**Updating Data Guidance in the Citizen Participation &
Equitable Engagement (CPEE) Toolkit**

May 2022

INTRODUCTION

We write as organizations of attorneys and advocates with decades of experience in promoting the production, protection and desegregation of housing for lower-income and working families and years of working with community groups and local, state and federal governments on disaster recovery and mitigation in response to the devastation caused by over a dozen major disasters from Katrina to Ida.

We are following up after participating in the November HUD listening session on CDBG-DR and CDBG-MIT programs and the subsequent release of the Citizen Participation & Equitable Engagement (CPEE) Toolkit. We are very excited to see HUD moving forward with the CPEE Toolkit to help grantees further engage communities and comply with civil rights obligations.

That said, we have one critical concern with the toolkit as published. Accurate, publicly accessible data are critical to furthering equitable recovery for the lowest-income and most marginalized disaster survivors and ensuring citizen participation and engagement. Yet a key document linked to in the toolkit, the Disaster Impact and Unmet Needs Assessment Kit from March 2013 (Kit), has not been updated in nearly a decade and thus does not reflect lessons learned and best practices. We believe that updating this document, as summarized below, would further significantly the overall goals of the toolkit:

I.   **Target resources to the those with the greatest needs and refine unmet needs methodology.**

- To ensure that the needs of renters are not undercounted, HUD should establish the methodology used by New York State after Superstorm Sandy as the baseline for allocations among grantees and within grantee jurisdictions.

- To advance equity, HUD should update its Disaster Impact and Unmet Needs Assessment Kit to direct grantees to adjust damages for homeowners.

II. **Provide, and require grantees to provide, transparent data to the public.**

- HUD should direct grantees to provide the raw data that HUD/FEMA use in their methodology to the public in a timely and systemized manner to allow the public the needed ability to participate in Plan development and to identify potential racially disparate outcomes in action plan programs.

- HUD should collaborate with FEMA to institute a common format for distribution of data to the public after a major disaster, based on the OpenFEMA data set.

III. Require Action Plan programs to align with objective measures of unmet need and not force the displacement of impacted communities.

- HUD should specify more measures to actively prevent displacement and require grantees to make public metrics for allocation of program dollars based on neighborhood-level analysis of need.

- The rental housing redevelopment portion of the New Jersey Voluntary Consent Agreement (VCA) meets many of HUD's allocation CDBG-DR plan requirements and should be included as an example in the Kit.

Updating the Kit, in concert with the release of the CPEE Toolkit and other actions to ensure disaster recovery is more equitable, also will provide a significant opportunity for the agency to respond to Executive Order 13985 of January 20, 2021, to advance a "comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized and adversely affected by persistent poverty and inequality." Disaster recovery has historically been a major area in which HUD grantees have not sufficiently addressed the systemic barriers referenced by the President. Fair Share Housing Center's (FSHC) fair housing complaint on behalf of the Latino Action Network and the New Jersey State Conference of the NAACP following Superstorm Sandy became the largest federal fair housing case ever brought, and other major fair housing challenges have resulted from major disasters including *GNOFHAC, et. al. v. HUD, et. al.* (723 F. Supp. 2d 14 (D.D.C. 2010), *GNOFHAC v. St. Bernard Parish* (648 F. Supp. 2d 805 (E.D. La. 2009) following Katrina, Texas Appleseed and Texas Housers' fair housing complaint against the State of Texas following Hurricanes Ike and Dolly, and ongoing civil rights advocacy following Hurricanes Maria and Harvey, all have involved the use of data to show how CDBG-DR funds do not reach impacted communities of color proportionate to need. Climate change is making major disasters more frequent and more severe, and marginalized groups have been forced onto the frontlines by historical discrimination. The CDBG-DR and CDBG-MIT programs - because of their critical importance to these low-income and marginalized people - are a particularly crucial area for HUD to examine where changes are needed to programs and policies to ensure equity.

We present the following recommendations for modification and improvement of the Kit that we believe can be implemented administratively, within existing statutory authority. These recommendations should also be key considerations in any future disaster recovery guidance or regulations.

