

**Community Associations and Transgender Discrimination**  
by  
**Susan B. Tarley, Esquire, CCAL®<sup>1</sup>**

Transgender discrimination is not a new topic but it has become more visible via recent news stories about laws pertaining to the ability of transgender people to use the bathroom that aligns with their gender identity.<sup>2</sup> Although the bathroom issue seems to generate strong feelings within communities, there are other areas of discrimination experienced by transgender persons that are being addressed by the enactment of state laws to protect transgender persons and policies of governmental agencies that prohibit discrimination against transgender persons. This paper will review the current status of protections for transgender persons with respect to housing, and will further discuss the effect that such laws have on community associations.

**Transgender People**

It is estimated that there are more than one million four hundred thousand transgender adults living in the United States ranging in age from 18 years old to 65 plus years of age.<sup>3</sup> The transgender population in the United States is racially and ethnically very diverse with 55% identifying as White, 16% as African-American or Black, 21% as Hispanic or Latino and 8% as another race or ethnicity.<sup>4</sup>

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<sup>1</sup> I acknowledge the assistance of William and Mary Law student Allison Schoettler for her assistance in some of the research and preparation of this paper.

<sup>2</sup> Robert Barnes and Moriah Balingit, "Supreme Court takes up school bathroom rules for transgender students." *Washington Post*. 28 October 2016 Published.  
[https://www.washingtonpost.com/politics/courts\\_law/supreme-court-takes-up-school-bathroom-rules-for-transgender-students/2016/10/28/0eece4ea-917f-11e6-a6a3-d50061aa9fae\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-takes-up-school-bathroom-rules-for-transgender-students/2016/10/28/0eece4ea-917f-11e6-a6a3-d50061aa9fae_story.html)  
28 October 2016 Accessed.

<sup>3</sup> Andrew R. Flores, Jody L. Herman, Gary J. Gates, and Taylor N. T. Brown HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? *The Williams Institute*, June, 2016.

<sup>4</sup> Andrew R. Flores, Jody L. Herman, Gary J. Gates, and Taylor N. T. Brown RACE AND ETHNICITY OF ADULTS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES, *The Williams Institute*, October, 2016.

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Terminology<sup>5</sup> is an important factor in understanding and respectfully discussing transgender discrimination, as the use of certain terms or phrases is offensive and insensitive and often creates the hostility typically linked to discrimination. A transgender person is an individual whose gender identity, expression, or behavior is different from their assigned gender at birth.<sup>6</sup> “Transgender” does not refer to a person’s sexual orientation.<sup>7</sup> Rather, a broad understanding of the term “transgender” refers a person acting outside the stereotypical gender norms of their biological sex.<sup>8</sup> The term is usually used as an adjective; using it as a noun is typically seen as disrespectful.

“Female-to-male” (“FTM”) or “transgender man” refers to a person assigned a female when born but who identifies as a male. “Male-to-female” (“MTF”) or “transgender woman” refers to a person assigned a male when born but who identifies as a female. “Transsexual,” on the other

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<sup>5</sup> All terminology from this section came from *Transgender Terminology*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Jan. 15, 2014), [http://www.transequality.org/issues/resources/transgenderterminology?gclid=CjwKEAjwm\\_KBRDx5o-sxq6ouXASJAC7TsFLBsChYCFIaoSCTFU\\_uJsFe9DEJvgw\\_DxcVm73PdiLRoCkKbw\\_wcB](http://www.transequality.org/issues/resources/transgenderterminology?gclid=CjwKEAjwm_KBRDx5o-sxq6ouXASJAC7TsFLBsChYCFIaoSCTFU_uJsFe9DEJvgw_DxcVm73PdiLRoCkKbw_wcB)

<sup>6</sup> *Terminology: Transgender*, GENDER DIVERSITY, <http://www.genderdiversity.org/resources/terminology/#transgender> (last visited Oct. 4, 2016). “Gender” and “sex” are different concepts. A person’s sex refers to his or her biological or anatomical characteristics. Kari J. Carter, Note, *The Best Interest Test and Child Custody: Why Transgender Should Not be a Factor in Custody Determinations*, 16 HEALTH MATRIX 209, 218 (2006). Gender, however, refers to cultural characteristics associated with being a man or a woman. *Id.*

<sup>7</sup> *Terminology: Transgender*, GENDER DIVERSITY, <http://www.genderdiversity.org/resources/terminology/#transgender> (last visited Oct. 4, 2016).

