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September 16, 2013

Ms. Camille Acevedo, Associate General Counsel for Legislation and Regulations
Regulations Division, Room 10276
Office of the General Counsel
Department of Housing and Urban Development
451 7th Street, NW
Washington, DC 20410-0500

Re: Docket No. FR-5173-P-01 Affirmatively Furthering Fair Housing

Dear Ms. Acevedo:

Thank you for the opportunity to offer what we hope will be seen as constructive comments to make the proposed rule for Affirmatively Furthering Fair Housing more effective. Daniel Lauber, Bernard Kleina, and Donald Eager are the three signatories to this comment letter.

Daniel Lauber, AICP is President of Planning/Communications which has conducted seven Analyses of Impediments beginning in 2007 including those for the District of Columbia; Naperville, IL; Lakewood, OH; Billings, MT; Murfreesboro, TN; and Clark County, North Las Vegas, Boulder City, and Mesquite, Nevada. They have been among the most highly-regarded AIs ever produced. If you would like additional information on Planning/Communications, please visit our website at <http://www.planningcommunications.com>. Mr. Lauber has served as a trainer at two day-long workshops for HUD on how to conduct an analysis of impediments as well as numerous seminars and workshops on affirmatively furthering fair housing. His involvement with CDBG goes back to when he wrote the comments on the initial CDBG rules for the American Society of Planning Officials (predecessor to the American Planning Association) as well as two articles in *Planning* magazine, "The Housing Act & Discrimination," (Feb. 1975) and "Some Tips on the New Housing Act" (Nov. 1974). He has been practicing in the area of fair housing for over 40 years as a professional city planner and 28 years as an attorney. He is a past President of the American Planning Association and twice of the American Institute of Certified Planners. In 1998, he received the Paul Davidoff Award from the American Planning Association

for demonstrating a sustained social commitment to advocacy planning in support of the needs of society's less fortunate members. His 2007 Naperville, Illinois AI received the 2009 Best Practices Award from the Illinois Chapter of the American Planning Association.

Bernard Kleina, one of the most respected names in fair housing, has been a fair housing pioneer since the 1960s. From 1970 to 2011, Mr. Kleina served as the first Executive Director of the HOPE Fair Housing Center which covers the west and northwest suburbs of Chicago. He now consults with numerous fair housing centers throughout the country. He continues to produce educational videos to help viewers better understand the destructive impacts of housing discrimination and housing and ethnic segregation. He is also nationally known for his photographs that chronicled Dr. Martin Luther King's time in Chicago during the Chicago Freedom Movement. He received a Lifetime Achievement Award from the DuPage County Branch of the NAACP in 2012 and the Fair Housing Testing Awards from HUD in 2000 and 2001.

As President of Donald B. Eager and Associates, LLC, **Donald Eager** has conducted analyses of impediments for more than 30 jurisdictions in nine states. Mr. Eager has been engaged in fair housing work since his professional planning beginnings in 1977 with the Northeast Regional Planning Agency in Ohio. He has helped dozens of communities design programs and policies to affirmatively further fair housing.

Overall we would like to congratulate HUD for taking the initiative to create a more specific set of requirements for the proposed Assessment of Fair Housing (AFH), acting to better integrate the recommendations of the AFH into the Consolidated Plan and other planning efforts, and establishing the framework for implementation and enforcement mechanisms.

Let us add that this is a necessary process to fulfill the original and current purposes of the Housing & Community Development Act of 1974, namely to bring an end to the extreme levels of racial, ethnic, and economic segregation brought about by the distortion of the free market in housing that ongoing housing discrimination causes. We hope that those reviewing the comments that have been submitted to HUD will distinguish between commentators who have actually read the proposed rules and the politically-motivated attacks in posted comments from people who obviously have not read the proposed regulations and do not understand that the principles they are intended to implement remain in force in law.

Please forgive the length of these comments, but we wanted to explain the basis for each comment rather than just proffer comments. And as one of our high school English teachers was prone to say, "I'm not going to have a lot of comments on your poorly written paper, but I'll have a lot to say about your well-written paper." She, too, would have had a lot to say about the proposed AFFH regulations.

Priorities: Summary of Major Provisions of the Rule

One of the core purposes of these proposed new rules is to achieve the following:

Establishing an approach to affirmatively further fair housing that calls for coordinated efforts to combat illegal housing discrimination, so that individuals and families can make decisions about where to live, free from discrimination, with necessary information regarding housing options, and with adequate support to make their choices viable.

May we suggest that this goal or outcome be the first outcome listed in the final rule rather than the last one. Listing it first will emphasize that this is a core goal of the new rules and that the other five points are all geared toward achieving this goal. The other five items all address tools to attain this goal. By listing this goal first, HUD will further demonstrate to funding recipients that HUD is serious about the new rules to affirmatively further fair housing choice.

The Need to Refine the Current AFFH Planning Framework

With all due respect to the Government Accounting Office, the reason “uneven attention” has been paid to the AI was because too many program participants want their CDBG money without having to fulfill their CDBG obligation to affirmatively further fair housing. It has nothing to do with a lack of sufficient guidance or clarity. We have seen countless recipients opt for consultants they know will whitewash or ignore segregation. We have seen a CDBG recipient reject an AI because it reported the extreme levels of segregation in the county and hire a consultant to make that factual information disappear.

The rules however, are quite right that recipients have little incentive to incorporate the findings of the AI into their consolidated plan or PHA Plan. Generally speaking, public housing authorities put on blinders when it comes to their segregative practices.

By placing a greater emphasis on integrating the findings of the AFH into consolidated plans, PHA Plans, and each jurisdiction’s planning processes, the new rules take a giant step in the right direction. However, it is critical that HUD carefully evaluate each AFH and its implementation and that HUD deny funding to recipient jurisdictions that fail to adequately examine racial, ethnic, and economic segregation and implement effective remedies that address the causes of this segregation. Public education on fair housing rights, fair housing poster contests, and rhetoric do little to reduce segregation and achieve stable integration. HUD needs to ensure that recipients comply with their obligation to affirmatively further fair housing or lose their CDBG and other funds that are issued contingent on them complying with these rules and regulations. HUD cannot return to its ways prior to 2009 and must move forward to assure that these limited federal funds are spent in accord with the purposes of the legislation that authorized them in the first place. This point is explored further in the section headed “Enforcement.”

We applaud the proposed rule that specific funding decisions, specific strategies, and other relevant planning processes are *not* required to be detailed in an AFH. These properly belong in the annual action plan and consolidated plan. Having conducted a fair number of AIs, we understand the temptation to try to solve all of a community’s issues in the AI and detail step-by-step how to implement the recommendations of the AI. But the AI, and now the AFH,

cannot solve everything nor address specific implementation steps. That would turn the AFH into an action plan, which is, quite properly, a different document and along with the consolidated plan, a primary tool for implementing the recommendations of the AFH.

