or -insured housing requirements in 24 CFR 5.105(a)(2).

PART 1005—LOAN GUARANTEES FOR INDIAN HOUSING

■ 7. The authority citation for part 1005 continues to read as follows:

Authority: 12 U.S.C. 1715z–13a; 15 U.S.C. 1639c; 42 U.S.C. 3535(d).

■ 8. Add § 1005.115 to read as follows:

§ 1005.115 Equal Access.

The equal access to HUD-assisted or -insured housing requirements in 24 CFR 5.105(a)(2) apply to this part.

PART 1006—NATIVE HAWAIIAN HOUSING BLOCK GRANT PROGRAM

■ 9. The authority citation for part 1006 continues to read as follows:

Authority: 25 U.S.C. 4221 *et seq.*; 42 U.S.C. 3535(d).

■ 10. In § 1006.355, revise the introductory paragraph and add paragraph (d) to read as follows:

§ 1006.355 Nondiscrimination requirements.

Program eligibility under the Act and this part may be restricted to Native Hawaiians. Subject to the preceding sentence, no person may be discriminated against on the basis of race, color, national origin, religion, sex, familial status, or disability, or excluded from program eligibility because of actual or perceived sexual orientation, gender identity, or marital status. The following nondiscrimination requirements are applicable to the use of NHHBG funds:

* * * * *

(d) The equal access to HUD-assisted or -insured housing requirements in 24 CFR 5.105(a)(2).

PART 1007—SECTION 184A LOAN GUARANTEES FOR NATIVE HAWAIIAN HOUSING

■ 11. The authority citation for part 1007 continues to read as follows:

Authority: 12 U.S.C. 1715z–13b; 15 U.S.C. 1639c; 42 U.S.C. 3535(d).

■ 12. Amend § 1007.45 by revising the section heading, redesignating the undesignated paragraph as paragraph (a), and adding paragraph (b) to read as follows:

§ 1007.45 Nondiscrimination.

* * * * *

(b) The equal access to HUD-assisted or -insured housing requirements in 24 CFR 5.105(a)(2) apply to this part.

Dated: November 4, 2016.

Lourdes Castro Ramirez,
Principal Deputy Assistant Secretary for Public and Indian Housing.

Nani A. Coloretti,
Deputy Secretary.

[FR Doc. 2016–27196 Filed 11–16–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9788]

RIN 1545–BM84

Liabilities Recognized as Recourse Partnership Liabilities Under Section 752; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to final and temporary regulations (TD 9788) that were published in the **Federal Register** on Wednesday, October 5, 2016 (81 FR 69282). The final and temporary regulations provide rules concerning how liabilities are allocated for purposes of section 707 of the Internal Revenue Code and when certain obligations are recognized for purposes of determining whether a liability is a recourse partnership liability under section 752.

DATES: This correction is effective November 17, 2016 and is applicable on and after January 3, 2017.

FOR FURTHER INFORMATION CONTACT: Caroline E. Hay or Deane M. Burke (202) 317–5279 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations (TD 9788) that are the subject of this correction are under sections 707 and 752 of the Internal Revenue Code.

Need for Correction

As published, the final and temporary regulations (TD 9788) contain errors that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

People For the American Way

PFAW Sues DOJ, HUD To Release Information On Secret LGBTQ Policy

FOR IMMEDIATE RELEASE: March 1, 2018

Contact: Drew Courtney at People For the American Way

Email: media@pfaw.org

Phone Number: 202-467-4999

People For the American Way filed suit in federal court today against the Department of Justice and the Department of Housing and Urban Development to demand the release of documents concerning reported changes in federal policy toward LGBTQ people.

Last year Right Wing Watch, a project of PFAW, filed Freedom of Information Act requests with both agencies asking for documents on reported actions removing mentions of LGBTQ people from federal programs. All of these reported actions were being taken quietly and without public announcement, raising the questions of which agency or other official directed that the actions be taken, why, the scope of the decisions, and whether agency staff had been directed to implement certain policies regarding programs for LGBTQ people without public knowledge.

“There’s absolutely no reason why the these agencies should refuse to release these documents,” said Elliot Minberg, Senior Fellow at People For the American Way. “The public has a right to know what directives are being handed down that resulted in LGBTQ people being written out of federal programs and activities. These under-the-radar changes can have a massive effect on the way our government works, and it appears Trump administration officials are trying to create secret agency laws in order to push their extreme agenda. That’s simply not permissible. We have a right to see these documents and we’re going to court to get them.”

In August, Right Wing Watch asked HUD for copies of any directives to pull back from efforts to combat LGBTQ homelessness after New York magazine reported <http://nymag.com/daily/intelligencer/2017/08/ben-carson-hud-secretary.html> that department leadership had:

... ordered the removal of online training materials meant, in part, to help homeless shelters make sure they were providing equal access to transgender people. It also pulled back a survey regarding projects in Cincinnati and Houston to reduce LGBT homelessness. And it forced its Policy Development and Research division to dissociate itself from a major study it had funded on housing discrimination against gay, lesbian, and transgender people — the study ended up being released in late June under the aegis of the Urban Institute instead.

In September, after The New York Times reported <https://www.nytimes.com/2017/09/10/business/trump-regulations-religious-conservatives.html> that the Department of Justice had “scrubbed references to ‘L.G.B.T.Q. youth’ from the description of a federal program for victims of sex trafficking,” Right Wing Watch asked DOJ for any directives related to that action as well.

Although the deadlines for fulfilling these requests have long past, neither agency has produced any responsive documents.

Right Wing Watch also recently filed a FOIA request with the Department of Health and Human Services regarding similar decisions

<https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774> to remove references to LGBTQ people from agency policies.

People For the American Way is a progressive advocacy organization founded to fight right-wing extremism and defend constitutional values including free expression, religious liberty, equal justice under the law, and the right to meaningfully participate in our democracy.

###

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▶ **General Guidelines for Forms and Patient-Provider Discussions**

Filling out the intake form gives patients one of their first and most important impressions of your office. The experience sets the tone for how comfortable a patient feels being open about their sexual orientation or gender identity/expression.

On page xx are recommendations for questions you may want to consider adding to your standard intake and health history forms, or—ideally—discuss with the patient while taking an oral history. Examples include more inclusive choices for answers to questions, open-ended questions, and adding “partner” wherever the word “spouse” is used. The following are additional topics for possible inclusion in health history forms or to help a provider with in-person discussions with LGBT patients:

- ◆ Intake forms should use the term “relationship status” instead of “marital status,” including options like “partnered.” When asking—on the form or verbally—about a patient’s significant other, use terms such as “partner,” in addition to “spouse” and/or “husband/wife.”
- ◆ Adding a “transgender” option to the male/female check boxes on your intake form can help capture better information about transgender patients, and will be an immediate sign of acceptance to that person.
- ◆ As with all patient contacts, approach the interview showing empathy, open-mindedness, and without rendering judgment.