<sup>8</sup> *Id.*; Carter, *supra* note 1, at 218. The term “transgender” is a broad definition. *See id.* at 219 (explaining the definition “includes transsexual people (who may or may not pursue medical treatments to change their bodies), cross-dressers, “drag queens,” “drag kings,” and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical”).

hand, is an older term generally not used anymore. It refers to a person who has a gender identity different from their assigned sex and looks to transition FTM or MTF.

As mentioned earlier, “sexual orientation” and “gender identity” are two different concepts. A person’s “sexual orientation” describes the attraction a person has to members of the opposite sex or the same sex. Related terms include gay, lesbian, bisexual, and heterosexual. “Gender Identity,” on the other hand, refers to a person’s sense of his or her own gender. A person’s gender identity may translate into his or her gender expression or how he or she represents his or her gender identity to others. A person whose gender expression differs from social gender norms is considered “gender non-conforming.”

When a person “transitions,” they begin living as their identified gender instead of their assigned gender. This may involve a name change and changing how one dresses and grooms themselves, and it may or may not include other medical or legal changes.

While person may identify entirely with one gender, a “genderqueer” person does not identify entirely as either male or female. Similarly, a “bi-gendered” person has a gender identity encompassing both male and female genders.

A transgender person is different than a cross-dresser. A “cross-dresser” wears clothes traditionally worn by the opposite gender, but they do not intend to live full time as that gender. Similarly, “drag queens” and “drag kings” dress as women and men, respectively, to entertain others at various events. Some people use the term “drag queen” in a derogatory manner to refer to transgender people.

Transgender people experience various forms of discrimination, as evidenced in the National Transgender Discrimination Survey.<sup>9</sup> For example:

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<sup>9</sup> *National Transgender Discrimination Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (2011), <http://www.transequality.org/issues/national-transgender-discrimination->

- 26% of transgender people lost a job due to gender identity
- 50% of transgender people have been harassed on the job due to gender identity
- 19% of transgender people reported having been refused a home or apartment because of their gender identity/expression.
- 11% reported being evicted because of their gender identity/expression.
- 78% of transgender students have been harassed or assaulted due to gender identity.
- 53% of transgender people have been verbally harassed or disrespected in a public accommodation, which includes transportation, hotels, airports, buses, and government agencies.

Transgender people seek to “be treated with the same dignity and respect as anyone else and be able to live, *and be respected*, according to their gender identity.”<sup>10</sup> People should extend the same courtesies to transgender people they would extend to non-transgender people.<sup>11</sup> People should also respect the name and pronoun a transgender person chooses to use, even if it is different from his or her birth name or gender.<sup>12</sup> People should not inquire into his or her “real name,” or reveal the person’s birth name, if known.<sup>13</sup> Because gender identity is separate from sexual orientation, people should also not assume all transgender people are a specific sexual orientation.<sup>14</sup>

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[survey](#). NOTE: A new survey was conducted in 2015 with 27,000 respondents. Results are expected to be published in late 2016. Once published, this paper will be updated.

<sup>10</sup> *Frequently Asked Questions about Transgender People*, National Center for Transgender Equality

<sup>11</sup> *Tips for Allies of Transgender People*, GLADD, <http://www.glaad.org/transgender/allies> (last visited Oct. 25, 2016).

<sup>12</sup> *Transgender FAQ*, GLADD, <http://www.glaad.org/transgender/transfaq> (last visited Oct. 25, 2016).

<sup>13</sup> *Tips for Allies of Transgender People*, GLADD, <http://www.glaad.org/transgender/allies> (last visited Oct. 25, 2016).

<sup>14</sup> *Id.*

## Housing Laws protecting Transgender Person

Transgender people are protected in access to housing through the federal, state, and local laws. The three primary sources of fair housing protection are the federal Fair Housing Act, the program regulations enacted by HUD, and various state and local non-discrimination laws.<sup>15</sup> The protections relate to discrimination associated with housing sales and rentals, participating in transitional and supporting housing programs, accessing homeless shelters, and applying and receiving federally-insured mortgage loans.<sup>16</sup>

### *Fair Housing Act*

The Fair Housing Act (the “Act”) was enacted in 1968 as Title VIII of the Civil Rights Act of 1968. The Act states “ It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>17</sup> The Act has been a work in progress since its enactment. Additional protected classes have been added, cases have given us interpretations and rulings on the applicability and meaning of certain provisions in the Act, and governmental agencies have published guidance and rulings.