RECOMMENDATIONS

I. Target resources to those with the greatest needs and refine unmet needs methodology.

Section 6 of the new CPEE Toolkit, "Evaluate Engagement and Programming," discusses the need for citizen participation in evaluating unmet needs and links to the 2013 Disaster Impact and Unmet Needs Assessment Kit. HUD must update the Assessment Kit to more accurately recognize the lessons learned in the last decade on how to best identify and target resources to meet renters needs.

The methodology and data for determining unmet needs that is the foundation for HUD's allocation of disaster appropriations must be restructured to better serve the needs of renter households - particularly lower-income renters that are disproportionately households of color. The 'methodology' that traditionally appears as Appendix A to HUD Allocation Notices, dramatically and indefensibly minimizes these unmet needs of renters, thereby establishing a baseline that persists through grantee action plan design and implementation to produce indefensible discriminatory outcomes for impacted households and communities of color and low income. (See: 85 F.R. 4681, 4689 – Jan. 27, 2020) See: mandate of

Executive Order 13985, Sec. 7. *Promoting Equitable Delivery of Government Benefits and Equitable Opportunities.*

The initial under-assessment and undercounting of rental housing and renter needs by FEMA is compounded by HUD's Appendix A methodology that calculates unmet need allocations based upon repair estimates for serious damage only for rental units occupied by very low-income renters. By assuming that all landlords renting to households with incomes over the greater of poverty level or 50% of area medium income "have adequate insurance coverage" (85 F.R. 4681, 90), the impact of the disaster on the entire pre-event rental inventory is critically undercounted. Faced with scarce inventory and resulting supply-driven rent increases, higher-income renters migrate into the remaining lower-income inventory and lower-income households are totally deprived of housing with no recovery plan in place to reestablish the balance.

To ensure that the needs of renters are not undercounted, HUD should establish the methodology used by New York State after Superstorm Sandy as the baseline for allocations among grantees and within grantee jurisdictions. The initial 2013 New York State Action Plan in response to Superstorm Sandy rejected the use of FEMA Individual Assistance (IA) data as a basis for allocating need because it correctly found that the IA data "systematically underrepresents the extent of damage to the rental stock; given the large proportion of minority and low-income New Yorkers who require affordable rental properties, the State believes it is critical to understand damage incurred by this segment of the housing market." The New York State methodology, which is easily replicable based on a standard formula, corrects for the systematic underrepresentation of renters by using homeowner data as a baseline and extrapolating the more detailed homeowner data collected by FEMA to assess damage to renters in the same Census block or block group. HUD should use this methodology as the baseline methodology for assessing housing needs in the Disaster Impact and Unmet Needs Assessment Kit. Future guidance or regulations should also require grantees to use it as the default methodology for assessing unmet need.

There are similar deficiencies in assessing the unmet needs of low-income homeowners. Any methodology using property value as a metric systemically underestimates the level of damage and unmet need in terms of the resources necessary to rebuild. The use of property value also has a disparate, harmful impact on Black, Indigenous, and people of color homeowners and communities. As President Biden noted in his January 26, 2021 Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, discriminatory housing policies at the federal, state, and local government level are responsible for creating segregated neighborhoods and obstructing access to opportunity and the ability to build wealth for BIPOC Americans. The President went on to acknowledge that "[o]ngoing legacies of residential segregation and discrimination . . . include a racial gap in homeownership; a persistent undervaluation of properties owned by families of color; a disproportionate burden of pollution and exposure to the impacts of climate change in communities of color; and systemic barriers to safe, accessible, and affordable housing."

To advance equity, HUD should update its Disaster Impact and Unmet Needs Assessment Kit to direct grantees to adjust damages for homeowners based on metrics of home values such that the minimal damage qualifying as major damage is expressed as a percentage of overall home value, and not as a flat number that does not recognize the well-documented impacts of racial bias on appraisal methodology and neighborhood home values.
HUD should reconsider its assumption that damages of less than $8000 do not constitute "major damage" for purposes of determining unmet need - particularly when such determinations are made by FEMA inspectors who are trained to exclude anything they subjectively consider "deferred maintenance" from the amount of damages.

II. Provide, and require grantees to provide, transparent data to the public

HUD should provide greater guidance in the toolkit on how to access and use data on impact and recovery assistance, particularly for protected classes. While we support the toolkit's point that each grantee must maintain a public website for the CDBG-DR program that shows how the funds are used, managed, and administered, there is little information in the Disaster Impact and Unmet Needs Assessment Kit on how survivors, advocates and community leaders can obtain the data underlying the analysis.