- ◆ Prepare now to treat a transgender patient someday. Health care providers’ ignorance, surprise, or discomfort as they treat transgender people may alienate patients and result in lower quality or inappropriate care, as well as deter them from seeking future medical care.
- ◆ Transgender individuals may have had traumatic past experiences with doctors causing fear or mistrust. Therefore, developing rapport and trust with transgender patients may take longer and require added sensitivity from the provider.
- ◆ When talking with transgender people, ask questions necessary to assess the issue, but avoid unrelated probing. Explaining why you need information can help avoid the perception of intrusion, for example: “To help assess your health risks, can you tell me about any history you have had with hormone use?”
- ◆ Be aware of additional barriers caused by differences in socioeconomic status, cultural norms, racial/ethnic discrimination, age, physical ability, and geography. Do not make assumptions about literacy, language capacity, and comfort with direct communication.
- ◆ When talking about sexual or relationship partners, use gender-neutral language such as “partner(s)” or “significant other(s).” Ask open-ended questions, and avoid making assumptions about the gender of a patient’s partner(s) or about sexual behavior(s). Use the same language that a patient does to describe self, sexual partners, relationships, and identity.



- ◆ When discussing sexual history, it is very important to reflect patients' language and terminology about their partners and behaviors. Many people do not define themselves through a sexual orientation label, yet may have sex with persons of their same sex or gender, or with more than one sex. For example: some men who have sex with men (MSM), especially African American and Latino men, may identify as heterosexual and have both female and male partners.
- ◆ When assessing the sexual history of transgender people, there are several special considerations:
 - 1 do not make assumptions about their behavior or bodies based on their presentation;
 - 2 ask if they have had any gender confirmation surgeries to understand what risk behaviors might be possible; and
 - 3 understand that discussion of genitals or sex acts may be complicated by a disassociation with their body, and this can make the conversation particularly sensitive or stressful to the patient.
- ◆ Ask the patient to clarify any terms or behaviors with which you are unfamiliar, or repeat a patient's term with your own understanding of its meaning, to make sure you have no miscommunication.
- ◆ It is important to discuss sexual health issues openly with your patients. Non-judgmental questions about sexual practices and behaviors

are more important than asking about sexual orientation or gender identity/expression.

For additional information on sexual risk assessment for LGBT populations, see Resources section.

- ◆ Be aware that sexual behavior of a bisexual person may not differ significantly from that of heterosexual or lesbian/gay people. They may be monogamous for long periods of time and still identify as bisexual; they may be in multiple relationships with the full knowledge and consent of their partners. However, they may have been treated as confused, promiscuous, or even dangerous. They may be on guard against health care providers who assume that they are "sick" simply because they have sexual relationships with more than one sex. Yet they may also, in fact, lack comprehensive safer-sex information that reflects their sexual practices and attitudes, and may benefit from thorough discussions about sexual safety.
- ◆ When discussing sexual practices and safer sex avoid language that may presume heterosexuality or discriminate.

There are so few trained experts in transgender health that you will often have to become that expert. Likewise, providers who treat transgender patients often have to build the base of specialty-care referrals by pre-screening other providers for sensitivity or guiding them to educational resources. Do not be afraid to tell your patient of your inexperience. Your willingness to become educated will often stand out from their previous healthcare experiences.



► Confidentiality

Encourage openness by explaining that the patient-provider discussion is confidential and that you need complete and accurate information to have an understanding of the patient's life in order to provide appropriate care. Ensure that the conversation will remain confidential and specify what, if any, information will be retained in the individual's medical records.

Developing and distributing a written confidentiality statement will encourage LGBT and other patients to disclose information pertinent to their health knowing that it is protected. Key elements of such a policy include:

- 1 The information covered
- 2 Who has access to the medical record
- 3 How test results remain confidential
- 4 Policy on sharing information with insurance companies
- 5 Instances when maintaining confidentiality is not possible²

Display the confidentiality statement prominently and provide it in writing to every patient. Consider having staff agree to the statement in writing.

► Some Specific Issues to Discuss with LGBT Patients

Homophobia, biphobia, transphobia, discrimination, harassment, stigma and isolation related to sexual orientation and/or gender identity/expression can contribute to depression, stress and anxiety in LGBT people. Conduct depression and mental health screening as appropriate, and do not discount these sources of stress for your LGBT patients.

- ◆ Explore the degree to which LGBT patients are “out” to their employers, family, and friends, and/or the extent of social support or participation in community. One's level of identification with community in many cases strongly correlates with decreased risk for STDs (including HIV) and improved mental health.
- ◆ Understand that LGBT people are particularly vulnerable to social stresses that lead to increased tobacco and substance use. A recent large study showed GBT men smoked 50% more than other men, and LBT women smoked almost 200% more than other women. Emphasis on other health issues may leave many people unaware of the disproportionate impact of tobacco in this population. Be prepared to intervene and provide treatment options. Likewise, explore whether LGBT patients are dealing with social stress through alcohol or drug use and be prepared to present treatment options. Social stress may also contribute to body image, exercise, and eating habits.
- ◆ Discuss safer sex techniques and be prepared to answer questions about STDs and HIV transmission risk for various sexual activities relevant to LGBT people.

Topics to include in a staff training program should include:

- 1 Use of appropriate language when addressing or referring to patients and/or their significant others
- 2 Learning how to identify and challenge any internalized discriminatory beliefs about LGBT people
- 3 Basic familiarity with important LGBT health issues (e.g., impacts of homophobia, discrimination, harassment, and violence; mental health and depression; substance abuse; safe sex; partner violence; HIV/STDs)
- 4 Indications and mechanisms for referral to LGBT-identified or LGBT-friendly providers

Developing resource lists and guidelines for patient interactions can reduce possible staff anxiety in dealing with LGBT patients.

- ◆ All employees need to understand that discrimination against LGBT patients, whether overt or subtle, is as unethical and unacceptable—and in many states as illegal—as any other kind of discrimination. Employers should make it clear to employees that discrimination against LGBT patients “will not be tolerated.” It is also important to monitor compliance and provide a mechanism for patients to report any disrespectful behavior.
- ◆ Some of your employees may have long-standing prejudices or negative feelings about LGBT patients due to ignorance or lack of familiarity with LGBT issues. Some may also feel that their religious beliefs require them to condemn LGBT people.