The Act applies to all dwellings unless the dwelling is exempt under the Act.<sup>18</sup> A dwelling is defined as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.”<sup>19</sup>

The exemptions apply to (i) the sale or rental of single-family homes if the home is sold or

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<sup>15</sup> *Know Your Rights: Fair Housing and Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (March 2012), [http://www.transequality.org/sites/default/files/docs/kyr/FairHousing\\_March2012.pdf](http://www.transequality.org/sites/default/files/docs/kyr/FairHousing_March2012.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> 42 U.S.C. 3601.

<sup>18</sup> 42 U.S.C. 3603.

<sup>19</sup> 42 U.S.C. 3602(b).

rented without the use of a real estate broker, agent or salesperson, and without the use of any advertising; and (ii) rooms or units in dwellings that contain living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.<sup>20</sup>

The actions that are prohibited by the Act include the following:<sup>21</sup>

- To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
- To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
- To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
- To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
- For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status,

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<sup>20</sup> 42 U.S.C. 3603(b).

<sup>21</sup> 42 U.S.C. 3604.

or national origin.

- It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

The Act prohibits discrimination based on race, color, religion, sex, national origin, familial status or disability. States and localities have also enacted laws and ordinances that prohibit discrimination in housing based on additional factors, such as source of income, sexual orientation, gender identity, age, and marital status.

#### *State Specific*

Presently, twenty states and the District of Columbia have laws clearly protecting against gender identity and sexual orientation discrimination,<sup>22</sup> three states have laws protecting against sex and sexual orientation discrimination,<sup>23</sup> and twenty-eight states protecting against sex discrimination only.<sup>24</sup>

The laws vary between states. For example, in California, a person owning housing accommodations cannot discriminate against a person based on “gender, gender identity, gender expression, [or] sexual orientation,” among other factors.<sup>25</sup> Maryland prohibits people from

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<sup>22</sup> California, Connecticut, Colorado, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Vermont, Washington, and Washington, D.C. *Map: State Nondiscrimination Laws*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (Jan. 30, 2015), <http://www.transequality.org/issues/resources/map-state-nondiscrimination-laws>.

<sup>23</sup> New Hampshire, New York, and Wisconsin. *Id.*

<sup>24</sup> Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming. *Id.*

<sup>25</sup> Cal. Gov’t Code § 12995(a) (West 2016).

refusing to sell or rent to a person based on a prospective tenant's or buyer's gender identity or sexual orientation.<sup>26</sup> It also prohibits discrimination through the "the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection with the sale or rental of a dwelling."<sup>27</sup> The Virginia Fair Housing Act protects Virginia state citizens "regardless of race, color, religion, national origin, sex, elderliness, familial status, or handicap" and prohibits housing discrimination of any people within those groups of people.<sup>28</sup> The statute does not include specific language prohibiting discrimination on the basis of sexual orientation or gender identity.<sup>29</sup>

### *Governmental Agencies*

The U.S. Department of Housing and Urban Development (HUD) has issued a statement explaining, while "[t]he Fair Housing Act does not specifically include sexual orientation and gender identity as prohibited bases[,] . . . discrimination against a lesbian, gay, bisexual, or transgender (LGBT) person may be covered by the Fair Housing Act if it is based on non-conformity with gender stereotypes."<sup>30</sup> Further, any lenders receiving FHA insurance must follow HUD's Equal Access Rule, which mandates people must receive equal access to HUD programs regardless of his or her "actual perceived sexual orientation, gender identity, or marital status."<sup>31</sup> HUD has provided examples of what constitutes discrimination:

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<sup>26</sup> Md. Code Ann., State Gov't § 20-705(1) (West 2016).

<sup>27</sup> *Id.* § 20-705(2).

<sup>28</sup> VA. CODE § 36.96.1 (2016).

<sup>29</sup> *Id.*

<sup>30</sup> *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families*, U.S. DEP'T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/LGBT\\_Housing\\_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination) (last visited Oct. 11, 2016).