Rules Likely to Dilute the AFH

However, not enough AIs have actually addressed the core goal of CDBG to reduce and eventually eliminate the extreme levels of racial, ethnic, and economic segregation that keep this nation from being all that it can be. Far too many have focused on other issues to the exclusion of segregation. Just count how many AIs focused on affordable housing and blamed any racial or ethnic segregation on the lack of affordable housing. But as the court in *Westchester* noted, affordable housing is not a proxy for race. While the proposed rules rightly seek to get recipients to focus on the core issue of segregation, the addition of many subjects that have little, if anything to do with segregation, undermines this goal.

The proposed rules seem to go beyond the issue of affirmatively furthering fair housing to require AFHs to cover subjects that are at best ancillary issues — which will likely result in diluted AFHs. While they may be issues that a jurisdiction should address, they have little, if anything to do with fair housing or racial, ethnic, and economic integration. Requiring recipients to include them in the AFH will only give recipients further opportunity to ignore the core issue of segregation while focusing on these peripheral issues. While the consolidated plan might properly address these issues, they do not belong in the AFH.

The final rule should clarify that directing most of a jurisdiction's low income housing resources into existing racially or poverty concentrated areas will not likely satisfy a jurisdiction's AFFH obligation. Every program participant should be expected to make significant progress toward reducing segregation and expanding fair housing choice.

For example, the new rule notes that “disparities in access to community assets negatively impact educational and economic outcomes.” So the new rule requires recipients to reduce these disparities for the classes protected under the Fair Housing Act. But this has little to do with affirmatively furthering fair housing. We have sometimes seen public school systems willing to take the steps needed to help achieve stable integrated neighborhoods (and the public schools play a major role in perpetuating housing segregation). Reducing disparities without integrating the schools just smacks of separate but equal all over again.

But the bottom line is that as deplorable as these disparities are, they have little to do with affirmatively furthering fair housing. We are *not* confident that including this wider scope for the AFH will be productive or prudent. We would like to suggest that HUD reconsider how the final rule addresses these peripheral issues.

Even more removed from affirmatively furthering fair housing are such issues as recreational facilities and programs, social service programs, parks, roads, street lighting, trash collection, street cleaning, crime prevention, and police protection activities which were also in the 1995 *HUD Fair Housing Planning Guide*. Recipients have largely left these peripheral issues out of their AIs for good reason. They have little, if nothing, to do with affirmatively furthering fair

housing and addressing them would make the cost of conducting an AI (and AFH) soar. Funds for conducting AFHs are limited. **The new AFFH rules should be focused on achieving the central goal of CDBG rather than requiring recipients to address all of these peripheral issues that have little or nothing to do with affirmatively furthering fair housing and dilute the AFH.**

Similarly, some of the data that the new rules provide as a “starting point in the fair housing assessment process” has little or nothing to do with affirmatively furthering fair housing: education (except the role that public schools play in fostering segregation and their pivotal role in achieving stable integrated neighborhoods), exposure to environmental health hazards, employment (except access to employment opportunities), and others.

And some of the data HUD is providing is seriously inappropriate and misleading for inclusion in an AFH. The most glaring problem is the **Dissimilarity Index** which is a perfectly fine tool for sociologists who wish to compare *relative* degrees of segregation between different jurisdictions, but a tool that masks segregation within a jurisdiction.

But it is a very inaccurate and misleading measure of how segregated a city is. The Dissimilarity Index identifies the percentage of each racial or ethnic group that would have to move to have an even, uniform distribution throughout a jurisdiction. That is *not* integration. The Dissimilarity Index fails to take into account the cost of rental and ownership housing as well as differences in household income by race and ethnicity.

The Dissimilarity Index tends to mask segregation. For example, the McHenry County, IL AI used the Dissimilarity Index to whitewash the nearly all–white county’s extreme segregation. In 2010, McHenry County was 89.5 percent white and 0.8 percent African American. The consultant reported a Dissimilarity Index of 28.9 which represents “mild” segregation and asserted that McHenry County was “reasonably well integrated, based on national standards.”¹ (We are at a loss to imagine to which “national standards” this refers.) The catch is so few members of minority groups even live in McHenry County (0.8 percent African American), that a relatively small number of them would have to move to achieve an even distribution throughout the county. McHenry County illustrates the point that the Dissimilarity Index can be used only “in populous geographic areas since dissimilarity cannot be accurately assessed when the racial/ethnic group being measured does not make up a significant portion of the overall population.”²

But if you take into account household income by race and Hispanic ethnicity and the actual cost of housing, (a method we call “free market analysis” and others call a “race and income index” or “colorblind analysis”), we quickly discovered that the McHenry County cities that were two percent or less African American (nearly all of them) would be expected to be at least 10 to 17 percent African American in a free market not distorted by discrimination.³ The

¹ *Analysis of Impediments to Fair Housing Choice McHenry County, Illinois 2012* (July 2012), 23–24.

² Chicago Metropolitan Planning Agency, *Draft Fair Housing and Equity Assessment: August 7, 2013*, 29.

³ A few McHenry County cities illustrate the problem with the Dissimilarity Index. Algonquin would have been 12.6 percent Black instead of its actual 0.2 percent; Bull Valley 13.2 percent instead of 0.0; Cary 13.6 instead of 0.3;

methodology of the “free market analysis” eliminates housing costs and income disparities as possible causes of these differences. It is almost certain that these differences are largely due to the major remaining variable: housing discrimination. The expected proportion of African Americans is what the cities would be *without* any change in incomes or housing prices. This proportion is what the composition would be *without* adding affordable housing. It clearly shows that a lack of affordable housing is *not* the cause of the near total absence of African Americans from these McHenry County towns. Now that’s segregation which the Dissimilarity Index hides, and which is exactly why recipient jurisdictions that are not serious about affirmatively furthering fair housing use the Dissimilarity Index.

It would undermine the integrity of HUD and AFHs if program participants are allowed to use the Dissimilarity Index in the new AFHs and HUD provides the misleading Dissimilarity Index data to recipients. We strongly urge that use of the Dissimilarity Index be prohibited and that HUD not include the Dissimilarity Index in the data it provides to recipients.

The free market or “race and income index” methodology is described in detail in the AIs we have produced. It is explained most cogently in text and footnotes of the *District of Columbia Analysis of Impediments to Fair Housing Choice 2006–2011* (pages 21–23) and *Billings, Montana Analysis of Impediments to Fair Housing Choice 2012* (pages 22–25), a city that has small proportions of minority residents. The application of the methodology follows those pages in each AI. The AIs can be downloaded at <http://www.planningcommunications.com> (click on the “Analyses of Impediments” button).

Some of the data that HUD plans to provide has extreme limitations. Not everything can be reduced to an index. For example, the “**School Proficiency Index**” is a **deeply flawed** measure that fails to take into account household incomes, the most accurate predictor of performance on the testing on which the School Proficiency Index is based. And there is, of course, the question of why an AFH should even be looking at education except in terms of the pivotal role the racial and ethnic composition of the public schools plays in achieving and maintaining racially, ethnically, and economically integrated neighborhoods.