HUD should direct grantees to provide the raw data that HUD/FEMA use in their methodology to the public in a timely and systemized manner to allow the public the needed ability to participate in action plan development and to identify potential racially disparate outcomes in action plan programs. Applications for assistance or program participation must be reported in granular detail with deletion of personally identifying information (PII). The data should include the date the information was acquired and posted along with a specific, individual case tracking number assigned to every applicant, household/individual/participant (participant). These data, on both initial impacts and the spending of funds, are instrumental to empowering residents and advocates to enforce equity and civil rights protections in the structure and content of DR grantee plan programs and resource allocation. Program data should be disaggregated by geography, income, race, and ethnicity, and all protected classes of individuals to ensure fair and equitable access. HUD and FEMA should collaborate in making these data available, and these data should be accessible through the toolkit.

In recent years, OpenFEMA has released data collected through Preliminary Damage Assessments (PDAs), National Flood Insurance Program (NFIP) claims, Small Business Administration (SBA) loan data and Individual Assistance/Public Assistance applications, following a federally declared disaster. Currently, their IA dataset contains data from all declared disasters since 1998 on variables including geography, tenure of the applicant, damage, and assistance eligibility and amount.

HUD has the authority to incorporate this data into CDBG-DR platforms. The treatment of records on individuals, collected by the federal entities, is governed by the Privacy Act of 1974 (5 U.S.C. 552a). With respect to HUD, disclosure is regulated by 42 CFR §16.11. Under §552a, any item or collection of information on an individual, that also contains the subject's name or a number, symbol, or particular assigned to that individual, is protected. Distribution to CDBG-DR grantees is allowable to enable them to provide disaster assistance. Distribution is also allowed under the "routine use" exception "for a purpose which is compatible with the purpose for which [the information] was collected." To the extent that personally identifying information is removed, the remaining data would not constitute a protected "record"[1] and can be made publicly available, as FEMA and HUD have both recognized on an ad hoc

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[1] 5 U.S.C. § 552a defines "record" as: "(4) . . . any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph; and "routine use" as "(7) . . . with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;"
44 CFR §206.110 provides: . . . (j) *Application of the Privacy Act.*
(1) All provisions of the Privacy Act of 1974, 5 U.S.C. 552a, apply to this subpart. FEMA may not disclose an applicant's record except:
    (i) In response to a release signed by the applicant that specifies the purpose for the release, to whom the release is to be made, and that the applicant authorizes the release;
    (ii) In accordance with one of the published routine uses in our system of records; or
    (iii) As provided in paragraph (j)(2) of this section.
(2) Under section 408(f)(2) of the Stafford Act, 42 U.S.C. 5174(f)(2), FEMA must share applicant information with States in order for the States to make available any additional State and local disaster assistance to individuals and

basis in OpenFEMA data sets and the New Jersey VCA.

HUD should collaborate with FEMA to institute a common format for distribution of data to the public after a major disaster, based on the OpenFEMA data set. These data must include information at the most local available Census geography, preferably the Census block, to enable the public to compare the data with Census data on areas such as race and ethnicity that FEMA does not currently collect.

An exceptional example of transparency in procurement and operations post-impact is the New Jersey Office of the Comptroller's Sandy Transparency pages. This has been taken down, but many of its elements are resurrected in its Covid-19 Oversight page and Covid-19 Compliance and Transparency page (https://www.nj.gov/covid19oversight/transparency/contracts/).
One agreement reached in the FSHC – State of New Jersey VCA was that the state was, and continues to be, required to send FSHC quarterly reports containing much of the data described above, at an individual award level with procedures to protect recipient privacy. This has proven helpful, however monthly updates on a public page, including all of described data and procedures should be a baseline in data access and transparency.

III.   **Require Action Plan programs to align with objective measures of unmet need and not to force displacement of impacted communities.**

The toolkit should more explicitly reflect the non-discrimination, resident protection, and fair housing provisions of its Allocation Notices, with the central question being whether allocation of funds addresses unmet need in a granular way that grants residents of all races and backgrounds the ability to return to impacted communities, accounts for fair and equitable mitigation and relocation options, and prioritizes the most impacted communities.