<sup>31</sup> *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families*, U.S. DEP'T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/LGBT\\_Housing\\_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination) (last visited Oct. 11, 2016).

- “A transgender woman is asked by the owner of her apartment building not to dress in women’s clothing in the common areas of the property. This is a violation of the Fair Housing Act’s prohibition of sex discrimination.
- A property manager refuses to rent an apartment to a prospective tenant who is transgender. If the housing denial is because of the prospective tenant's non-conformity with gender stereotypes, it constitutes illegal discrimination on the basis of sex under the Fair Housing Act.
- A female prospective tenant alleges that a landlord refused to rent to her because she wears masculine clothes and engages in other physical expressions that are stereotypically male. If true, this may violate the Fair Housing Act’s prohibition of discrimination based on sex.
- An underwriter for an FHA-insured lender is reviewing a loan application by two males; both incomes are being used as the basis for the applicants’ credit worthiness. The underwriter assumes the applicants are a gay couple and, as a result, denies the application despite the fact that the applicants meet all requirements for the loan. This violates HUD’s Equal Access Rule, which prohibits FHA-insured lenders from taking actual or perceived sexual orientation into consideration in determining adequacy of an applicant’s income.”<sup>32</sup>

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<sup>32</sup> *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families*, U.S. DEP’T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/LGBT\\_Housing\\_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination) (last visited Oct. 11, 2016).

This includes a ban on asking about a tenant's or applicant's sexual orientation or gender identity.<sup>33</sup> HUD also requires grantees and those participating in HUD programs to comply with any state and local non-discrimination policies, including any policies that relate to gender identity and sexual orientation.<sup>34</sup>

## Important Cases and Regulations/Trends

### *a. Title VII*

Title VII of the Civil Rights Act prohibits discrimination “because of sex” or “on the basis of sex.”<sup>35</sup> That prohibition goes beyond discrimination due to a person's gender.<sup>36</sup> While it explicitly contemplates protecting women against discrimination when pregnant, the provision also does not limit the term to pregnancy situations only.<sup>37</sup>

The Supreme Court has held that discrimination in employment that is based on sexual stereotypes is unlawful discrimination based on sex under Title VII finding that “[i]n the...context<sup>38</sup> of sex stereotyping, an employer who acts on the basis of a belief that women cannot be aggressive, or that she must not be, has acted on the basis of gender.”

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<sup>33</sup> *Maps of State Laws & Policies*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (last visited Oct. 25, 2016) (under “Select An Issue,” choose “Statewide Housing Laws and Policies”).

<sup>34</sup> *Id.*

<sup>35</sup> 42 U.S.C.A. § 2000e.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

The Supreme Court has recognized the breadth of this definition, explaining, for example, “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”<sup>39</sup> The Equal Employment Opportunity Commission (EEOC) has also ruled that the plain language of the Civil Rights Act protects transgender people, and discrimination of a transgender person based on gender identity constitutes sex discrimination prohibited by Title VII of the Civil Rights Act.<sup>40</sup>

*b. Title IX*

Title IX of the Education Amendment of 1972 prohibits sex discrimination in educational activities and programs receiving federal financial assistance.<sup>41</sup> Courts interpret the term “on the basis of sex” in Title IX in the same manner they do that same term in Title VII.<sup>42</sup>

Bathrooms serve as one example of transgender discrimination currently being argued under Title IX. Some federal agencies have already responded to this issue. For example, the Occupational Health and Safety Administration has recognized that gender identity “is an intrinsic part of each person’s identity and everyday life,” and that restricting bathroom use may result in

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<sup>39</sup> *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.3 (1978).

<sup>40</sup> *Mia Macy*, EEOC DOC 0120120821, 2012 WL 1435995, at \*11-12 (Apr. 20, 2012).

<sup>41</sup> 20 U.S.C.A. § 1681.