- ◆ Some employees may need individual training and counseling.

See Resources section.

▶ Other Suggestions

- ◆ A universal gender-inclusive “Restroom” is recommended. Many transgender and other people not conforming to physical gender stereotypes have been harassed for entering the “wrong” bathroom, so at least one restroom without Men or Women labels would help create a safer and more comfortable atmosphere.
- ◆ Be aware of other resources for LGBT individuals in your local community, as well as national/internet resources, and build collaborative relationships between your office and local lesbian, gay, bisexual, and transgender organizations and support groups.

See Resources section.

▶ Sample Recommended Questions for LGBT-Sensitive Intake Forms

These are sample questions to include as part of your intake form or ideally when taking a patient’s oral history as part of a comprehensive intake; please do NOT use this list as an intake form.

Legal name

Name I prefer to be called (if different)

Preferred pronoun?

- She
- He



Gender: Check as many as are appropriate (An alternative is to leave a blank line next to Gender, to be completed by the patient as desired)

- Female
- Male
- Transgender
 - Female to Male
 - Male to Female
 - Other
- Other (*leave space for patient to fill in*)

Are your current sexual partners men, women, or both?

In the past, have your sexual partners been men, women, or both?

Current relationship status (An alternative is to leave a blank line next to current relationship status)

- Single
- Married
- Domestic Partnership/Civil Union
- Partnered
- Involved with multiple partners
- Separated from spouse/partner
- Divorced/permanently separated from spouse/partner
- Other (*leave space for patient to fill in*)

Living situation

- Live alone
- Live with spouse or partner
- Live with roommate(s)
- Live with parents or other family members
- Other (*leave space for patient to fill in*)

Children in home

- No children in home
- My own children live with me/us
- My spouse or partner's children live with me/us
- Shared custody with ex-spouse or partner

Sexual Orientation Identity

- Bisexual
- Gay
- Heterosexual/Straight
- Lesbian
- Queer
- Other (state "please feel free to explain" and leave space for patient to fill in)
- Not Sure
- Don't Know

What safer sex methods do you use, if any?

Do you need any information about safer-sex techniques? If yes, with:

- Men
- Women
- Both

Are you currently experiencing any sexual problems?

Do you want to start a family?

Are there any questions you have or information you would like with respect to starting a family?

Do you have any concerns related to your gender identity/expression or your sex of assignment?

Do you currently use or have you used hormones (e.g., testosterone, estrogen, etc.)?

Do you need any information about hormone therapy?

Have you been tested for HIV?

- Yes
most recent test (space for date)
- No

Are you HIV-positive?

- Yes
when did you test positive? (space for date)
- No
- Unknown

I have been diagnosed with and/or treated for:

- Bacterial Vaginosis
- Chlamydia
- Gonorrhea
- Herpes
- HPV/human papilloma virus (causes genital warts & abnormal pap smear)
- Syphilis
- None

Have you ever been diagnosed with or treated for hepatitis A, B, and/or C?

- Hepatitis A
- Hepatitis B
- Hepatitis C

Have you ever been told that you have chronic hepatitis B or C, or are a “hepatitis B or C carrier?”

- If yes, which and when?

Have you ever been vaccinated against hepatitis A or B?

- Vaccinated against hepatitis A
- Vaccinated against hepatitis B

Below is a list of risk factors for hepatitis A, B, and C.

Check any that apply to you.

- Sexual activity that draws blood or fluid
- Multiple sex partners
- Oral-fecal contact
- Sexual activity during menstrual period
- Travel extensively
- Dine out extensively
- Tattooing, piercing
- Use intravenous or snorted drugs
- Ever been diagnosed with or treated for an STD
- Close contact with someone who has chronic hepatitis B or C
- None apply
- Not sure if any apply

▶ Reference and Resource Documents

Chapter 1 Endnotes

- 1 Kaiser Permanente National Diversity Council and Kaiser Permanente National Diversity Department. A Provider's Handbook on Culturally Competent Care: Lesbian, Gay, Bisexual, and Transgender Population, 2nd ed. 2004.
- 2 Gay Men's Health. Small Effort, Big Change. www.gmhp.demon.co.uk/guides/gp

Chapter 1 Resource Documents

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POLICY FOCUS:

How to gather data on sexual orientation and gender identity in clinical settings

Judith B. Bradford, PhD; Sean Cahill, PhD; Chris Grasso, MPH; and Harvey J. Makadon, MD

In this brief, we discuss two methods for gathering sexual orientation and gender identity from patients, by asking questions on the patient registration (intake) form, and by requiring that providers gather this information directly from patients during medical visits, recording responses in the electronic medical record.

HOW TO ASK PATIENTS ABOUT SEXUAL ORIENTATION AND GENDER IDENTITY

REGISTRATION (INTAKE) FORMS

Patients should be asked about how they self-identify as to their sexual orientation and gender identity on intake forms. Questions should be included in the demographic part of the form, alongside questions about race, sex, and date of birth. Patients should also be assured that this information will be kept confidential, and allows health care providers to provide them with the most relevant prevention information and screen them for health conditions disproportionately affecting members of their demographic group. Examples of such health conditions that correlate with race, ethnic background, sex, or sexual orientation can be given, such as sickle cell anemia, Tay Sachs's disease, or cervical cancer.

Fenway Health, a federally qualified health center in Boston, Massachusetts has been testing two versions of a sexual orientation identity question as well as a transgender identity question in 2011. The U.S. Department of Health and Human Services (HHS) will field test a sexual identity question on the National Health Interview Survey (NHIS) in early 2012. It is hoped that it will be added as a standard question to NHIS in fall 2012. HHS is also conducting research on how to measure gender identity and has committed to adding gender identity to a battery of demographic questions alongside sexual orientation, age, sex, and race/ethnicity, etc.

Fenway Health recently evaluated the best way to ask sexual orientation on its patient registration form. Two sets of questions widely used to measure sexual orientation were included in the patient registration form over a period of 7 months. Staff alternated the forms such that about half of new patients received one version of sexual orientation options and another half the second version. Sexual orientation was coded as “missing” on a total of 65 of 978 completed forms (6.6%). Fenway conducted this activity to gather patient input on the best way to ask sexual orientation identity on the registration form, required of all new patients at the main health center and other Fenway Health locations. Based on results from this evaluation, the following question has been added to the patient registration form now used at all Fenway Health locations and throughout its departments.