Lake in the Hills 13.4 instead of 0.0; Union 16.9 instead of 0.0. These figures come from Coleman, Leachman, Nyden, Peterman, *Black, White and Shades of Brown: Fair Housing and Economic Opportunity in the Chicago Region* (Chicago: Leadership Council for Metropolitan Open Communities, 1998). Our experience producing AIs very strongly suggests that these discrepancies between the proportion of African American population in a free market not distorted by discrimination and the actual proportion in 1990 would be just as large in 2000 and 2010 as it was in adjacent Lake County where there was a tiny increase in minorities in many of the 31 (out of 51) Lake County cities with a Black population of less than two percent. And indeed, a recent study found that in 2010, McHenry County would have been 63.5 percent white and 15.7 percent African American in the absence of discrimination instead of its actual 89.5 percent white and 0.8 percent Black composition — making McHenry the most segregated county in the Chicago area. **The use of the Dissimilarity Index in McHenry County’s AI clearly whitewashed segregation in that county.** Chicago Metropolitan Planning Agency, *Draft Fair Housing and Equity Assessment: August 7, 2013*, 31.

Instead HUD should explicitly require collection and analysis of data on the racial and ethnic composition of each public school (including charters) within the subject jurisdiction as well as the percentage of children at each school from households in poverty (measured by the percentage eligible for free lunches). Appendix A contains pages from the Billings, Montana AI that illustrate how these data are relevant in an AFH and how they should be used.

We remain uncertain as to how “disparities in access to community assets” across protected classes within a jurisdiction or region has anything to do with affirmatively furthering fair housing choice. Of course these disparities exist, especially for lower-income households (which are disproportionately minority and female-headed). But the proposed rules do not explain how this uneven access to community resources causes or maintains racially, ethnically, or economically segregated communities. **If HUD wants these concerns addressed, HUD should require that the consolidated plan addresses them, not the AFH.**

If HUD retains these expansive requirements, it will result in AFHs that are as watered down as most AIs have been. HUD needs to carefully choose its “battles.” It makes little sense for the “proposed rules to incorporate a set of measures designed to assess the extent to which a particular area possesses or is linked to assets that correlate with an increased chance to improve an individual or family’s life trajectory.” This is certainly a worthy *planning* goal, but it has nothing to do with affirmatively furthering fair housing and has no rational place in an AFH. Recipients may wish to address this in their consolidated plans, but it’s not a proper subject for an AFH and the final rule should not suggest that it is.

Missing from the proposed rule is any requirement to review accessibility to information about housing discrimination. We have routinely included a review of accessibility to such information in the AIs we have produced and these reviews have resulted in greater accessibility to such information. We urge that HUD include this requirement in the final rule.

Also missing from the proposed rule is an explicit requirement to evaluate the program participant’s zoning for community residences for people with disabilities for compliance with the Fair Housing Act and state law. **The final rule should explicitly require the AFH to evaluate the municipal, county, or state program participant’s zoning, building code, and property maintenance code provisions for community residences for people with disabilities for compliance with the Fair Housing Act and state law.** (Obviously this would *not* apply to public housing authorities.)

We are concerned that the language in the proposed rule suggests that a program participant could set only one goal in its AFH. **We strongly urge that the final rule make it clear that a single goal is not acceptable.**

A Step Backward?

Take a look at the Analyses of Impediments (AI) that cities have conducted on their own rather than retaining the services of a qualified consultant. What do they have in common?

They rarely report racial and/or economic segregation no matter how clearly the data show their presence. Most essentially whitewash the data and conclude nothing is amiss. Rarely do they admit to segregation existing or that the jurisdiction might be even partially to blame for its existence. Rarely do they contain any actual analysis of the data or any understanding of the causes or dynamics of housing segregation.

At least one high-ranking HUD official has stated that the new rules are intended to discourage the use of consultants to conduct the AFH. I don't know whether this is true, but we do know from experience that this would constitute a step backwards and damage the integrity of AFHs.

By establishing a process that strongly encourages recipients to conduct the Assessment of Fair Housing (AFH) themselves and eliminate the use of qualified consultants to produce the new AFHs, the proposed rules take a big step backwards due to the **inherent conflict of interest in a recipient jurisdiction conducting its own Assessment of Fair Housing**.

A recipient jurisdiction simply is unable to provide that kind of independence as the self-produced AIs attest. Producing your own jurisdiction's AI puts local government staff in the impossible position of evaluating their employer's practices and policies for violations of the Fair Housing Act. It makes no sense to require input from groups that are "sufficiently independent" while having the study conducted by staff that are not even remotely independent.

My experience as President of the American Planning Association and American Institute of Certified Planners revealed to me the wide extent to which professional planners feel constrained by local politics in their routine planning practices. While they object to the segregative and exclusionary practices of the jurisdictions that employ them, they are terrified to raise objections because they have seen too many of their colleagues lose their jobs for doing just that.

(I realize that there are far too many consultants who have produced AIs that whitewash segregation [usually by using the Dissimilarity Index] — which is done in response to the directions the recipient jurisdiction gives them.)

Not only is there a serious inherent conflict of interest in a recipient producing its own AFH, but planning and community development staff do not have the skills or experience needed to conduct such a study and accurately analyze and evaluate the data. The needed skills are not taught in planning school. And you cannot teach those skills in a few day-long workshops. Both the AI and the AFH require a thorough understanding of the causes of segregation

Overburdens Local Staff

Cutbacks in local, state, and federal funding have decimated municipal and county planning and community development departments. We've seen community development and planning staffs reduced by 50 percent and more.

It is hard to understand how HUD could impose the burden of producing an AFH on the reduced professional staff in these departments in addition to their already overloaded work schedules. They are only human.

and of the techniques for achieving and maintaining stable integration. There's a lot of sociology and law involved, and planners do not receive that kind of education in school or in continuing education courses — and it takes lengthy courses in school to obtain the level of understanding needed to conduct a competent AI or AFH.

It is important to remember that housing integration does not just “happen” after 300 years of segregation. It requires government action to correct the distortions in the free market in housing that housing discrimination has caused.

It would be overly optimistic to expect the technical assistance HUD plans to provide to solve these issues.

In addition, there are several other conflict of interest situations of which HUD should be aware.

Two other conflict of interest situations also threaten the integrity of an AFH:

- (1) A recipient jurisdiction retains the services of an organization to produce the AFH that already receives CDBG funding from the jurisdiction. How can that funding recipient be independent when it is already funded by the jurisdiction it is supposed to evaluate?
- (2) A recipient jurisdiction hires the local fair housing organization to conduct the AFH. This puts the local fair housing organization in the position of evaluating its own practices — a position just as untenable as a recipient jurisdiction conducting its own AFH.

Well intentioned as these rules are, they do not overcome the fundamental and unavoidable conflict of interest deficiency of a self-conducted AFH and the failure to retain an independent third party to conduct the AFH.

