



THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S EQUAL ACCESS RULE

And the Contradiction of FR-6152

Abstract

This paper overviews the U.S. Department of Housing and Urban Development's (HUD) 2012 and 2016 Equal Access (EA) rules. Both rules seek to address discrimination in programs and shelters faced by lesbian, gay, bisexual, transgendered, and queer (LGBTQ) persons by ensuring HUD-funded programs commit to providing equal access to all communities. The writer continues to examine HUD's recently proposed HUD rule, FR-6152, which contradicts the agency's EA rules and undermines the agency's previous LGBTQ anti-discrimination efforts. The reader will learn how an administrator's ideology can drive policy making decisions and can ultimately steer a public agency contradictory to its mission and how Federal citizen participation requirements, pursuant to the Administrative Procedures Act of 1946, offers the public an opportunity to influence the rule making process.

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Public policy is driven by a desire to address both real and perceived problems facing the public. While we hope our nation's legislators and administrators act in the best interest of the community they serve, it's not always clear what intention is at the core of a policymaker's agenda. Through Thomas A. Birkland's book, *"An Introduction to the Policy Process: Theories, Concept, and Models of Public Policy Making,"* we will examine the factors leading to the U.S. Department of Housing and Urban Development's (HUD) enactment of its 2012 and 2016 Equal Access (EA) rules, which attempt to address discrimination in shelters faced by lesbian, gay, bisexual, transgendered, and queer (LGBTQ) persons who experience homelessness. This paper also analyzes a HUD rule currently under review, FR-6152, which contradicts the agency's EA rules and previous LGBTQ anti-discrimination efforts. This analysis will also illustrate how ideologically driven policy making agendas, and what Birkland calls the "black box" policy process, can redirect an agency contradictory to its mission. Furthermore, we will discuss how citizen participation requirements, pursuant to the Administrative Procedures Act of 1946, offer the public an opportunity to dramatically influence the rule making process.

As Birkland (2016) writes, policy is a government's declaration of how it will address a public problem. We witness this in HUD's actions codifying both the 2012 and 2016 EA rules. For instance, its 2012 EA Rule, titled *"Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity"*, the agency sought to address systemic discrimination against LGBTQ persons by requiring all HUD-funded programs ensure equal access to services, regardless of sexual orientation, gender identity, or marital status (Office of the Secretary, HUD, 2012). HUD again used its regulatory authority to expand upon its equal access efforts enacting the 2016 EA rule titled, *"Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs"*,

which responded to “significant violence, harassment, and discrimination” experienced by transgendered homeless persons trying to access our nation’s shelter system (Office of the Secretary, HUD, 2016).

Within the final 2016 rule, we also see the agency respond to current social environment trends, as Birkland (2016) highlights are a key input to the public policy process. In this sense, the rule shows LGBTQ persons are disproportionately impacted by homelessness; thus illustrating how equal access to shelters is crucial for this population. Additionally, due to studies uncovering systemic discrimination in shelters and knowledge of the current environment, the rule requires HUD-funded shelters and single-sex facilities to place transgendered clients in shelter beds in accordance with their gender identity. More specifically, it revised 24 CFR 5.100 to include that a person's “perceived gender identity” doesn’t always coincide with “identification in documents”, thus signaling program staff keep this detail in mind when placing someone in shelter beds and also required programs establish procedures to help create an LGBTQ-inclusive programs (Office of the Secretary, HUD, 2016). Here we witness the agency address demonstrated discrimination against the LGBTQ community by ensuring its own programs remain inclusive, discrimination free, and accessible.

Turning to its regulatory powers, HUD uses both EA rules to further align its programs with its mission. As Birkland (2016) writes, the regulatory process ensures overarching policies are effectively followed once enacted. HUD’s move to utilize their codification power to ensure accessibility for its LGBTQ communities, upholds it’s expectation as “the Nation’s housing agency” by promoting access to fair, safe, and decent housing for all, free from discrimination; a responsibility entrusted to the agency through The Fair Housing Act in 1968 (Office of the Secretary, HUD, 2012). Here we see the department’s mission in action; creating two rules that reflect elements of what Birkland (2016) described as protective regulatory policy. As Birkland states, this policy type, “is intended to protect the public at large from the negative effects of private activity” (Birkland, 2016, p 253). In this sense, the EA rules protect one of the agency’s most vulnerable beneficiaries, LGBTQ persons experiencing homelessness, from “the negative effects” (Birkland, 2016, p. 253) of discriminatory practices found in almost 30% of shelters nationwide (Office of the Secretary, HUD, 2016).