7 Do you think of yourself as:

Lesbian, gay, or homosexual Straight or heterosexual

Bisexual Something else Don't know

Ideally health care organizations will include sexual identity and gender identity questions on a field in the registration form. If the patient answers the questions, this is one less question the provider must ask about during patient visits, although further discussion may be desired. However, if the patient leaves these questions blank, the provider should ask them again during the visit. Providers may want to ask these questions periodically, as sexual and gender identity and sexual attraction can change over the life course.¹

It is important that staff treat all patients with respect in their interactions with patients. This will ensure a greater likelihood that patients will respond accurately and honestly to sensitive questions.

PROVIDER-PATIENT INFORMATION SHARING

BEST PRACTICES ON ASKING ABOUT SEXUAL ORIENTATION AND GENDER IDENTITY IN CLINICAL SETTINGS

When seeing a patient for the first time, providers should also ask questions about sexual orientation, behavior, and gender identity during the patient’s visit. Providers should start with an open-ended question, such as “Tell me a bit about yourself.” In talking about his or her life and family, the patient may bring up issues related to sexual orientation or gender identity.² Providers can facilitate open conversations



Providers can facilitate open conversations about being gay or transgender by sending a message that LGBT people are welcome in their medical offices.

about being lesbian, gay, bisexual, or transgender by sending a message that LGBT people are welcome in their medical offices. This can be signaled by posting a rainbow flag, the logo of the Gay and Lesbian Medical Association, and/or a social marketing campaign showing affirming images of LGBT people.³ Providers can also use inclusive or neutral language, such as “Do you have a partner?” instead of asking “Are you married?” which in most states and to most people still refers to heterosexual relationships.

Providers should ask permission to include information about a patient’s sexual orientation and gender identity in the medical record, remind the patient of its importance to quality health care, and assure him or her that the information will be kept confidential.

If self-disclosure does not come up in response to general questions such as those proposed above, further questions can be embedded in the sexual history. Such a history should address sexual risk behavior as well as sexual health,⁴ sexual orientation (including identity, behavior, and attraction), and gender identity. A provider can start the conversation by asking,

“Do you have any concerns or questions about your sexuality, sexual orientation, or sexual desires?”⁵

It may help put the patient at ease to preface these questions with a statement that these are questions you ask all patients, and that the information is important to helping you provide the best quality care. For example, you could say:

*“I am going to ask you some questions about your sexual health and sexuality that I ask all my patients. The answers to these questions are important for me to know how to help keep you healthy. Like the rest of this visit, this information is strictly confidential.”*⁶ Most patients are forthcoming with information, particularly once they understand why they are being asked.

The provider can ask “Do you have a partner or a spouse?” or “Are you currently in a relationship?” He or she can also ask:

- Are you sexually active?
- When was the last time you had sex?
- When you have sex, do you do so with men, women, or both?
- How many sexual partners have you had during the last year?
- Do you have any desires regarding sexual intimacy that you would like to discuss?

Providers should also ask whether patients are transgender or have gender-related concerns. For example:

*“Because so many people are affected by gender issues, I ask patients if they have any relevant concerns. Anything you say will be kept confidential. If this topic isn’t relevant to you, tell me and I will move on.”*⁷

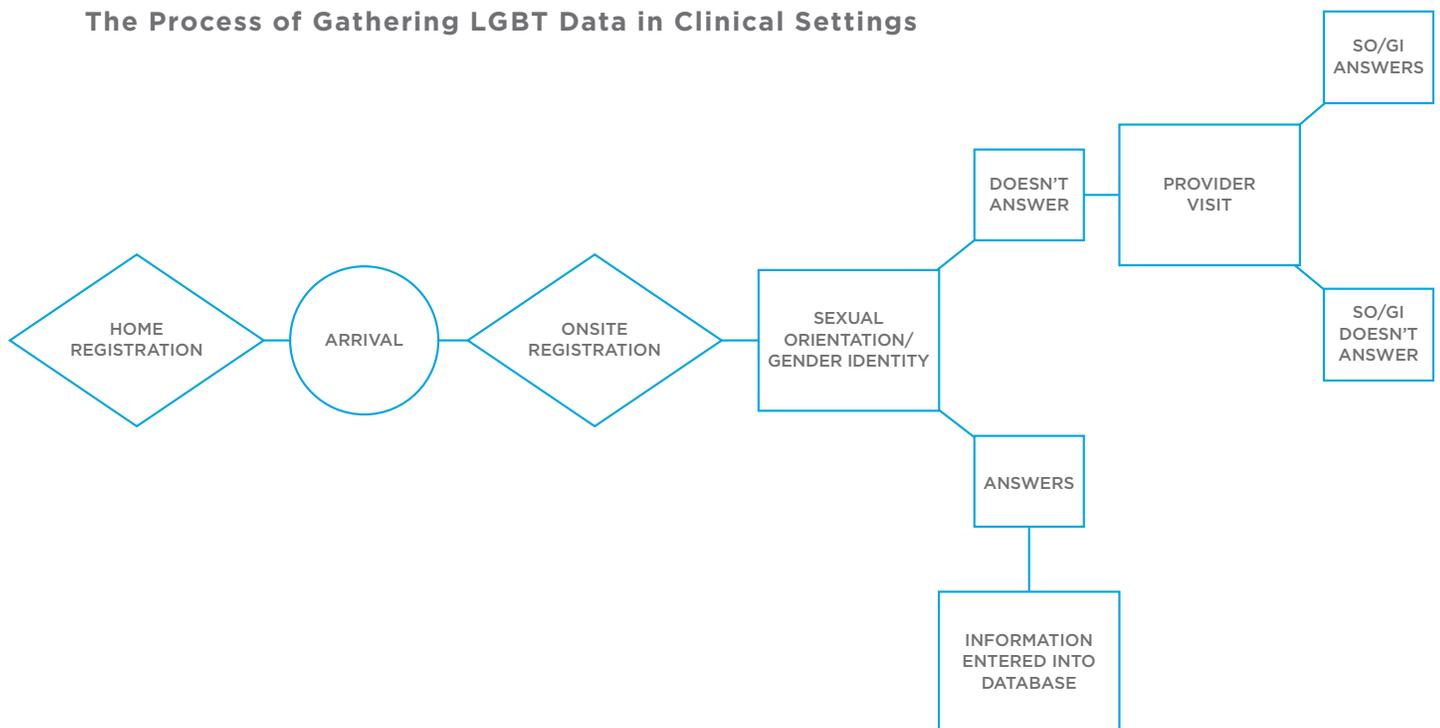
Once providers establish an open rapport with clients and they feel comfortable discussing their homosexuality, bisexuality, and/or gender identity, providers should offer care that addresses the particular health issues and disparities facing LGBT people. Guidelines for providing primary care to LGBT patients can be found in *The Fenway Guide to Lesbian, Gay, Bisexual and Transgender Health*, published by the American College of Physicians.⁸

BARRIERS TO COLLECTING DATA ON LGBT IDENTITY, INCLUDING PRIVACY CONCERNS

ON INTAKE FORMS

LGBT patients may be hesitant to disclose information about their sexual orientation or gender identity due to fears about confidentiality and privacy.⁹ These fears may have to do with the fact that one hands a filled out intake/registration form to a medical office staff person. Patients may be reluctant to provide such personal information to office staff in a waiting room, because it feels less private than answering the question of a provider in an examination room.