The proposed rules repeatedly refer to consultation on the proposed AFH, consolidated plan, and other documents with fair housing groups that are “sufficiently independent.” Similarly the rule should require that the AFH be conducted by an entity that is *sufficiently independent* to provide meaningful research and analysis to the jurisdiction — an independent third party free of conflicts of interest.

To remedy this situation, the rules should be revised to:

- ❖ **Require the use of a qualified *independent* third party to conduct the AFH.**
- ❖ **Promote an open competitive bidding process that is not rigged in advance by making the RFP available to few potential bidders, HUD should establish a HUD website at which all RFPs for AFFH projects including AFHs are posted at least one month before proposals are due.** Recipients should be able to easily post their RFPs on the site. RFPs should be organized by type of study or plan to be conducted and a search function

should be included. The rule should prohibit using CDBG funds to finance an AFH for which the RFP is not posted on time on the HUD website.

- ❖ **Prohibit conduct of an AFH by an entity that already receives CDBG funding from the program participant.**
- ❖ **Prohibit conduct of an AFH by the local fair housing organization responsible for fair housing enforcement within the program participant's jurisdiction.**

Enforcement

Regulations rarely solve anything by themselves. An enforcement mechanism must have teeth to make a difference.

We applaud HUD's efforts beginning in 2009 to improve enforcement of its requirements for AIs and AFFH. And while the proposed rules offer some very constructive requirements for the AFH, there was not that much wrong with AIs that couldn't have been fixed if HUD were to seriously and consistently enforce the existing rules for affirmatively furthering fair housing. But for too long HUD accepted AIs as short as 13 pages and AIs that contained no analysis or, like Westchester County, NY consistently has done, ignored or whitewashed racial, ethnic, and economic segregation.

The proposed rules take a major step forward by requiring that the AFH be submitted to HUD for approval. Unfortunately, the rigid time requirements for review are a recipe for disaster. One proposed rule (§5.162(a)) would effectively grant acceptance of an AFH if HUD does not rule on it within 60 days of submittal. This approach makes little sense and defeats the goals of the new rules. The rule should be changed. An AFH should not be deemed accepted if HUD fails to accept the AFH within 60 days of its receipt by HUD.

As best we understand it, 39 percent of the 1,218 CDBG recipients will have a consolidated plan due by July 1, 2015. That will lead to 471 jurisdictions submitting an AFH by October 1, 2014. Is it really conceivable that HUD can conduct thorough reviews of 471 AFHs within just two months?

HUD needs to refine the rules to stagger the introduction of the AFH requirements over a several years. This change will not only give HUD adequate time to review the incoming AFHs, but adequate time to refine how it conducts its reviews of this new requirement. It will allow HUD to refine its review to reflect the realities of the new AFHs. And it will allow HUD time to refine how it delivers data, as well as what data it provides to recipients.

It will also prevent this flood of AFHs in future years because if every recipient is on a five year schedule, then this flood will recur every five years.

It may also be desirable to allow more than 60 days for HUD to review the AFH for compliance with requirements to affirmative further fair housing. Strong, active regulatory review is a critical component to producing compliance with AFFH requirements. Given the understaffing at HUD (and nearly all federal departments), 60 days are probably an inadequate

time frame to conduct this assessment. And by allowing approval through default, HUD may be creating a disincentive to program participants to have a thorough study of their communities' needs conducted. The unanticipated consequence of this process as proposed would undermine the purpose of enacting the proposed more effective standards for the mandate to affirmatively further fair housing. We suggest that **the final rule allow HUD 90 or 120 days to review AFHs and that HUD be required to make a formal determination of the AFH's compliance with the rule.**

HUD also needs to train staff to evaluate the AFHs in a more detailed manner than simply using a checklist to assure that topics are addressed. Just as an AI and AFH must actually contain analysis, an evaluation of them must actually evaluate the quality of their content.

If the Westchester County case is to mean anything, **the proposed rule (§5.162) needs to explicitly state that failure to adequately address housing segregation constitutes grounds for rejection of the AFH and denial of funding.** Far too many AIs have whitewashed the question of housing segregation through the use of the Dissimilarity Index or by just ignoring it like Westchester County did.

In addition **there should be a mechanism that enables advocates to appeal to HUD's Office of Fair Housing and Equal Opportunity the local HUD office's decision to accept an AFH or certification that a recipient is affirmatively furthering fair housing.** Local advocates may have information that the local HUD office lacks.

The final rule should clearly state that **after consulting with other HUD program staff, HUD's Office of Fair Housing and Equal Opportunity staff have full authority over the AFH review and acceptance functions and the certification that a recipient is actually affirmatively furthering fair housing.**

HUD acknowledges in its own regulatory analysis of the proposed rule, that "the proposed rule will place an additional burden on HUD staff." Like others, we are concerned that the already understaff HUD could be overwhelmed by its more demanding responsibilities under the new AFFH rules. **To assure that HUD can rigorously enforce the rules to hold program participants accountable, HUD must first ensure that it has all the necessary resources in place before the first AFH review period begins. In preparation for the initial reviews, we strongly recommend that HUD conduct reviews of AIs using the new rules to identify the most cost-effective and practical means to conduct the reviews of the new AFHs.**

Assuring Adequate Time to Conduct an AFH

In our experience, it takes at least six or seven month to produce a competent Analyses of Impediments to Fair Housing Choice for a single jurisdiction. Producing an AI that covers multiple jurisdictions takes around a year.

It is possible that with HUD providing much of the data that this time frame could be reduced, although that data will need to be refined and reformatted to be presentable in an AFH. However, the new AFH is required to cover much more ground than the AI, which adds to

the length of time needed to produce the AFH. In addition, the new requirements for public participation will lengthen the amount of time needed to produce a final AFH.

We have seen far too many recipients issue RFPs for AIs that allow just three or four months to produce the AI. Many wait until the last minute to even issue an RFP. With the new rules proposing strict deadlines for completing an AFH prior to completion of the consolidated plan and imposing extensive citizen participation requirements, **it is critical that the rules make it clear that a single jurisdiction allow at least seven months to complete an AFH (including all public hearings and comment periods) and that at least one year be allowed to complete an AFH that covers multiple jurisdictions.** Otherwise recipients will wind up producing the hurried, inadequate AFHs reminiscent of the generally inadequate AIs that have been all too common.

Extent of the AFFH Obligation

Observers have noted that some recalcitrant jurisdictions and even some divisions of HUD have acted as though the obligation to affirmatively further fair housing applies only to the particular HUD-funded activity at hand. It would, of course, be absurd for the regulation to allow jurisdictions to violate fair housing standards with non-HUD resources while they certify they are complying with their AFFH obligations in only their activities that use HUD funds. **The rules should explicitly state that the AFFH obligation extends to all housing activities within the participating program's jurisdiction.**

The following specific refinements to the rule would help achieve this goal. Recommended new language is underlined.

In § 91.225 Certifications.

