

Opening the Shelter Doors for LGBTQ Survivors of Intimate Partner Violence: *A Guide for Civil Legal Services Providers on the Recent OCFS Administrative Directive*

LGBTQ DV Roundtable Statewide Meeting
December 16, 2015

Today's Presenter

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Goals for Today

- Better understand the NYS shelter system and the state and federal sources of law and policy that guide these services
- LGBTQ victims challenges accessing residential and non-residential DV services
- The October 2015 ADM from OCFS and its expected impact on inclusive service provision for LGBTQ communities statewide

NY's Domestic Violence Services System

- Services in every county in the state and generally contracted out by the local DSS
- Licensed/Approved by Office of Children & Family Services
 - Piecemeal funding, but primary funder is NYS (pass-through for TANF funds)
- Non-Residential and Residential Program
 - Shelter
 - DV Program
 - Safe Dwelling
 - Safe Homes Networks
- Sources of Law: Social Services Law §459-a *et seq* and regulated at 18 NYCRR §§ 408.4, 452.2, 453.2, 454.2, 455.2, 462.2 (residential and non-residential)
 - Passed in 1987--implementing regulations and administrative policy directives promulgated for nearly 30 years thereafter

Who Can Access Residential Services?

“With the exception of those persons described in paragraph (2) of this subdivision and **to the extent space is available**, residential programs for victims of domestic violence must provide emergency services and temporary shelter to **any victim of domestic violence**, as defined in section 452.2(g) of this Part.... .”

“Victim of Domestic Violence”

- **Any person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, or strangulation; and**
 - (i) such act or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person's child; and**
 - (ii) such act or acts are or are alleged to have been committed by a family or household member.**

“Victim of Domestic Violence”

- **“Family or household members”** means: (a) persons related by **consanguinity** or **affinity**; (b) persons **legally married** to one another; (c) persons **formerly married** to one another regardless of whether they still reside in the same household; (d) persons who have a **child in common** regardless of whether such persons are married or have lived together at any time; (e) **unrelated persons who are continually or at regular intervals living in the same household or who have in the past continually or at regular intervals lived in the same household**; (f) persons who are not related by consanguinity or affinity and who are or have been in an **intimate relationship** regardless of whether such persons have lived together at any time. Factors that may be considered in determining whether a relationship is an “intimate relationship” include, but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an “intimate relationship”; or (g) any other category of individuals deemed to be a victim of domestic violence as defined by the office of children and family services in regulation.
- **Per 18 NYCRR §§408.2 & 462.2, also includes “unrelated persons who have had intimate or continuous social contact with one another and have access to one another’s household.”**
- **09-OCFS-ADM-07 & marriage equality:** Applicable statutes and regulations, including the domestic violence services, to include LGBTQ people “legally married in [New York or] another country or state.”

DV Service Delivery Practices in NY

- Despite traditional and long-standing service delivery practices to date, sex-specificity or sex-segregated service provision has *never actually been written* into NY's residential and non-residential domestic violence program law or regulations
 - Law and regulations are gender-neutral throughout
 - No explicit exclusions for access to services based on gender identity, gender expression or sexual orientation are in law, regulations, or policies
- Administrative guidance addressing this issue was not explicit, nor were there consequences for DV programs, despite awareness that cisgender heterosexual male victims and LGBTQ folks, as a rule, were either not receiving assistance from DV programs at all--or in very limited capacities
 - If male victim needs residential services they ***“cannot be automatically excluded” unless it is determined that “the placement will not be conducive to the ‘safety or well-being of the other residents’ ”. 04 INF-12 Temporary Assistance Question and Answers (May 19, 2004)*** (emphasis added)

Institutional & Programmatic Barriers for LGBTQ Victims Seeking DV Services

- Few DV programs have LGBTQ-specific project and if so, busy or limited in scope
- Name of organization is female-identified, so think program unavailable
- Advised by DV staff that the program will not, does not, or cannot serve male-identified victims in shelter (bi/trans/gay men)
- DV program advised by funders/local DSS that they are not entitled to reimbursement services to male-identified victims
- Denied access to support groups or other supportive services because of gender/gender expression or sexual orientation, relegated to one-on-one assistance
- Access given only to services off-site because of sexual orientation, gender or gender expression
- Endure harassment, bullying, or discrimination by staff or other DV program clients
- Staff lack cultural competency and education about LGBTQ people/rights for effective counseling, advocacy, or referrals
- Outreach materials/website depict or targeted only to cisgender or straight victims; limited direct outreach or education to LGBTQ community

Moving Towards More Inclusive Practices

- Increasing visibility of the problem
- Scholarly research on LGBT
- Direct advocacy/pressure from groups who work at the intersection of this issue, as well as from impacted survivors and their families
- Sex discrimination lawsuits against DV organizations
- Funding conditions mandating more inclusion
- Changes in law and policy
- More DV programs implementing inclusive practices and serving as peer support to others

It's about creating a safe, welcoming space where all survivors of intimate partner violence and abuse can have control over their environment, take healing steps, and are treated with respect and dignity by staff and other survivors.