The Process of Gathering LGBT Data in Clinical Settings



Concept: Harvey Makadon, MD Created by: Komal Basra

Privacy and confidentiality concerns are exacerbated by the increasing computerization of health records. The U.S. government is seeking the full computerization of Americans' health records by 2014. Funded by the 2009 economic stimulus program and the 2010 health care reform legislation, the shift underway to electronic health records (EHR) and health information exchanges (HIE) could dramatically improve healthcare, increase providers' ability to determine the most effective treatments, and advance health science.¹⁰ It also poses new threats to patient data. For example, the electronic health care records of 4.9 million active and retired military members and their families may have been exposed in a major data breach reported in September 2011. Backup tapes of these EHRs, handled by Science Applications International Corporation, were reported "lost."¹¹

However, with the development of proper standards for encoding medical information, along with the development of best practices for how to manage a computer infrastructure by institutions like the National Institutes for Standards and Technology, these threats are manageable.¹² Sections 1411(g), 1411(c)(2), and 1414(a)(1) of the 2010 Patient Protection and Affordable Care Act provide privacy and security protections for information used by HIEs.¹³ A rule proposed in July 2011 would mandate "appropriate security and privacy protections" for any "personally identifiable information," including sensitive health information, that is collected and used in the provision of health care.¹⁴ And with EHRs there is greater control over who views and copies them than with traditional paper medical records. Audit reports can be run that show who has viewed information in a patient's



Given the connection between open disclosure of same-sex behavior and health, asking about these issues is integral to providers' ability to care for their LGBT patients.

EHR. Blocks can be put in place that prevent the printing of certain document types. Such safety controls do not exist with paper records.

During provider-patient interaction there are several potential barriers to gathering this information. Providers may not be comfortable asking these questions, or lack knowledge on how to elicit this information. Some worry LGBT people will be reluctant to disclose due to anti-LGBT stigma and prejudice. This may be true, and as a result not all LGBT patients will disclose their sexual or gender identity. However, this should not prevent providers from asking such questions and trying to gather such data. As society becomes more tolerant and accepting of LGBT people, more and more LGBT patients will self-disclose. In the meantime, the data we get from those who do self-disclose allows us to better understand the unique health needs and experiences of LGBT people.

Providers may worry that they don't have the time for these discussions. High patient volume may be a barrier to comprehensive, quality data capture.¹⁵ However, given the connection between open disclosure of same-sex behavior and health, asking about these issues is integral to providers' ability to care for their LGBT patients.

USING SELF-ADMINISTERED COMPUTER-BASED QUESTIONNAIRES TO GATHER PATIENT REPORTED OUTCOMES

Research shows that respondents are 1.5 to 1.6 times more likely to report same-sex behavior and attraction on an audio computer assisted self-interviewing survey than in response to questions asked by an interviewer.¹⁶ The reporting of Patient Reported Outcomes (PROs) on computer tablets such as iPads may also garner more truthful responses to sensitive questions, not only about sexual identity and behavior but also about substance use and sexual risk behavior. Self-provided PROs may also overcome barriers to data gathering posed by high patient volume in clinical settings.¹⁷ PROs are standardized, validated patient questionnaires administered directly to patients using touch-screen computer-based administration.¹⁸

flyers, or other materials to highlight the organization's inclusiveness, expertise, and concern for LGBT issues. Including some LGBT-specific information and examples in your organization's general presentations or brochures is particularly helpful. At any of your presentations, keep in mind that there is likely an LGBT person or an LGBT person's close friend or family member in the audience.

You can make your office space welcoming by hanging posters or signs on LGBT issues in your waiting area or outside your office along with other materials and information. If you have materials in your waiting area, include some LGBT-specific ones. If you have lists of targeted populations on any flyers or brochures for your organization, be sure to include LGBT people in those lists. If you give information in other languages, be sure to include LGBT content in each language.

2. SPREAD THE WORD. Reach out directly to LGBT communities with information about your services and expertise. Research LGBT populations in your area—who they are, what legal needs they may have, how you might best connect with them. Spread the word about your work through relevant publications, word of mouth, and organizational connections, as well as by supporting and attending LGBT community events.

3. PARTNER WITH LGBT ORGANIZATIONS. Partnering with LGBT organizations and community groups is crucial to building successful outreach. Research potential partners and create genuine, mutually beneficial relationships with them. Be an ally, share your resources, and open yourself to learning from their experiences. Draw on your community partners' relationships with LGBT individuals to increase visibility and attract potential legal aid clients. Some groups you may consider partnering with are culturally based LGBT groups, policy organizations, political groups, safe-school organizations, faith-based groups and open and affirming church-

es, LGBT health and wellness projects, LGBT community centers, LGBT youth and family organizations, and LGBT employee groups.

At the larger community level, show your commitment to LGBT inclusiveness and equality by supporting and participating in LGBT community events, such as annual LGBT Pride parades, organizational fund-raisers, film screenings or festivals, or LGBT cultural events.



4. SPEAK OUT ON LGBT RIGHTS. Show your solidarity with LGBT communities by signaling your support for civil and human rights. For example, if an LGBT-bullying incident or hate crime surfaces in your community, you could conduct legal rights workshops to educate community members on the issues and to reach other potentially affected victims.

Intake Systems

Many legal aid organizations do not currently inquire about a client's gender identity or sexual orientation. This, however, can make serving LGBT clients difficult. The best practice is to incorporate questions about gender identity and sexual orientation into your standard intake form and allow clients to self-identify. For some organizations, changing the standard intake form may not be possible. The next best practice is to include these questions in the intake interview for all prospective clients. At a minimum, every advocate and intake

worker must be trained and prepared to have respectful discussions about sexual orientation and gender identity with clients.

WHY ASKING QUESTIONS ABOUT SEXUAL ORIENTATION AND GENDER IDENTITY MATTERS. Clients must be able to talk about sexual orientation and gender identity with you. Asking about sexual orientation and gender identity sends an affirming and welcoming message to LGBT clients. And by allowing clients to

self-identify their gender, our advocates can then use appropriate pronouns, titles, and chosen names to address and advocate for them appropriately and respectfully.