(a) * * *

(1) Affirmatively furthering fair housing. Each jurisdiction is required to submit a certification that it will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in the AFH conducted in accordance with the requirements of 24 CFR 5.154, and that it will take no actions, whether using federal funds or not, that are materially inconsistent with its obligation to affirmatively further fair housing.

[The same certification change should be made in §91.325 and §91.425.]

In § 5.154(d) (2) the AFH Analysis a new paragraph “v” should be added:

v. Identify the existence and status of all current complaints relating to housing-related civil rights or fair housing claims against the jurisdiction and its subdivisions as well as any findings, settlements, Voluntary Compliance Agreements (VCAs) and judgments relating to the jurisdiction and its subdivisions in the past 10 years. The assessment must identify specific actions that the jurisdiction has taken to remedy each finding, settlement, judgment or VCA in a timely manner and provide an assessment of its progress in achieving full compliance. This required analysis is applicable to housing-related civil rights claims in any administrative or court actions and to all the jurisdiction's functions, whether or not that function is federally funded.

In § 5.162 Review of AFH, Standard of Review, add the following provision:

(b)(3) An assessment that fails to identify claims of fair housing violations or fails to identify and demonstrate adequate remedial actions responding to any fair housing or housing-related civil rights findings, settlements, Voluntary Compliance Agreements (VCAs) and judgments as required pursuant to 5.154(d)(2)(v).

Completion of a Recent Comprehensive AI

HUD asked commentators to address the question of whether HUD should waive or delay implementation of the AFH requirement for program participants that have recently completed a comprehensive AI.

We encourage HUD to waive or delay the requirement *only* after carefully evaluating the content of the recently completed comprehensive AI to determine whether it adequately addresses the core AI issues of segregation and housing discrimination. It is very possible that an AI covers all the key issues the proposed AFH would cover. We think that, for example, the AIs that Planning/Communications recently completed for the District of Columbia; Billings, Montana; and Lakewood, Ohio are the sort of comprehensive AIs that include the essential components of the proposed AFH and that are perfectly capable of providing the foundation for annual fair housing action plans and consolidated plans for another five years.

Natural Disasters and Other Unexpected Occurrences

In theory, the proposed rule in Section 5.164 to require revision to an AFH in the event of a significant natural disaster or similar material change in circumstances is a prudent requirement. In practice, we're not so certain. It is critical to allow some flexibility. Not every natural disaster will warrant revisions. Something like Hurricane Katrina that wiped out large sections of New Orleans and environs would probably warrant revision. But would a tornado that destroys part of a city warrant revision? The tornado that destroyed nearly all of Xenia, Ohio might, but would a tornado that destroys just part of a town warrant it? It's hard to say and we don't pretend to have the answer. **The rule needs to allow some flexibility and discretion in determining when a jurisdiction needs to revise its AFH.**

Citizen Engagement

We applaud the amendments to paragraph §91.105(b) that would require the recipient to make the data that HUD provides available to the public, public agencies, and other interested parties as soon as practical.

However, the proposed amendment to §91.105 that would require at least one public hearing on the AFH *before* it is published for comment is confuses the planning principle of citizen participation for plans with research studies like the AFH (which is *not* a plan). Under sound planning principles, the appropriate time for a public hearing on a research study like an AFH, would be when the AFH is completed and made available for public comment. There is no

need for a public hearing before the AFH is completed. The comment period should be conterminous with the notice period for a public hearing on the AFH. HUD has not shown any factual basis for a need for a public hearing *prior* to the AFH being issued for comment and public hearing. This additional public hearing requirement will only delay completion of the AFH an extra month — and given the realities of how recipients have handled AIs, this is time that cannot be lost.

We strongly urge HUD to eliminate the requirement of a public hearing *before* the AFH is published for comments and urge that the comment period start when the public notice of the public hearing on the draft AFH is published. This time period should be no less than 30 days. In addition to publishing the public notice in a local print newspaper, the notice should be published on the home page of the program participant’s website with a link to view and download the draft AFH.

Strategic Plan

We applaud the proposed new paragraph §91.215(a)(5) that requires a jurisdiction’s consolidated plan to “describe how the priorities and specific objectives of the jurisdiction will affirmatively further fair housing, and that the description should be done by setting forth strategies and actions consistent with the goals and other elements identified in an AFH conducted in accordance with §5.154. We also applaud new paragraph (a)(5) for requiring that when these priorities and objectives do not address these issues, “the consolidated plan must identify additional objectives and priorities for affirmatively furthering fair housing.”

Public Housing Authorities

We have seen few public housing authorities willing to directly address affirmatively furthering fair housing. There are exceptions, of course, but generally public housing authorities tend to be blind to their practices that have produced highly segregated public housing located in minority areas.

We do applaud the revision to §903.15 that requires an AFH to be conducted for a public housing authority’s PHA plan. Based on our AI experience, we strongly suspect that the first choice to participate in the AFH of the relevant unit of local government to be the far superior option. We encourage HUD to find some way to indicate this preference.

Measuring Progress

It is critical that HUD recognize that efforts to affirmatively further fair housing, particularly those aimed at achieving stable, racially, ethnically, and economically integrated neighborhoods and municipalities, will produce only incremental change. This is the reality of the dynamics of housing. Even tenants are relatively stable in their residency, on average moving maybe once every five or six years. Homeowners are even less mobile. So the universe available to reduce segregation and achieve integrated housing is relatively small.

Achieving integration generally requires members of minority groups to move to previously segregated almost all-white neighborhoods and for Caucasians to move to integrated neighborhoods. The vast majority of households do not deliberately make pro-integrative moves. They largely base their moves on other factors like housing affordability; proximity to work, family, desirable public schools, and institutions (religious, cultural); and quality of housing. The key to achieving stable, integrated neighborhoods and cities is to expand the housing choices, especially those of minorities.

We raise this concern because the proposed rules are rife with requirements to measure progress toward goals with precise numbers. But after 40 years of working to promote the core goals of the CDBG program, we've got to report that it's just not that simple.

Progress toward housing integration *cannot* be easily measured with numbers. It is unrealistic to expect to a city to set a specific goal, for example, to go from 1 percent African American to 5 percent Black in a decade. All that can be realistically expected is that the proportion of African Americans in that city should be growing, not declining, and that its Black or other "minority" residents should not be segregating within the city. This dilemma is vividly illustrated in the *District of Columbia Analysis of Impediments 2006–2011* where the analysis on pages 23 through 84 shows how complex and nuanced measuring progress can be.

We are not exactly sure how HUD can do this, but **the requirements for measuring progress need to recognize these concerns and allow some flexibility from rigid numerical standards.**

Impacts on Costs

Having conducted a fair number of comprehensive AIs, we conclude that the expansion of topics that the AFH must cover and more complicated nature of AFHs will cost more to conduct than a competent and comprehensive AI. While HUD officials seem to believe that providing data to grantees will reduce costs, the reality is that it will not reduce them very much. Those who have conducted AIs know where to find the data. Therefore, HUD providing much of the data will *not* reduce costs. The form in which the data are supplied is not conducive to presentation in an AFH. The data will need to be reorganized and reformatted to be useful — just as data have been for AIs. Some of the data HUD is proffering is not as appropriate or useful as other data that belongs in an AFH (or AI) — which will still need to be obtained.