What Inclusive Services Does This Include?

Inclusion means actual, meaningful access to the residential and/or non-residential core services and other programming that DV programs are licensed, approved or otherwise grant funded to provide and includes:

- Non-residential programs
- Residential programs
- *Hotline Assistance*
- *Emergency Housing (and transitional housing if provided)*
- *Information & referral*
- *Advocacy*
- *Counseling & support groups*
- *Community education & outreach*
- *Children's services*
- Legal services
- Transportation
- Translation / interpretation services
- Other specialized services or funded programming

Selected Sources of Law and Other Policies Addressing DV Program Inclusion

NYS Human Rights Law: Executive Law §296

- Prohibits discrimination based on, inter alia, *actual or perceived* sex, sexual orientation, and disability in “public accommodations”, housing, and more
 - Per court decisions, the transgender community has been protected under sex- or disability-related statuses where such discrimination was based upon gender identity/expression or gender dysphoria
 - NYS regulations are now open for public comment by 12/21/15 to codify the court interpretations at:
<http://docs.dos.ny.gov/info/register/2015/november4/pdf/rulemaking.pdf>
- DV service provider programs may be a “housing accommodation”, a “public accommodation”, or both depending upon nature of services
- Providers of “housing accommodations” may legally assign *rooms* to individuals of one sex [Exec Law §296(5)(2)].

Local Laws May Also Prohibit Anti-LGBTQ Discrimination

- DV service providers in certain communities may also be subject to *local* anti-discrimination laws protecting LGBTQ people
- Cover sexual orientation and gender identity/expression
 - New York City (broader protections than the NYS Human Rights Law)
 - City of Rochester
 - Town of Brighton
 - Town of Rhinebeck
 - Suffolk County
 - City of Buffalo
 - City of Ithaca
 - Tompkins County
 - Albany County
 - Westchester County
 - City of Binghamton
 - City of Syracuse

VAWA 2013

- The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 (VAWA 2013), enacted on March 7, 2013
 - Effective date of grant-related changes was October 1, 2013
- Numerous amendments sought to increase protections and access to services for LGBTQ people:
 - Adds “intimate partner” to eligible relationships in “domestic violence” definition
 - **Adds civil rights provision applicable to all OVW grantees prohibiting discrimination on the basis of *actual or perceived* sexual orientation, sex, and gender identity—as well as other protected grounds**
 - Definition of “underserved” now includes sexual orientation and gender identity
 - Creates a new STOP funding purpose area for LGBTQ victims

VAWA 2013's Anti-Discrimination Provision

- Protects LGBTQ victims from discrimination by prohibiting VAWA grantees from denying victims from these communities access to services on the basis of their sexual orientation or gender identity
- “No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, **sex, gender identity (as defined in paragraph 249(c)(4) of title 18, United States Code), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part** with funds made available under [VAWA], and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women.”

VAWA 2013's Anti-Discrimination Provision

- “If **sex segregation** or **sex-specific** programming is necessary to the **essential operation of a program**, nothing in this paragraph shall prevent any such program or activity from consideration of an individual’s sex.”
- “In such circumstances, grantees **may meet** the requirements of this paragraph by providing **comparable services** to individuals who cannot be provided with the sex-segregated or sex-specific programming.” (*emphasis added*)
- *SO—not off the hook, sex-designated may instead provide comparable services!*

VAWA 2013's Anti-Discrimination Provision

Per VAWA Guidance: “A recipient **should not assume** that, because services have been sex-segregated or sex-specific in the past, continued sex segregation or sex specificity is ‘necessary’ to its programming.”

- Onus is *on the grantee* to make a fact-based, clear articulation of why sex-designated programming is necessary to its essential operations, based upon:
 - The relative facts and circumstances;
 - Best practices and research findings, as applicable; and
 - “[J]ustification cannot rely on **unsupported assumptions** or **overly broad sex-based generalizations**” or reasons that are “trivial or based solely on the recipient’s convenience.”

Which Grant Recipients Are Covered?