Another reason why we ask our clients to self-identify is directly related to legal counseling. We need the information to help us better understand our clients' circumstances, determine whether they may have legal claims related to sexual orientation or gender identity, and openly ask questions to help develop the legal theories of their cases. Self-identifying on an intake form or in the intake interview allows each client to disclose the client's identity to us in a direct, matter-of-fact way. The advocate can then ask questions and explore whether the client's identity is tied in any way to the client's legal issues. While our clients may not always come to us with legal problems that appear at first glance to be tied to LGBT issues, we must know how our clients self-identify

because clients often do not realize that they may have legal protections as LGBT people.

For example, a client comes to your office with what appears to be an unemployment insurance denial. The client explains that he was asked to resign from work voluntarily because he was truant. The employer challenges his application for benefits because it argues that the client quit work voluntarily and without good cause. After several interviews, the client discloses that he is gay. The advocate then explores whether the client suffered harassment at work. Indeed he had been harassed because of his gender presentation, and he was not aware that harassment based on failure to conform to stereotypes about gender could be illegal under Title VII. He was aware that the harassment caused him depression and in turn caused him to be late to work, but he did not know that the harassment was relevant to his

the client's sexual orientation, the advocate could ask the client whether the client had listed a domestic partner or same-sex spouse on any employee benefit forms, thereby giving the employer actual knowledge about the client's sexual orientation. Asking for information about the client's sexual orientation and about a same-sex spouse or partner on the intake form or up front in the intake interview can help the advocate quickly investigate and collect evidence for the case.

For some cases, the need to gather information and rule out LGBT discrimination can be extremely urgent. Take, for example, eviction cases. If a client gets a three-day notice to pay rent or quit, the advocate needs to be able to investigate quickly whether the eviction was based on discrimination. If the client discloses an LGBT identity, the advocate can explore whether LGBT discrimination played a role in the eviction case.

their lived gender markers and names. Counseling on this topic is part of an overall advocacy strategy for transgender clients.

HOW AND WHERE QUESTIONS ABOUT GENDER IDENTITY AND SEXUAL ORIENTATION SHOULD BE ASKED.

In order to get information about sexual orientation and gender identity, we must be able to preserve the client's right to confidentiality. The context in which our clients give us this information must also be kept private. Intake forms and interviews should be completed in private in such a way that the information is not shared with third parties. Considerations of privacy should already inform an organization's procedures because clients often disclose confidential information in forms and interviews.

One approach to asking questions about gender identity and sexual orientation could involve asking these questions in the section inquiring about other demographic data. Under a section inquiring about a client's age, race, and so on, you could ask the client to self-identify gender and sexual orientation in the following manner:

The best practice is to incorporate questions about gender identity and sexual orientation into your standard intake form and allow clients to self-identify.

case. The harassment he suffered and his employer's failure to take corrective action were good cause to quit the job. His seemingly voluntary termination of employment was a constructive discharge. Had the client been asked about his sexual orientation up front, the advocate could have explored whether the client was discriminated against at work and developed a legal theory at a much earlier phase of the case. Getting this information early not only helps the advocate develop a more coherent legal theory of the case but also can matter in cases where a deadline to file is quickly approaching.

Questions about sexual orientation may also inform the type of investigation needed for the case. Take the above example. If the employer denied having knowledge about

Inquiring about a client's gender identity opens up a discussion about strategies for preventing discrimination. For a transgender client, you may need to explore whether the client has identity documents that align with the client's gender identity and lived name. This may lead to additional legal counseling around options and strategies for presenting the client's identity before administrative agencies and courts.

A client's gender identity may also lead the advocate to advise the client to obtain a court-ordered legal name and gender change. Many transgender clients are not aware of the legal requirements for obtaining such changes. Instead many suffer harassment and "outings" in their daily transactions with the world because their identity documents do not contain

Gender (check all and any that apply):

I consider myself:

- Male
 Female
 Transgender male
 Transgender female

¹¹

["Transgender" means a person whose gender identity is different from the gender assigned at birth.]

Sexual Orientation:

I consider myself:

- Straight/Heterosexual
 Bisexual
 Gay
 Lesbian

¹¹ This blank space may be used by a client to self-identify however the client chooses.

By giving clients the opportunity to self-identify sexual orientation and gender, we open up an attorney-client relationship that allows for a more effective investigation, thorough counseling, and impactful advocacy strategy. By asking clients to self-identify sexual orientation and gender, we can better serve them.

INTAKE PRACTICE TIPS. The following are practical tips for respectful and helpful intake communication.

1. ASK ABOUT A CLIENT’S SEXUAL ORIENTATION OR GENDER IDENTITY JUST AS YOU WOULD ASK ANY OTHER QUESTIONS ABOUT THE CLIENT’S LIFE OR IDENTITY.

When collecting information from a client, include questions about the client’s sexual orientation and gender identity, along with questions about other background characteristics.

Do not create a stigma when asking these questions by stating that the questions are “personal questions” or may be “sensitive.” Telling a client that questions about sexual orientation or gender identity are going to be too personal or sensitive sends the message that there is something wrong with being LGBT or that you are uncomfortable with LGBT clients. In reality, your entire intake sheet may involve personal or sensitive questions. Questions about a client’s race, income, citizenship, and experience with domestic violence, or other similar questions, are all personal and sensitive in nature. But saying they are so does not help a client share this information with you. Instead, at intake’s very beginning, let the client know that the client’s information will be kept confidential and is to be used for purposes of providing needed services, and then make sure that that you keep the information confidential according to your organization’s protocol.

2. USE LANGUAGE THAT DOES NOT IMPLICITLY ASSUME THE CLIENT’S SEXUAL ORIENTATION OR GENDER IDENTITY. Using inclusive language that does not assume the gender of your client or your client’s significant other sends a message that your client can talk to you

Include a brief statement or section on your website and written outreach brochures, flyers, or other materials to highlight the organization’s inclusiveness, expertise, and concern for LGBT issues.

safely about the client’s sexual orientation or gender identity. Use such inclusive language with all clients, not just the ones whom you think may be LGBT—you cannot tell by looking at a client what the client’s sexual orientation or gender identity is. For example, ask a client “Are you in a relationship?” instead of “Do you have a boyfriend?”