For us, the most expensive part of producing an AI has always been the reorganization of the data into a useful and presentable format, and the analysis. We recognize that many AIs have lacked thoughtful or insightful analysis. But the proposed AFH rules appear to demand analysis and the new required evaluations by HUD should be able to reject those AFHs that lack rational and insightful analysis.

The proposed rules also demand greater consultation with interested groups and the public in general. These rules will increase the cost of conducting an AFH as well as increase the time needed to complete an AFH.

Consequently, we have to conclude that HUD's estimates of the cost of performing AFHs is optimistic at best. It is likely that the more expansive AFHs will cost more to conduct than the

more narrowly-focused AIs, which will be a problem for recipients during an era in which their federal funding is *not* growing to meet this mandate and actually shrinking. In a sense, the new rules effectively amount to an unfunded mandate. We realize that recipient communities should put some of their own funds into producing the AFH. Some like Billings, Montana have been very innovative in raising money from diverse interests to fund their AI. But Billings has been an exception (in oh so many positive ways).

We strongly recommend that to minimize the costs of producing an AFH, that HUD narrow their scope to focus on factors that directly affect a recipient's ability to achieve the core goal of racial, ethnic, and economic integration as suggested earlier in these comments.

As suggested earlier, **HUD needs to narrow its own proposed definition of "affirmatively furthering fair housing" (§5.152) to remove addressing "significant disparities in access to community assets" and resist the unavoidable temptation to try to solve all of a jurisdiction's issues in its AFH. HUD needs to narrow the focus of the AFH in §5.154(c) to remove the peripheral issues of environmental health and access to assets in education.**

AFFH Tools

The AFFH Tool at http://egis.hud.gov.affht_pt gives users a means to show a variety of data on a map. we particularly appreciate the ability to click on the map and get the data for a block group or a census tract. It would be even more helpful if percentages were also shown (if technologically feasible).

It's a good start, but to be really useful, the following refinements are needed. For example, it's not clear where the dots for Race (2010) apply geographically. It's vague. Some explanation would be helpful. And is there someplace where there are instructions for using the maps?

- ❖ **Add a button to show municipal boundaries, county boundaries, and/or census tract boundaries.** It's essential to be able to show jurisdictional boundaries if a community is to use these maps for its AFH.
- ❖ **Use contrasting colors for the different levels for the Community Assets and Stressors.** While we realize that it is tempting to use varying shades of the same color to show increasing intensity, it is very difficult for viewers to distinguish between the different shades, especially adjacent shades. Perhaps you could give each user the option to choose how these indicators appear: contrasting colors or gradations of a single color (as is done now). This option would enhance the value of these maps.
- ❖ **Make the data maps downloadable at a resolution of at least 150 dpi.** Right now the only way a program participant can use these maps is by capturing their computer screens or right-clicking the map and selecting "Print page" which doesn't really help the viewer actually use the map. A button is needed that would allow the viewer to download the map (with the selected data showing) and legend in a graphic format at a resolution high enough to make it usable in a print publication (150 dpi minimum).
- ❖ **Add a link to instructions for how to use the maps and find data on them.**

Again, HUD has undertaken a monumental task and generally delivered. The comments here are intended to offer constructive advice to make the final rule more effective, more pragmatic, more cost-effective, and more streamlined.

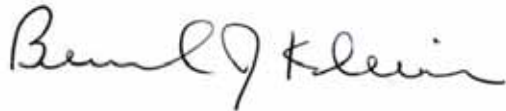
We would like to again thank HUD for the opportunity to submit these comments on the proposed AFFH rule. If you would like further clarification or expansion on any of these comments, please do not hesitate to call or write.

Thank you for your time and consideration.

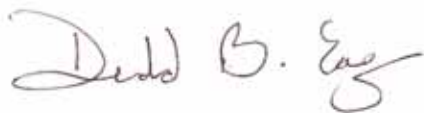
Sincerely,



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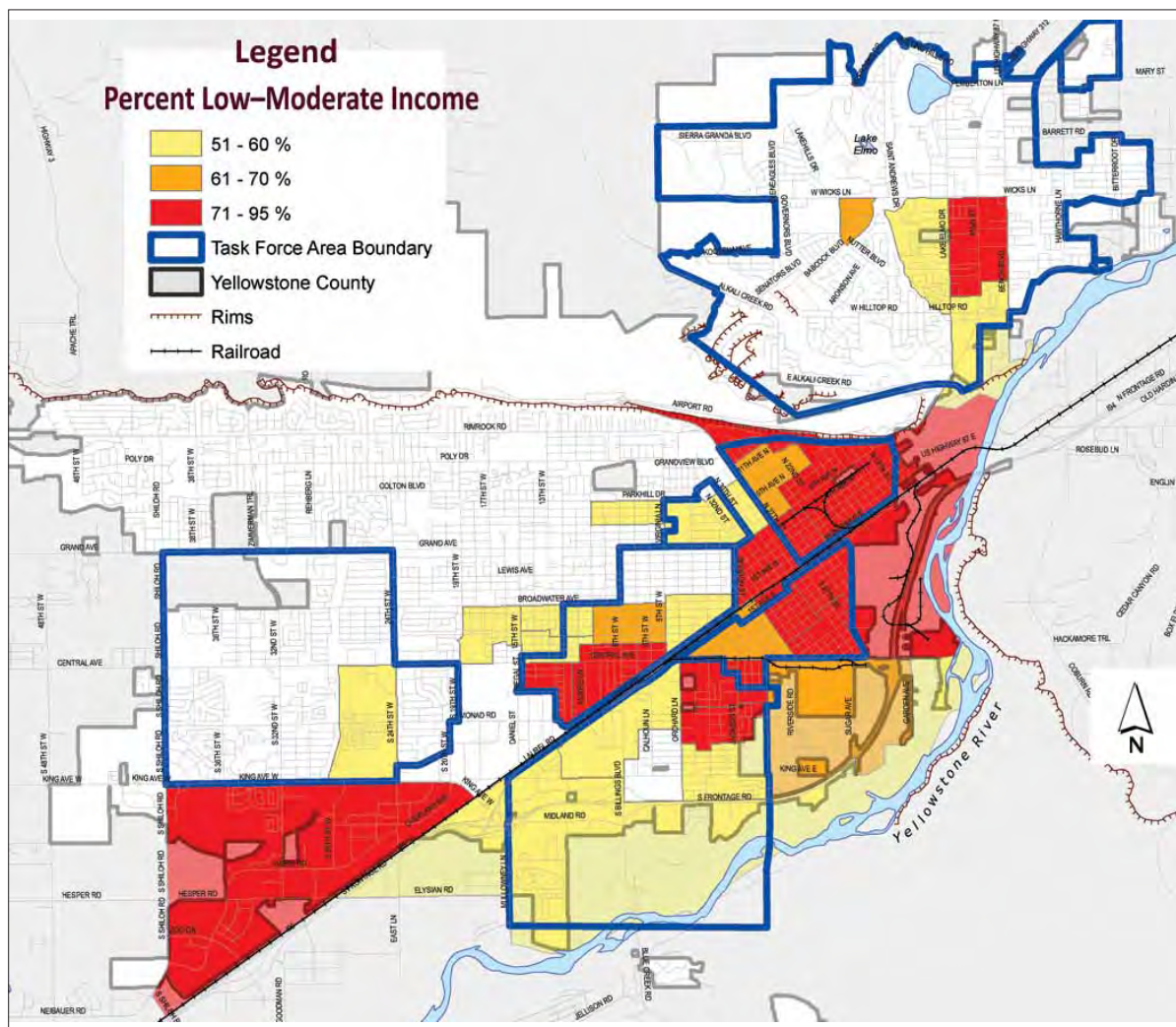
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Appendix A

