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Regulations Division, Office of General Counsel  
Department of Housing and Urban Development  
451 7th Street SW, Room 10276  
Washington, DC 20410-0500

**Re: HUD's Proposed Rule on Affirmatively Furthering Fair Housing, Docket No. FR 6250-P-01**

[Submitted via [www.regulations.gov](http://www.regulations.gov)]

The National Women's Law Center (the "Center") takes this opportunity to comment in support of strengthening the Department of Housing and Urban Development's (HUD) Affirmatively Furthering Fair Housing (AFFH) Proposed Rule.<sup>1</sup>

The Center fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQI+ people, and low-income women and families. For 50 years, the Center has been on the leading edge of every major legal and policy victory for women.

Because of the importance of safe, accessible, and affordable housing to all facets of the lives of women, LGBTQI+ people, children, and families, the Center generally supports the Proposed Rule, which is a vast improvement compared to the 2020 Preserving Community and Neighborhood Choice (PCNC) Rule. The Center urges HUD to strengthen the Proposed Rule to reduce fair housing barriers for women, LGBTQI+ people, and their families, particularly at the intersection of race/ethnicity, disability, and other protected classes. More specifically, the Center will stress the following in its comment:

- Access to safe and affordable housing in integrated neighborhoods is vital to the well-being of women and girls. Housing impacts health, education, food security, employment, access to quality child care, and access to public programs that help families with low incomes meet basic needs.

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<sup>1</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5 et al.)

- The AFFH mandate is vital to overcoming barriers to fair housing for women and families. Despite HUD’s statutory AFFH obligation, decades passed without effective, meaningful guidance on how jurisdictions could meet this obligation through taking concrete steps to tackle segregation and address fair housing issues. The 2015 AFFH Rule created strong pathways to address historic and ongoing discrimination but was short-lived. Unfortunately, HUD suspended the 2015 Rule and then promulgated the 2020 Preserving Community and Neighborhood Choice (PCNC) Rule—actions that halted, and threatened to wipe out, the progress from the 2015 AFFH Rule.
- The 2020 PCNC Rule was inconsistent with the FHA’s AFFH mandate and was promulgated without notice-and-comment.
- The Proposed Rule contains important provisions to advance fair housing but its definitions and the Equity Plan process, including data analysis and community engagement could be improved.

**I. Access to safe, accessible, and affordable housing in integrated neighborhoods is vital to the well-being of women, LGBTQI+ people, and families.**

Access to safe, accessible, and affordable housing is crucial to health, nutrition, education, access to quality child care, and stable employment.<sup>2</sup> Where we live is at the very core of our daily lives.

**A. Access to fair housing impacts health outcomes for women and families.**

Safe, decent, accessible, and affordable housing is key to one’s health and well-being.<sup>3</sup> When women and families spend too much on housing, they have insufficient resources for other essential needs, including food and health care. People who are cost-burdened are more likely to skip health care treatments or prescriptions because of cost, which is particularly harmful for women who are already more likely to delay needed medical care because of expenses.<sup>4</sup>

Different forms of housing instability, including eviction, also aggravate mental health conditions.<sup>5</sup> Prior to the COVID-19 pandemic, among renters with low incomes, Black

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<sup>2</sup> Sammi Aibinder, Andrea Flynn, Richelle Gernan, Sarah Hassmer & Rakeen Mabud, *The Roots of Discriminatory Housing Policy: Moving Toward Gender Justice in Our Economy*, NAT’L WOMEN’S L. CTR (Aug. 2022), <https://nwlc.org/resource/the-roots-of-discriminatory-housing-policy-moving-towards-gender-justice-in-our-economy/>; *Gender and Racial Justice in Housing*, NAT’L WOMEN’S L. CTR (Oct. 2021), <https://nwlc.org/resource/gender-and-racial-justice-in-housing-2/>.

<sup>3</sup> Lauren Taylor, *Housing and Health: An Overview of the Literature*, HEALTH AFFAIRS (June 7, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/>.

<sup>4</sup> *Comments in Response to HUD’s Proposed Rule on Affirmatively Furthering Fair Housing*, NAT’L WOMEN’S L. CTR (Mar. 16, 2020), <https://nwlc.org/resources/nwlc-comments-to-the-u-s-department-of-housing-and-urban-development-on-affirmatively-furthering-fair-housing/> [hereinafter “NWLC 2020 AFFH HUD Comment”].

<sup>5</sup> Aibinder et al., *supra* note 2, at 8.

women were nine times more likely than white women to be evicted.<sup>6</sup> This exacerbates the heightened risk that women, particularly women of color, have of experiencing depression, anxiety, and high blood pressure.<sup>7</sup> Throughout the pandemic, Black, non-Hispanic women have faced the highest rates of being behind on rent,<sup>8</sup> heightening the threat of eviction. Further, unstable housing is particularly harmful to children’s health, including developmental delays and mental health conditions, and the harm grows the longer a child experiences housing instability.<sup>9</sup>

When access to stable, accessible, and affordable housing is limited, more women are forced to live in highly segregated and/or substandard housing. Housing segregation widens health disparities by determining access to schools, jobs, health care, and nutritious foods.<sup>10</sup> In contrast, the availability of resources—such as public transportation to one’s job, grocery stores with nutritious foods, and safe spaces to exercise—are all correlated with improved health outcomes.<sup>11</sup>

Substandard housing conditions—such as lead paint, poor ventilation or heat/cooling, and pest infestation—also pose a variety of health risks to women and girls.<sup>12</sup> Women and families with low incomes are most likely to experience unhealthy housing conditions and are typically least able to remedy them, contributing to disparities in health across socioeconomic groups.<sup>13</sup>

#### **B. Access to fair housing impacts educational outcomes for women and families.**

Gender justice, access to fair housing opportunities, and educational equity are deeply intertwined.