However, while HUD's mission is set forth in statutory law, we see major shifts in the agency's advocacy for LGBTQ person's with the beginning of the Trump administration in 2017. Within less than three years of the 2016 EA rule publication, the agency proposed FR-6152, currently within the Notice to Proposed Rulemaking stage. This rule would allow HUD-funded shelters to take in account, among other factors, "religious beliefs" and "the individual's sex as reflected in government documents" when determining placement in shelters (Executive Office of The President, 2019). These proposed changes greatly challenge the department's EA rules, as well as supportive guidance on LGBTQ anti-discrimination released by the department prior to 2017. This contradictory policy move is reflective of what Birkland discusses as the second definition of "agenda"; a policymaker's "underlying" intention, which could be "ideological" in nature (Birkland, 2016, p. 200). Birkland (2016) seems to elude this other view of agenda setting as part of a wider culture concerned with political conspiracies. Yet, documented actions by current HUD leadership point to a more overt plan to weaken protection for the LGBTQ community. For example, shortly after newly appointed HUD Secretary Ben Carson took office, the department removed all LGBTQ nondiscrimination guidance from its website, stopped research, and has yet to replace any materials on the subject (Street, E., 2019). Quiet, "subtle" changes like this, Birkland writes, are instances the public should be more concerned with, as they are "far less public and official nature" than the public policy process is known to be (Birkland, 2016, p. 247). These recent actions by the agency beg us to reconsider whether HUD officials are upholding their responsibility to enforce fair access to housing and services.

During a House Appropriations Subcommittee hearing, Rep. Mike Quigley questioned Sec. Carson as to whether the agency would replace the webpage and provide additional guidance on this matter. In response, Sec. Carson stated he believed not providing sub-regulatory guidance would allow "considerably more freedom", insinuating that LGBTQ interest groups "wouldn't agree with" the agency's direction (Street, E., 2019). The Secretary's response is indicative of how governments can also choose what "not to do" in the public policy sphere by not actively providing policy or guidance on a

public problem (Birkland, 2016, p. 8). Sec. Carson's refusal to provide this guidance and instead propose FR-6152 can be considered as actively choosing not to address LGBTQ housing discrimination.

Students, professionals and the public often witness the public policy process as unpredictable and unclear. Yet, with HUD's 2012 and 2016 EA rules, we observe a "stages model" of the public policy process, which has a linear approach to policy making (Birkland, 2016, p. 27). With these rules, we can easily observe the issue leading to the agenda setting phase of these policies and then the course to the rules' enactment, supported with transparent research and data. On the other hand, the reason for the agency's proposal of FR-6152 remains unclear. It is unknown whether a specific problem or existence data led to the proposal of the rule and whether the intention of FR-6152 is in alignment with HUD's mission to combat housing discrimination. As stated, the agency's mission is to promote fair and accessible housing for all, yet FR-6152 seems to support increasing barriers to accessing appropriate shelter and promotes the use of personal beliefs when determining how to serve LGBTQ persons. This confusing and uncertain course is what Birkland (2016) writes about as the "black box" public policy process. This version of policymaking leaves the public uncertain as to what exactly informed a policy change or agenda. Without much more information, in conjunction with the agency's removal of LGBTQ related content in general, the proposal of FR-6152 begs the question as to whether it is supporting a particular issue, such as the protection of religious rights. As well as whether its utilizing the new administration as "an opportunity to advocate" for it (Birkland, 2016, p. 285). Unfortunately, we won't know more details about FR-6152 until it progresses along the federal rulemaking process.

A key Federal policy tool to remember, as FR-6152 moves along this process, is the existence of the Administrative Procedures Act (APA) of 1946 (Birkland, 2016, p. 261). APA is a "procedural policy" ensuring the Federal government provides the public with an opportunity to review and comment on proposed regulations (Birkland, 2016, p. 261). As he points out, APA is an important rule when proposed regulation takes on a "controversial" nature (Birkland, 2016, p. 262). Considering the overwhelming media coverage FR-6152 has faced thus far, as well as how it seems to conflict with HUD's mission, the rule may receive several comments opposing it. Yet, as Birkland (2016) continues to

write, APA allows for all of the public to voice their opinion; both “regulated interests and the people supportive of regulation” (Birkland, 2016, p. 262). Therefore, in the case of FR-6152, we can also expect comments from both religious rights and LGBTQ interest groups.

HUD’s statutory responsibility to enforce fair housing and help create inclusive communities is at the very fabric of its 2012 and 2016 EA rules, yet we witness a drastic redirection of the agency’s mission with the proposal of FR-6152. This move solicits the question as to what the motives of the agency’s current leadership are. While, our federal rulemaking procedures allow for a transparent policymaking process, it doesn’t always pinpoint a legislator or administrator’s policy intention or provide clear insight into the black box of policymaking. Interest groups and concerned citizens will need to wait until FR-6152 is published in the Federal Register to gain a better understanding of the reasoning behind it and the overall impact on the LGBTQ community. We can only wait and see whether the public, through the APA process, can steer HUD back to what it’s been charged to do: create inclusive communities utilizing “housing as a platform for improving quality of life” and “communities free from discrimination...” (HUD, Mission, 2019).

References

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