Analysis starts on next page; this page included only for context

minorities are concentrated. These are the same areas where the concentrations of public housing are located. And they are the same areas where the use of Housing Choice Vouchers is concentrated.

Figure 30: Low- and Moderate-Income Areas of Billings: 2010



The pink areas are 71 to 85% in Yellowstone County, not the City of Billings. Source: Planning & Community Services Department, City of Billings, 2012. Based on 2010 Census Data. Low- and moderate-income estimates were prepared at the Census Bureau's Geography Summary Level "090": State-County Subdivision-Place/Remainder-Census Tract-Urban/Rural Block Group for Fiscal Year 2011.

This is the type of economic segregation that Community Development Block Grants are supposed to mitigate.⁵⁹

These concentrations of poverty — and the placement of so much assisted housing in them — have implications far beyond fair housing choice. These concentra-

59. See Chapter 2 of this report for details.

tions in schools and in housing obstruct mobility out of poverty⁶⁰ in large part by impeding the ability of the public schools to adequately educate children from poor households.

Figure 31: Two Houses Share a Single Lot on Cook Street



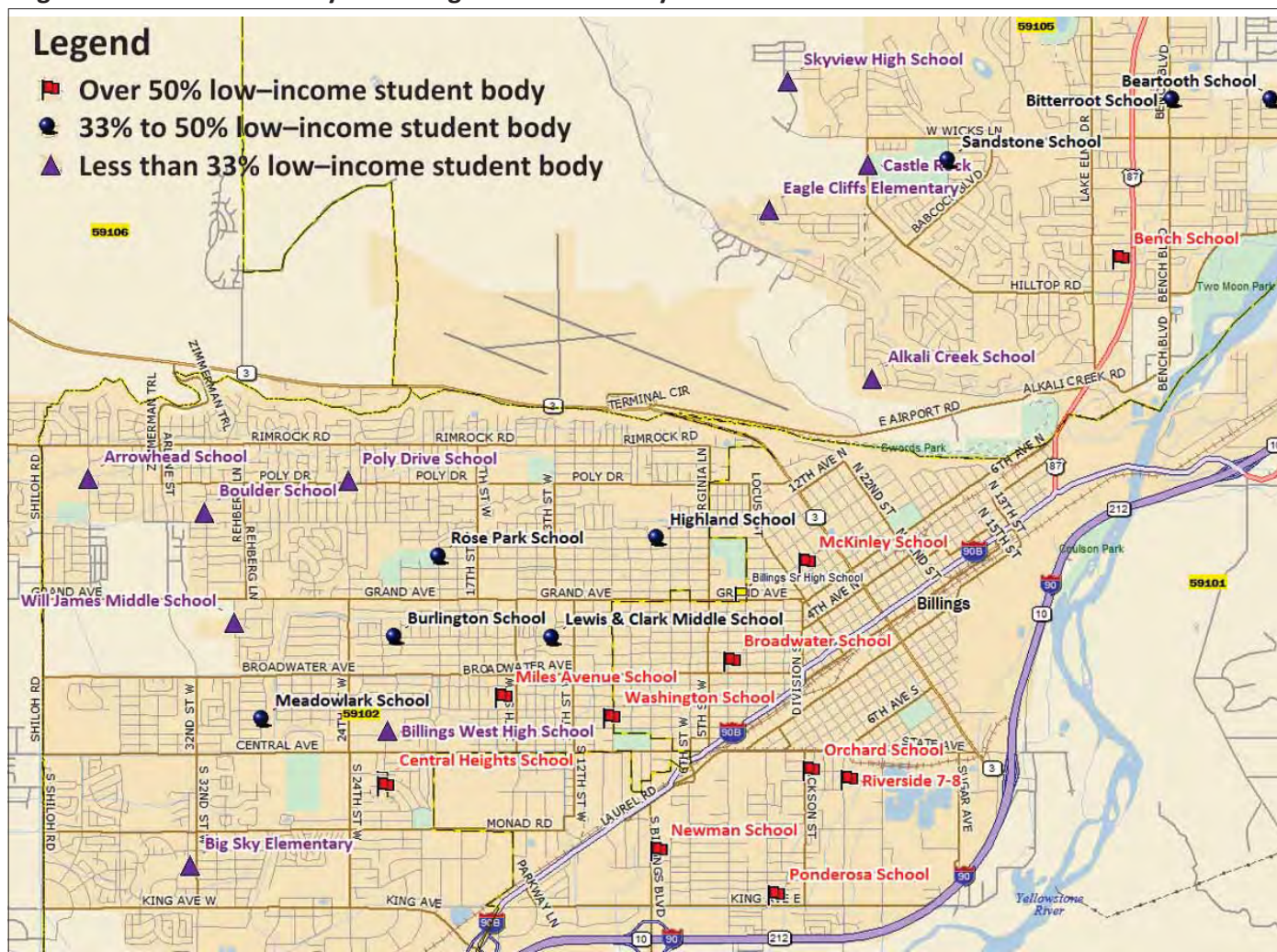
Analysis
starts here

For more than 50 years, research has consistently found that concentrating children from poor households in schools harms academic performance. “One of the most consistent findings in research on education has been the powerful relationship between concentrated poverty and virtually every measure of school-level academic results.”⁶¹

Forty years of research shows that the single most important predictor of academic achievement is the socioeconomic status of the family a child comes from, and the second most important predictor is the socioeconomic makeup of the school she attends.... All students — rich, poor, white, black, Latino, and Asian — perform significantly better in schools with strong middle-class populations than they do in high poverty schools. Virtually everything that educators talk about as desirable in a school — high standards and expectations, good teachers, active parents, a safe and orderly environment, a stable student and teacher population — are more likely to be found in economically mixed schools than in high-poverty schools.⁶²

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60. Jewel Bellush and Murray Hausknecht, “Public Housing: The Contexts of Failure,” in *Housing Urban America*, ed. Jon Pynoos, Robert Schafer, and Chester Hartman (Chicago, IL: Aldine Publishing Company, 1967), 116.
 61. Gary Orfield and Susan Eaton, *Dismantling Desegregation, The Quiet Reversal of Brown v. Board of Education* (New York: New Press, 2006) 53.
 62. Richard Kahlenberg, *Rescuing Brown v. Board of Education: Profiles of Twelve School Districts Pursuing Socioeconomic School Integration* (New York: Century Foundation, 2007) 6. Emphasis added. *See also*, Gary Orfield, *Must We Bus? Segregated Schools and National Policy* (Washington DC: Brookings Institu-

Figure 32: Public Schools By Percentage of Student Body That Is Low Income: 2010



Source: October 2010 count of students eligible for free and reduced-price lunches, Montana Office of Public Instruction.