3. BE PREPARED TO TALK ABOUT ISSUES OF SEXUAL ORIENTATION AND GENDER IDENTITY IN A PROFESSIONAL, NONJUDGMENTAL WAY. Whatever your intake method, be sure that you and your colleagues are prepared to talk about issues of sexual orientation and gender identity in a professional, nonjudgmental way that respects all clients at all intake stages. A client may not initially be comfortable discussing gender identity or sexual orientation with intake staff or may not realize that such information could be relevant to the client’s legal case. Some LGBT clients may disclose aspects of their sexual orientation or gender identity after the initial interview, or they may have legal issues that require staff to ask further questions about identity, family life, or medical history and needs. Being prepared to ask about and receive this information without making assumptions about a client’s sexual orientation or gender identity at the outset, and being able to talk with a client about the client’s options without judgment, are ways to maintain a respectful and professional environment for LGBT clients.¹²

While understanding the basic terminology related to sexual orientation and gender identity, you must allow each client to describe the client’s own identity even if the

term that the client uses may not seem to match your understanding of the term. For example, a woman who is in a relationship with another woman may identify as gay instead of lesbian, or she may identify as bisexual. Persons can identify as transgender regardless of how they express their gender and whether or not they have had any surgery or medical treatment. We do not need to inquire into a client’s life, dating practices, or medical history to understand how the client self-identifies—all we need to know is which terms the client wishes to use.

Clients may also identify as queer, gender-queer, or by other terms you might not commonly use or hear. If you work with clients in other languages, you should connect with native speakers of those languages who work with the LGBT community to find out what terms are considered appropriate and respectful.

4. BE PREPARED TO GIVE A CLEAR EXPLANATION IF A CLIENT ASKS WHY YOU ARE ASKING ABOUT SEXUAL ORIENTATION AND GENDER IDENTITY.

If the client does ask why you are inquiring about gender identity and sexual orientation, you can explain that you serve a diverse community and want to do a better job of serving the community. You can also note that you are looking for ways to improve your outreach and services to the LGBT community and that a person’s gender identity or sexual orientation might have some legal relevance to certain claims. You can explain to the client that giving this information may help you decide on the best strategies and legal theories and helps you avoid making decisions or recommendations based on assumptions.

¹² For more detailed best practices on how to ask people about their sexual orientation especially, see [Sexual Minority Assessment Research Team \(SMART\), Williams Institute, Best Practices for Asking Questions about Sexual Orientation on Surveys](#) (Nov. 2009).

from your organization as a speaker. Legal services organizations could also offer to do free legal clinics for these groups on specific issues such as advance planning documents and perhaps even co-locate these services within the centers on an ongoing basis. You may also consider asking these organizations if they'd be willing to list your legal services organization as a legal resource on their website and if possible, provide referral information to their social services staff, and ask permission to leave informational materials in common spaces or with program staff. Another way to reach an older LGBT population would be to advertise in local LGBT publications, especially those that might be read by an older audience. In your outreach and advertising of your intake process and services, consider explicitly naming issues around LGBT seniors as a topic your organization works on. This specificity helps create an environment even prior to the intake process that welcomes LGBT older adults to seek services. You may also reach out to a local senior center, meal program, and adult day health care center staff about your services and emphasize that you have expertise in the legal issues facing LGBT older adults. Finally, if your community has a Pride event, and there are contingents of older people participating, you may think about setting up an information booth.

Intake Process

The intake process must be both comprehensive and culturally competent in order to best serve low-income LGBT seniors. Regardless of the legal issue the client presents, intake questions should be comprehensive so as to discover hidden legal issues an individual might be facing that require action. Cultural competence is also important in order to build trust between attorney and client. There are a few basic best practices to follow. Gender identity or sexual orientation should never be assumed. It's common, particularly when talking to an older person, to assume heterosexuality. Providing culturally competent services includes not making assumptions about people's sexuality regardless of how they "present" or their age. Review call scripts with an eye toward inclusive language and ask questions about sexual orientation and gender identity neutrally and factually.²⁶ An example of inclusive language is to ask if someone has a spouse, partner, or significant other. Look over forms to ensure that they include inclusive language, such as a blank space for gender identity, rather than two check boxes for Male and Female. If a person seems uncomfortable with any of your questions, move on.²⁷ After you have developed a relationship, and if they feel they can trust you, they may come back to the question later.

When asking sensitive questions, emphasize that that the information you're gathering is subject to attorney client privilege. The information you gather could be used to provide broader help to the individual in addition to the problem they are presenting to you, and may even be used to identify systemic issues affecting similarly situated clients. Keep in mind that because many initial intakes are conducted by telephone, you may not always be able to gauge body language and other in-person visual cues, so consider preparing more open-ended questions that help reveal other unmet legal needs and provide you with more audio cues about your client.

²⁶ *Id.*

²⁷ *Id.*

The information may also prompt you to refer the individual for further help. For example, a person may simply be asking for help with legal name change documents. But asking questions about income, health insurance, or living situation could lead you to discover that the person qualifies for SSI but doesn't know it, or needs to get on Medicaid, or is at risk of eviction. If your legal services program does not offer advice or representation with housing or benefits, you could then refer the individual to an organization with expertise in those areas.

Welcoming Environment

It is important to make your organization affirmatively welcoming to LGBT older adults, rather than simply neutral. There are a few simple ways to ensure that LGBT older adults know that they've arrived in a place that can serve them sensitively. Visual cues such as rainbow flags, or Pride stickers or posters are one way. If you have marketing materials or posters with photos of people displayed, you should ensure that the people pictured show a diverse spectrum, not just of race, but also show same-sex couples, and diversity of gender presentation.²⁸ Flyers that advertise senior centers that provide services aimed at LGBT older adults in your community can also signal that your organization is aware of this population and the challenges that it faces. Likewise, educational materials that include legal information specific to the LGBT older adults, such as the information produced by the National Resource Center on LGBT Aging, can serve as additional cues. Restrooms should also be well-signed, making it clear that they are for all genders.²⁹ Another crucial component of a welcoming environment is to ensure that you are affirmatively welcoming to LGBT older adults in a way that is visible to other clients to signal to both LGBT and non-LGBT clients that any disrespect toward LGBT people is unacceptable.

Cultural Competency

The fear of not being welcomed or understood can prevent LGBT elders from seeking help when they need it. Area Agencies on Aging report that when staff have received some form of LGBT cultural competency training, they were twice as likely to receive requests of help from LGBT individuals and three times more likely to receive requests from transgender individuals.³⁰ Cultural competency is a broad term that can be effectuated through many different practices, but the basic outcome is that it signals that you have an understanding of the unique issues, concerns, experiences, and history of a group. Legal organizations that seek to serve LGBT elders should have staff undergo a comprehensive training in cultural competency. And part of that training could include building an understanding that LGBT older adults have lived through years of discrimination and stigma, and may feel fearful or apprehensive about seeking help.³¹ A few specific best practices are also critical. In addition to having inclusive language on intake forms, staff should

28 Services and Advocacy for GLBT Elders, *Inclusive Services for LGBT Older Adults: A Practical Guide to Creating Welcoming Agencies*, available at <https://issuu.com/lgbtagingcenter/docs/nrcinclusiveservicesguide2012/28?e=2766558/5225381>.