- All awards made under covered grants on or after October 1, 2013
- All grant programs currently administered by the Office on Violence Against Women (OVW)
- Grants made beginning in FY 2014 under any OVW-administered special initiative or demonstration project related to covered grants
- May apply to new or supplemental grants made on or after October 1, 2013, under one or more grant programs administered by the Office of Justice Programs (OJP)
- *Regardless of effective date for nondiscrimination conditions, “**all OVW grantees** are subject to a contractual award condition prohibiting activities that may compromise victim safety, which would include excluding a victim from services or benefits based on one of the protected categories in the VAWA nondiscrimination grant condition.”*

DOJ Guidance for VAWA 2013 Issued

- FAQs for the STOP Formula Grant (updated February 2014):
<http://www.ovw.usdoj.gov/docs/consolidated-stop-faqs-bla.pdf>
- FAQ's for the Non-Discrimination Grant Condition (released April 9, 2014):
<http://ojp.gov/about/ocr/pdfs/vawafaqs.pdf> ***

Family Violence Prevention and Services [FVPSA] Grantees

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

LGBTQ ACCESSIBILITY POLICY

As of 2013, organizations receiving FVPSA funding must sign an application containing the following agreement:

The needs of lesbian, gay, bisexual, transgender, and questioning people are taken into consideration in applicant's programming. Applicant has considered how its programming will be inclusive of and non-stigmatizing toward such individuals. **If not already in place, awardee must establish and publicize policies prohibiting harassment based on race, sexual orientation, gender, gender identity (or expression), religion, and national origin.** The submission of an application for this funding opportunity constitutes an assurance that **applicant has or will put such policies in place within 12 months of the award.** Awardees should ensure that **all staff members are trained to prevent and respond to harassment or bullying in all forms** during the award period. Within 12 months of the award awardee must be prepared to monitor claims, address them seriously, and document their corrective action(s) so all programming beneficiaries are assured that the applicant organization and **its programming is safe, inclusive, and non-stigmatizing by design and in operation.**

Sources: Federal Register, FR Doc No: 2013-08711, Volume 78, Number 75, Pages 23263-23271, (Thursday, April 18, 2013),

available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-04-18/html/2013-08711.htm>; Funding Opportunity Number HHH2013-ACF-ACYF-SDVC-0564, (March 5, 2013),

published at: <http://www.acf.hhs.gov/grants/open/foa/view/HHS-2013-ACF-ACYF-FVPS-0564>.

Administrative Guidance: 15-OCFS-ADM-23

- **Issued and effective on October 16, 2015:** Titled “Non-discrimination on the Basis of Sex, Sexual Orientation, and Gender Identity or Expression in Residential and Non-residential Domestic Violence Programs”
- **Purpose of the ADM:**
 - **Applicable to EVERY licensed and approved DV program in NY, even if they are not receiving FVPSA or VAWA funding**
 - Reaffirms and explicitly clarifies the OCFS requirement that residential and non-residential programs for victims of DV “provide shelter and appropriate services for all victims of domestic violence, regardless of ... sexual orientation, gender identity or expression, ... sex, marital status, or disability.”
 - Must provide services to males and lesbian, gay, bisexual, transgender, intersex and questioning persons
 - Also provides guidance to DV programs in fulfilling federal requirements receiving funds through the federal FVPSA and VAWA—significant reference to VAWA!

Administrative Guidance: 15-OCFS-ADM-23

Enumerates a list of 7 required actions for each program to be in place by January 15, 2016 with written policies that will be reviewed and approved by OCFS:

1. Affirming it accepts program participants regardless of their protected status
2. Prohibits harassment of participants based upon their protected status
3. Written explanation of why, if they so conclude, service delivery should be or remain sex-segregated or sex-specific
4. Procedures for monitoring and responding to claims of harassment or bullying
5. Plans for staff training to respond to harassment or bullying
6. Review (and revise) outreach and educational materials, incl. websites
7. Provide shelter residents with updated notice of rights and grievance procedures

Administrative Guidance: 15-OCFS-ADM-23

- “A residential program for victims of domestic **violence may not categorically determine** that a person is likely to cause danger to themselves or to others or to substantially interfere with the health, safety, welfare or care of other residents **solely because of that person’s sex, sexual orientation, or gender identity or expression.** Similarly, programs **cannot summarily determine that they are unable to appropriately meet a victim’s needs solely because of that person’s sex, sexual orientation, and/or gender identity or expression.**”

(emphasis added)

Explain Why “Sex-Segregated” or “Sex-Specific” Programming is Essential To Their Operations

- **Sex-segregated:** Male- and female-identified persons receive services from the program in separate settings based upon their gender identity. Requires person to choose.
 - *Example: DV shelters have historically been sex-segregated as women-only spaces*
- **Sex-specific:** The program designed differently for male- and female-identified persons.
 - *Example: College campus educational programs addressing rape may offer different violence prevention skills to males and to females.*
- Written fact-based, clear articulation of why sex-designated programming is necessary to essential operations.
 - Per VAWA: “...[J]ustification cannot rely on **unsupported assumptions** or **overly broad sex-based generalizations**” or reasons that are “trivial or based solely on the recipient’s convenience.”