While "Step 3: Understand the Community," speaks to analyzing data to understand the characteristics of households that were displaced, **HUD should specify more measures to actively prevent displacement and require grantees to make public metrics for allocation of program dollars based on neighborhood-level analysis of need.** Such specificity reflects HUD's prior recognition in CDBG-DR allocation notices that it must evaluate draft grantee action plans with regard to their compliance, both patent and latent, with the affirmative requirements traditionally set out in Section VI of allocation notices that require not just lip service, but actual program structure, including resource distribution, to assist low- and moderate-income households and communities, minimization of displacement and incorporation of mitigation. See, for example, 83 F.R. 5844, 5849, VI. A. 2. a. (1) – (13) – Feb. 9, 2018).

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households.
     (i) States receiving applicant information under this paragraph must protect such information in the same manner that the Privacy Act requires FEMA to protect it. FEMA's IHP application instructions provide, in part: "This includes sharing this information with Federal, State, local, tribal and voluntary organizations to enable you to receive additional disaster assistance, prevent duplication of benefits, and as necessary and authorized by the routine uses published in DHS/FEMA-008 Disaster Recovery Assistance Files System of Records, 78 Fed. Reg. 25,282 (April 30, 2013), and upon written request, by agreement, or as required by law."
     https://www.disasterassistance.gov/DAC/ri/privacyAct.do

     (ii) States receiving such applicant information shall not further disclose the information to other entities, and shall not use it for purposes other than providing additional State or local disaster assistance to individuals and households.

In New Jersey, after Superstorm Sandy, multiple extensive written comments submitted by scores of resident and community advocacy organizations and others to effectively distribute resources were initially ignored by both the state and HUD. It required 14 months of negotiation, and dozens of public records requests, to require the state, through a VCA to make significant changes to the plan, including, ultimately, allocating over $650 million to the Fund for Restoration of Multifamily Housing (FRM) and establishing meaningful outreach to and communication with all residents and communities. Even thereafter, two years into the Superstorm Sandy recovery process, RREM (Reconstruction, Rehabilitation, Elevation and Mitigation) Program recovery funds for both homeowners and renters did not align with the hardest-hit areas. As an example, 17% of funding for rental recovery went to Essex County despite Essex County having 1% of the damage. As a key component of the VCA, as described more below, there was a specific distribution formula required to align resources for renters to demonstrated renter need, so that impacted renters would not be forced to move long distances to access affordable and resilient housing post-disaster.

The rental housing redevelopment portion of the New Jersey VCA meets many of HUD's allocation DR plan requirements and should be included as an example in the Kit. It required all units to be constructed in communities impacted by Superstorm Sandy in proportion to the amount of damage suffered by each county, to target certain percentages of these funds to specific low-income brackets, and to provide displaced families a preference to all units. For example, 52% of the total funds in the major rental program in the VCA (FRM) were required to be allocated to Monmouth and Ocean Counties, based on the share of renter damage experienced by those counties.

The 2010 Conciliation Agreement between the State of Texas, HUD, Texas Housers, and Texas Appleseed required that "the housing needs of low, very low, and extremely low-income households are assisted with housing in no less than their relative percentages of the overall populations which suffered housing damage within the community being served." In the Homeowner Assistance Program alone, this provision more than doubled assistance for the lowest-income homeowners.

CONCLUSION

The CPEE Toolkit is an exciting step forward on equity and citizen participation in disaster recovery. That said, its reliance on an outdated document on what is arguably the most critical aspect of equity – the accurate and transparent use of data to ensure an equitable recovery – should be remedied at the earliest possible date. Doing so will enable HUD, grantees, and the residents and communities they serve to realize complete and equitable recoveries.

Thank you for your consideration of these suggestions and we would appreciate an opportunity to follow up on any questions you may have and discuss the ideas in this memo further.

Sincerely,

Ayuda Legal Puerto Rico
https://www.ayudalegalpuertorico.org

National Low Income Housing Coalition
http://nlihc.org

Fair Share Housing Center
https://fairsharehousing.org

Texas Appleseed
https://www.texasappleseed.org