29 Services and Advocacy for GLBT Elders (SAGE) & National Center for Transgender Equality, *Improving the Lives of Transgender Older Adults*, available at <http://issuu.com/diverseelders/docs/transagingpolicyreportfull/33?e=6085256/1938916>.

30 Services and Advocacy for GLBT Elders, *Cultural Competence*, available at <https://www.sageusa.org/issues/cultural.cfm>.

31 Services and Advocacy for GLBT Elders, *Inclusive Services for LGBT Older Adults: A Practical Guide to Creating Welcoming Agencies*, available at <https://issuu.com/lgbtagingcenter/docs/nrcinclusiveservicesguide2012/28?e=2766558/5225381>.



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Int. No. 552-A

By Council Members Dromm, Johnson, Menchaca, Mendez, Torres, Van Bramer, Chin, Constantinides, Lander, Levine, Cohen, Rodriguez, Vallone, Ferreras-Copeland, Koslowitz, Lancman, Rosenthal, Levin, Reynoso, Kallos, Cabrera, Miller, Richards, Rose, Vacca, Williams, Cumbo, Cornegy, Gentile, Palma, Crowley, Espinal, Maisel, Dickens, Barron, Ulrich and the Public Advocate (Ms. James)

A Local Law to amend the New York city charter, in relation to the collection of data regarding sexual orientation and gender identity

Be it enacted by the Council as follows:

Section 1. Legislative Findings. The Council finds that it is unclear how many individuals who identify themselves as lesbian, gay, bisexual, transgender and questioning (LGBTQ) receive services from various New York City agencies. It is the intent of the Council, therefore, to ensure that City agencies capture this information and utilize it to tailor programs to best serve the LGBTQ community. Accordingly, the Council finds that it is necessary for City agencies to issue forms to capture data on individuals' sexual orientation and gender identity. Since gender identity alone is not always an indicator of whether a person is transgender, cisgender, or intersex, the Council also finds that such forms should include questions to this effect. Although the data collected by City agencies may not initially present a fully accurate representation of New York City's LGBTQ and gender non-conforming communities, over time the normalization of the collection of such data will lead to more accurate statistics regarding these communities. As the stigma against the LGBTQ community gradually erodes, evidenced by the fact that the U.S. Census began collecting data on married same-sex households in 2010, individuals are increasingly willing to identify themselves as LGBTQ.

§ 2. Section 15 of chapter 1 of the New York city charter is amended by adding a new subdivision k to read as follows:

k. 1. The department of social services, the administration for children's services, the department of homeless services, the department of health and mental hygiene, the department for the aging, the department for youth and community development, the department of education and any other agencies designated by the mayor that directly or by contract collect demographic information via form documents from city residents seeking social services shall provide all persons seeking such services who are either at least 14 years old or identify as the heads of their own households with a standardized, anonymous and voluntary demographics information survey form that contains questions regarding sexual orientation, including heterosexual, lesbian, gay, bisexual or asexual status or other, with an option to write in a response and gender identity, including transgender, cisgender or intersex status or other, with an option to write in a response.

2. Such survey form shall be created by the office of operations and office of immigrant affairs and may be updated as deemed necessary by those agencies based on changing demographics.

3. No later than 60 days after the effective date of this local law, the office of operations shall submit to the mayor and the speaker of the city council a plan to provide a mandatory training program and develop a manual for agency staff on how to invite persons served by such agencies to complete the survey. Such training and manual shall include, but not be limited to, the following:

(a) an overview of the categories of sexual orientation and gender identity;

(b) providing constituents the option of completing the survey in a private space and filling out any paperwork without oral guidance from city agency staff;

(c) explaining to constituents that completing the survey is voluntary;

(d) explaining to constituents that any data collected from such survey will not be connected to the individual specifically; and

(e) discussions regarding addressing constituents by their self-identified gender.

4. Beginning no later than six months after the effective date of this local law, and annually thereafter, the office of operations shall conduct a review of all forms issued by the agencies described in paragraph 1 of

this subdivision and any other agencies so designated by the mayor that: collect demographic information addressing the questions contained on the survey form, are completed by persons seeking services and contain content and/or language in relation to collecting such information that is within the administering city agency's authority to edit or amend. The office of operations shall submit to the council within 60 days of such review, a list of all forms reviewed and all forms eligible for updating, and for forms not eligible for updating an explanation of why such forms are not eligible for updating, and indicate which forms shall be updated. When practicable, when such forms are updated they shall request voluntary responses to questions about sexual orientation, including heterosexual, lesbian, gay, bisexual or asexual status, or other, and gender identity, including transgender, cisgender and intersex status or other. All forms identified as eligible for updating during the review required pursuant to this paragraph shall be updated to invite responses to questions about sexual orientation and gender identity no later than five years from the effective date of the local law that added this section. All forms not eligible for updating shall be provided in conjunction with the standardized, anonymous and voluntary demographics information survey form as established by subdivision k, paragraph 1 of this local law.

5. Beginning no later than 18 months after the effective date of this local law, and annually thereafter, the office of operations shall make available to the public data for the prior fiscal year that includes but is not limited to the total number of individuals who have identified their sexual orientation or gender identity on the survey form described in paragraph 1 of this subdivision and any forms updated pursuant to paragraph 4 of this subdivision, disaggregated by response option, agency and program. Such data shall be made available to the public through the single web portal provided for in section 23-502 of the administrative code.

6. Each agency that provides the survey form required pursuant to paragraph 1 of this subdivision shall evaluate its provision of services in consideration of the data collected pursuant to this local law and the office of operations shall submit to the council a report on any new or modified services developed by any agencies based on such data. Such report shall be submitted no earlier than 18 months after the effective date of the

local law that added this paragraph.

7. No information that is otherwise required to be reported pursuant to this section shall be reported in a manner that would violate any applicable provision of federal, state or local law relating to the privacy of information respecting students and families serviced by the New York city department of education. If any category requested contains between 1 and 5, or allows another category to be narrowed to between 1 and 5, the number shall be replaced with a symbol.

§ 3. This local law takes effect on the same date as a local law of the city of New York for the year 2016 amending the New York city charter relating to the collection of demographic data regarding ancestry and languages spoken, as proposed in introduction number 251-A, takes effect.

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