<sup>42</sup> *See, e.g., Miles v. N.Y.U.*, 979 F. Supp. 248, 249 n.4 (S.D.N.Y. 1997) (“The parties agree that it is now established that the Title IX term “on the basis of sex” is interpreted in the same manner as similar language in Title VII.”); *Burrow By & Through Burrow v. Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (“With respect to the other necessary elements for a claim of peer sexual harassment, the court finds . . . the standards developed under Title VII for hostile employment environment sexual harassment are appropriate.”).

physical injuries and illness.<sup>43</sup> A number of states now require employers to allow bathroom use on the basis of gender identity, and the agency encourages all employers to allow employees to use bathrooms in conformance with his or her gender identity.<sup>44</sup>

In the education context, however, this answer has not been so clear. *G.G. v. Gloucester County School Board of Gloucester, Virginia*, argued in 2016, is the first time a federal appeals court has addressed the question of whether bathroom restrictions for a transgender student violates Title IX. A transgender high school student challenged the Gloucester County School Board's policy requiring students to use bathrooms consistent with their birth sex.<sup>45</sup> For transgender students, the School Board has a policy requiring them to use an "alternative private" restroom facility. The lower courts denied the student's request to stop the School Board from following that policy, so the student appealed. The Fourth Circuit held that the court did not appropriately defer to the Department of Education's guidance on allowing students to use bathrooms that accord with their gender identity and allowed the Title IX claim to move forward.<sup>46</sup> However, the School Board appealed the Fourth Circuit's ruling to the Supreme Court, which has granted a *writ of certiorari* to hear the case.<sup>47</sup>

*c. Housing*

States and municipalities are increasingly protecting transgender people against housing discrimination. In addition to the state bans on housing discrimination discussed above, there are 240 local jurisdictions banning discrimination based on sexual orientation in employment,

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<sup>43</sup> *Best Practices: A Guide to Restroom Access for Transgender Workers*, OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION (2015), <https://www.osha.gov/Publications/OSHA3795.pdf>.

<sup>44</sup> *Id.*

<sup>45</sup> *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).

<sup>46</sup> *Id.* at 714.

<sup>47</sup> *Gloucester Cty. Sch. Bd. V. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016).

housing, and public accommodations.<sup>48</sup> Of these 240, sixty prohibit discrimination on the basis of gender expression or gender identity.<sup>49</sup> Courts have also recognized the rights of transgender people not to be discriminated against in housing discrimination cases.<sup>50</sup>

These protections do not only apply to denying a renter’s application or a refusing to sell a house to a transgender person. Rather, housing discrimination laws also increasingly protect against requiring different terms or conditions of the sale or rental, denying property insurance, and harassing or coercing people from interfering with their use of their fair housing rights.<sup>51</sup>

## **Community Associations**

### *Applicability*

Although the Act does not specifically include the words “gender identity” or “gender expression”, community associations can violate federal and state anti-discrimination laws that are found to be applicable in the context of gender identity or gender expression.<sup>52</sup> It is clear that community associations in states or localities that have enacted laws or ordinances prohibiting discrimination based on gender identity or gender expression must comply with the applicable law or ordinance. Based on the analysis of what constitutes sex discrimination in Title VI and Title IX

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<sup>48</sup> *Housing for LGBTQ People: What You Need to Know About Property Ownership and Discrimination*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/housing-for-lgbt-people-what-you-need-to-know-about-property-ownership-and> (last visited Oct. 25, 2016).

<sup>49</sup> *Id.*

<sup>50</sup> *Hispanic Aids Forum v. Estate of Bruno*, 839 N.Y.S.2d 691, 696 (Sup. Ct. 2007) (allowing a claim of housing discrimination to move forward because the state statute protecting against sex discrimination was not “based on such person's own sex. Such statute should be interpreted liberally, so as to provide protection to those individuals or “group of persons” who associate with and provide needed services to segments of the population that commonly suffer discrimination.”).

<sup>51</sup> *Know Your Rights: Fair Housing and Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (March 2012), [http://www.transequality.org/sites/default/files/docs/kyr/FairHousing\\_March2012.pdf](http://www.transequality.org/sites/default/files/docs/kyr/FairHousing_March2012.pdf).

<sup>52</sup> *See Will Van Vactor, HOAs and Housing or Enforcement Discrimination*, LAWYERS.COM <http://real-estate.lawyers.com/homeowners-association-law/hoas-and-discrimination.html> (last visited Oct. 25, 2016).

cases and HUD's Equal Access Rule, we are trending towards the applicability of sex discrimination to discrimination against transgender persons in housing cases. Arguably, sex discrimination encompasses discrimination based on gender identity and gender expression and we are only waiting on a case to explicitly say so.