Consequently, these concentrations of poverty in housing lead to concentrations of poverty in public schools that have neighborhood-based attendance zones. In the above map, the locations of the schools with most of their pupils living in poverty coincide with the most intense concentrations of low- and moderate-income households shown on the map on page 95. The concentrations are most severe in the Billings North Park neighborhood where 94.4 percent of families live below the poverty line, Billings South with 44 percent beneath the poverty line, and Billings Southwest where 27.1 percent of families live in poverty.⁶³

Given this research from across the nation, it is no surprise that the gradua-

tion Press, 1978) 69. “Educational research suggests that the basic damage inflicted by segregated education comes not from racial concentration but the concentration of children from poor families.”

63. Best Beginnings Council of Yellowstone County, *2012 Needs Assessment: Neighborhood Analysis v. 2* (Billings, MT: Best Beginning Council of Yellowstone County, 2012) 27, 29, 31.

tion rate of “economically disadvantaged” Billings high school students was just 54.2 percent in 2011 compared to 77.6 percent for all students.⁶⁴

Evidence has been mounting that placing children from lower-income households in classes and schools where children from higher-income households comprise the majority of the student body significantly reduces the educational achievement gap and opens the door to upward mobility out of poverty. In Montgomery County, Maryland low-income pupils who attended public schools with more affluent students in the majority cut the achievement gap in mathematics in half and in reading by one third. Public housing pupils who attended schools with more affluent students out performed similarly-situated pupils who attended schools with less affluent students.⁶⁵

Even more significant was the difference in learning by the low-income children who lived in public housing located in middle- and upper-income neighborhoods compared to low-income children who lived in low-income neighborhoods and who attended low-income schools that received substantial increased resources and state of the art interventions. The children from scattered site public housing located in non-poverty neighborhoods substantially outperformed the low-income students who attended schools that with student bodies comprised mostly of low-income students. “Given the enormous influence of economic and social conditions, ameliorating the negative effects of concentrated poverty may do more to improve our schools than most or all school reform.”⁶⁶

Montgomery County illustrates how housing policy and education meet. The county achieved its economic integration of pupils from public housing families thanks to the county’s mandatory inclusionary zoning which has produced over 12,000 moderately-priced homes throughout the county. Unique to the county’s inclusionary zoning is its provision that allows the public housing authority to purchase a third of the inclusionary zoning units in each subdivision as public housing. The authority operates over 1,000 public housing and Housing Choice Voucher units in market rate apartment complexes.⁶⁷

Efforts to achieve economic integration in the classroom are growing with over 80 public school districts that serve a total of 4 million students already pursuing economic integration in their classrooms.

As this research suggests, where Housing Choice Vouchers are used and where public housing is located have far reaching effects and implications for the

64. Best Beginnings Council of Yellowstone County, *Needs Assessment* (Billings, MT: Best Beginning Council of Yellowstone County, 2012) ‘Table 6A: High School Graduation Rates.’

65. Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland* (New York, NY: The Century Foundation, 2010) .

66. William Mathis, *Research-Based Options for Education Policymaking: Effective School Expenditures* (Boulder, CO: School of Education, University of Colorado Boulder, Feb. 2013) 2.

67. Heather Schwartz at 4, 6. The research also found that “academic returns from economic integration diminished as school poverty levels rose.” Children from public housing did best in schools where the proportion of students qualified for free or reduced-price meals did not exceed 20 percent. Public housing students who attended schools where as many as 35 percent of the student qualified for free or reduced-price meals performed in school as poorly as students who attended schools where 35 to 85 percent qualified for free or reduced-price meals. The precise percentage of poverty students at which academic improvement diminishes, however, can vary. While it was somewhere between 20 and 35 percent in Montgomery County, it could be at a different level elsewhere.

housing policies of the City of Billings and the Housing Authority of Billings. These are discussed in depth in Chapter 5.

Addressing Limited English Proficiency

As part of its administrative plan, the Housing Authority of Billings has adopted a three-page policy entitled “Improving Access to Services for Persons with Limited English Proficiency (LEP).”⁶⁸

The policy largely mirrors limited English proficiency guidance issued by the U.S. Department of Housing and Urban Development. The housing authority did not provide any details on how this policy has been implemented. The policy still refers to the 2003 “Notice of Guidance to Federal Assistance Recipients Regarding Title VI Prohibition Affecting Limited English Proficient Persons,” published December 19, 2003 in the *Federal Register*. Final Guidance was published January 22, 2007,⁶⁹ the Housing Authority might want to revisit the final guidance and make appropriate refinements to its policy.

Only 1.4 percent of Billings’ residents over four years old speak English less than “very well.” Of the 4.9 percent of the city’s residents who speak a language other than English, 28.3 percent speak English less than “very well.”⁷⁰ That’s 1.39 percent of the city — approximately 1,325 residents — that speaks English less than “very well.”

Suggestion Even though the federal guidance allows exceptions to its mandate to develop a written plan for people with limited proficiency in speaking English, it would be prudent for the Housing Authority of Billings to develop at least a bare bones written plan that is more specific than the federal guidelines that the authority has adopted as part of its administrative plan.

The Affordability of Housing

As the nation slowly recovers from the worst collapse in housing prices since the Great Depression, the cost of *most* ownership and rental housing remains beyond the means of *most Billings residents*.

The tables that follow show that while the median sales price of homes has stayed fairly steady from 2008 through 2011, they continue to be unaffordable to most of Billings’ population.⁷¹ Rentals still stretch tenant budgets even as rents decreased in 2011 to 2007 levels, possibly due in part to a rental vacancy rate that suddenly rose from a low 2.7 percent in 2010, 2009, and 2007 (it was 2.5 percent in 2008) to a healthier 6.3 percent in 2011.⁷²

68. The housing authority provided this policy to us in a file entitled “HAB HCV Nondiscrimination Policy–LEP Policy.pdf.” The policy appears on page numbers 2–10 through 2–12.

69. Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons; Notice, 72 *Federal Register* 2732 (Jan. 22, 2007).

70. “Language Spoken at Home,” 2007–2011 *American Community Survey 5–Year Estimates*, Table S1601.

71. Data on the actual sale prices of homes were not available for 2007.

72. Table CP04: Selected Housing Characteristics, 2011 *American Community Survey 1–Year Estimates* for