What is “necessary to the essential operation of a program”?

- Per the ADM (and VAWA) guidance, all factors that must be considered in the evaluation of whether sex-segregated or sex-specific programming is necessary include:
 - the nature of the service;
 - the anticipated positive and negative consequences to all eligible victims/beneficiaries of not providing the program in a sex-segregated or sex-specific manner;
 - the literature on the efficacy of the service being sex-segregated or sex-specific;
 - the impact on transgender individuals seeking services; and
 - whether similarly situated programs/grant recipients providing the same services have been successful in providing services effectively in a manner that is not sex-segregated or sex-specific

Considerations for Residential Services

- If DV program is considering whether to continue segregating its housing by sex, it would likely assess:
 - Type and layout of property where housing provided
 - May be significant consideration if residents must share bedrooms & bathrooms (may support having separate bathroom/bedroom facilities OR housing in separate physical locations)
- If requires a selection of gender to access, must be the gender identity that the individual identifies with
 - Best practice in the VAWA FAQ dictates that transgender IPV victims should be asked what services they wish to join & DV program “may not...ask questions about that” person’s “anatomy, medical history, or make burdensome demands for identity documents.”

Programs That Remain Sex–Designated

- **Per ADM:** Unless the residential program has determined that sex-designated is essential to its operations, it “**may not refer a victim or a victim’s family member to another program, program location, or shelter because of the sex, sexual orientation, or gender identity or expression of the victim or any member of the victim’s family.**”
(emphasis in ADM)
- **Incorporates VAWA by reference:** May meet the requirement by providing “**comparable services**”
- **SO—**
 - *Referrals not preferred, but may be tolerated under limited circumstances*
 - *Expectation is that many programs will be opening their own doors, rather than referring*

What are “comparable services”?

Under VAWA, a **comparable service** is “**designed to confer a substantially equal benefit**” and is of the same or similar quality and duration—need not be identical.

- Factors VAWA (and OCFS by reference) will consider individually, or in the aggregate, for comparability include:
 - the nature and quality of the services provided;
 - the relative benefits of different therapeutic modalities or interventions;
 - geographic location or other aspects of accessibility;
 - the characteristics of the facilities where services are provided; and
 - the characteristics of the individuals who provide the service

What are “comparable services”?

- If comparable services are provided, must make every reasonable effort to provide shelter that is “designed to confer substantially equal benefits” in terms of safety, quality, and amenities:
 - Secure & furnished sleeping area; bathroom and kitchen facilities/access to food
 - Case management, social services, supportive services (group & one-on-one counseling),
 - Arrange for transportation to primary building where services offered if house off-site

Notice of Rights & Grievance Procedures

- Add anti-discrimination and harassment language to the resident's notice of rights form
 - Give notice to residents within 1 day of their admission
- Advise residents of right to present grievances on their own or another resident's behalf and without fear of reprisal to one or more of the following :
 - Program, Program's designee, Local social services district (DV program's contracting agency), and/or OCFS
- Outline due process procedures for presenting grievances
- Establish a set of procedures for responding to harassment and bullying—in all forms.
- Plans for staff training on responding to harassment and bullying

Staff training and plan for grievances

Education & Outreach Materials

- Examine and revise:
 - Brochures, palm cards, and more
 - Training curriculum (inside and outside the organization) and for all projects
 - Website

Essentially, educate public and make sure outreach reflects inclusive nature of their work

What Can You Expect by January 15, 2016?

- DV program in your community will have some plan in place that complies with ADM--even if not fully flushed out by that time
 - More and more programs have been working towards inclusion, so may not be a big change
- Program may, in good faith, believe that it may still operate sex-designated services...until challenged or evaluated and reviewed by OCFS
- Program may be needing some technical assistance to implement ADM (from you? NYSCADV? Empire Justice? NYC AVP? OCFS?)
- Programs may begin to accept LGBTQ folks *before* all staff is fully on board or trained on how to serve them well, so mistakes/challenges will occur--counsel clients accordingly
- Even if doors are open, clients may still be unwilling/concerned/skeptical

What if Your Client is Denied Services or Discriminated Against?

- Assess reasons for service denial—was program actually at capacity? Pretext?
 - Advocate with the program directly to advise of client rights
- Reach out to Empire Justice Center, NYSCADV, AVP for TA
- Direct the client to utilize grievance procedures
- File a claim with the NYS Division of Human Rights
- File a claim with the DOJ, if VAWA funded
- Assess for propriety of a civil action

**For technical assistance, training, or
other questions:**

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