The crux of the issue for community associations when dealing with discrimination on factors other than disability is whether the action complained of is discrimination under the Act. A number of courts in the past have found violations of the Act to be limited to services that are related to the sale or rental of a dwelling, making any post-acquisition discrimination in providing services under 42 U.S.C. 3604(b) a non-issue under the Act.<sup>53</sup> However, the Halprin case recognized a cause of action against the defendant, homeowners' association under 42 U.S.C 3617 which provides: "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606." Recent cases have taken a different turn by analyzing the post-acquisition services of a community association as being an integral part of the owner's purchase of their dwelling.<sup>54</sup>

Courts have held that community association regulations regarding use of community facilities can violate the Act. A Florida federal district court found that "...the rights and privileges associated with membership within the community" are "part and parcel of the purchase of a home within a planned community" and "discriminatory conduct which deprives [members] of

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<sup>53</sup> See, e.g., *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327 (7th Cir. 2004) (a suit against a homeowners' association for allegations of religious discrimination);

<sup>54</sup> *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (allowing plaintiffs to proceed with religious discrimination claims against a homeowners' association under an intentional discrimination theory).

exercising those rights would be actionable un the FHA.”<sup>55</sup> A California federal district court held that a community association’s rules prohibiting children from using two of the community’s pools were “facially discriminatory” because they “effectively confine[d] children to the family section and prohibit[d] them from enjoying the privileges accorded to adults living in the adult section.”<sup>56</sup>

Similarly, a HUD ruling held a Florida homeowners’ association ban on the use of the community’s pool by children under the age of 5 and a restriction on the time older children could use the pool were discriminatory in violation of the Fair Housing Act.<sup>57</sup>

Thus, in light of the ever-increasing application of federal and state anti-discrimination laws to community associations and the cumulative trend of states enacting laws to protect transgender rights, community associations should consider proactively implementing policies to accommodate transgender people in their communities.

#### *Best Practices for Community Associations*

Implementing a comprehensive policy against discrimination or expanding on a current policy is critical to protecting members of the community and the community association. Likewise, educating board members and community members on what constitutes discriminatory conduct and why it is important is a necessity.

A policy for a community association should address all services provided by the community association and all actions taken by the community association. The policy should include information on the Act, applicable state law and any local ordinance, citing clearly the protected classes and the prohibited conduct. Transgender persons should be included as a

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<sup>55</sup> See, e.g. *Savanna Club Worship Service, Inc. v. Savanna Club Homeowners’ Association, Inc.*, 456 F.Supp.2d 1223 ( 9th Cir. 2005)

<sup>56</sup> *Llanos v. Estate of Coehlo*, 24 F. Supp. 2d 1052, 1060 (E.D. Cal. 1998)

<sup>57</sup> *Sec’y, United States Dep’t of Hous. & Urban Dev., on Behalf of Joseph A. Labarbera, Elizabeth Labarbera, & Gerald S. Ross, Fair Housing - Fair Lending (P-H) P 25,037, 1992 WL 406531 (Oct. 15, 1992).*

protected class regardless of whether the state or locality has a specific law or ordinance prohibiting discrimination based on gender identity or gender expression given the court cases pertaining to Title VII and Title IX finding gender identity and gender expression to be included within the protections of discrimination based on sex, and the HUD Equal Access Rule.

Community association practices related to approval of owners or tenants (mainly applicable to co-ops and condominiums) should avoid questions related to gender identity or expression. Community associations should be sensitive to an individual's request to use a different name or gender pronoun and in particular should modify the individual's name on official records of the association if the individual has legally changed his or her name.

Rules and regulations related to the use of community association amenities should indicate that they have been adopted neutrally and shall be applied without discrimination. Services that are provided by the community association should be provided equally to all owners without regard to race, national origin, creed, sex, age, sexual orientation, or gender identity.

## **Conclusion**

Lawyers have played a vital role in many of the ground-breaking changes to provide fair housing to all. Based on the court's interpretation that sex includes gender identity and gender expression discrimination in employment and education settings, it is very likely that we will have the same interpretation relative to a housing case soon. Knowing that fair housing laws are applicable to community associations, our best practice guidance would encourage community associations to adopt a comprehensive policy prohibiting discrimination, including protections for transgender persons. This action supports the purpose of the Act – to provide fair housing throughout the United States.