First, housing instability has negative impacts on education. Children who experience housing instability are more likely to have behavioral problems and struggle in school.<sup>14</sup> Being homeless is a traumatic experience that manifests in many ways in the classroom—including ways that are coded as disruptive and can trigger a punitive response from educators. As such, housing instability contributes to high suspension rates, school turnover, truancy, and expulsions.<sup>15</sup> Homelessness is associated with an

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<sup>6</sup> *Id.* at 3, 6.

<sup>7</sup> NWLC 2020 AFFH HUD Comment, *supra* note 4, at 3.

<sup>8</sup> NWLC *Analysis of U.S. Census Bureau COVID-19 Household Pulse Surveys*, NAT’L WOMEN’S L. CTR. (Jan 22, 2021) <https://nwlc.org/resource/nwlc-analysis-of-u-s-census-bureau-covid-19-household-pulse-surveys/>.

<sup>9</sup> NWLC 2020 AFFH HUD Comment, *supra* note 4, at 3.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Paula Braveman, Mercedes Dekker, Susan Egerter, Tabishir Sadegh-Nobari & Craig Pollack, *Housing and Health*, ROBERT WOOD JOHNSON FOUND. 3-7 (May 1, 2011), <https://www.rwjf.org/en/library/research/2011/05/housing-and-health.html>.

<sup>14</sup> Abigail L. Gaylord, Whitney J. Cowell, Lori A. Hoepner, Frederica P. Perera, Virginia A. Rau & Julie B. Herbstman, *Housing Instability is Linked to Adverse Childhood Behavior*, HOUSING MATTERS (May 9, 2019), <https://howhousingmatters.org/articles/housing-instability-linked-adverse-childhood-behavior/>.

<sup>15</sup> Mai Abdul Rahman, *The Demographic Profile of Black Homeless High School Students Residing in the District of Columbia Shelters and the Factors that Influence their Education* 16, 63, 73 (Mar. 2014),

83 percent greater likelihood of a child being pushed out of school.<sup>16</sup> In addition, housing instability directly correlates to decreased academic achievement and retention.<sup>17</sup> Conversely, educational attainment is linked to positive health outcomes and longer lives.<sup>18</sup> Access to housing, therefore, is critical to ensuring the future success of all students—including young women, girls, and LGBTQI+ students.

The neighborhoods in which children live typically determine the schools they attend, and the more racially segregated our neighborhoods, the more racially segregated our schools. Segregated neighborhoods isolate communities of color in environments that are often poorly resourced and economically disadvantaged. These disparities are mirrored in our schools, resulting in disparate educational opportunity and outcomes for students of color.<sup>19</sup> Today, the schools that serve the highest concentrations of Black and Latinx children routinely have less experienced teachers, offer less challenging courses, and invest less in their physical space.<sup>20</sup> By providing fewer resources and opportunities for growth, these schools perpetuate generational poverty and disproportionately harm students of color.

In addition to school segregation, allowing for the continued concentration of poverty in communities limits the resources available to schools. Because of the decentralized nature of education funding, and the reliance on local property taxes, low-wealth communities are less able to provide sufficient funding for their schools, even when tax rates are high.

In contrast, integration promises positive outcomes for all students. For example, research has shown that the academic achievement gap for Black children increases the more time they spend in segregated schools.<sup>21</sup> Meanwhile, the racial achievement gap fell dramatically during the 1970s and 1980s, the peak years of integration.<sup>22</sup>

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(Doctor of Education dissertation, Howard University) <https://www.proquest.com/dissertations-theses/demographic-profile-black-homeless-high-school/docview/1620832476/se-2>.

<sup>16</sup> Erin S. Ingram, John M. Bridgeland, Bruce Reed & Matthew Atwell, *Hidden in Plain Sight: Homeless Students in America's Public Schools*, CIVIC ENTERPRISES & HART RES. ASSOCS.17, 24 (2016), <https://eric.ed.gov/?id=ED572753>.

<sup>17</sup> Rahman, *supra* note 15.

<sup>18</sup> Viju Raghupathi & Wullianallur Raghupathi, *The Influence of Education on Health: An Empirical Assessment of OECD Countries for the Period of 1995-2015*, ARCHIVES OF PUBLIC HEALTH (April 6, 2020), <https://archpublichealth.biomedcentral.com/articles/10.1186/s13690-020-00402-5>; Anna Zajacova & Elizabeth M. Lawrence, *The Relationship Between Education and Health: Reducing Disparities Through a Contextual Approach*, 39 ANNU. REV. PUB. HEALTH 273-289 (April 1, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5880718/pdf/nihms947038.pdf>.

<sup>19</sup> See, e.g., *Racial Equity Advocates Are Housing Advocates*, OPPORTUNITY STARTS AT HOME, <https://www.opportunityhome.org/resources/housing-discrimination-unfinished-business-civil-rights/> (last visited Apr. 13, 2023).

<sup>20</sup> Catherine E. Lhamon, Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ., Dear Colleague Letter: Resource Comparability (Oct. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

<sup>21</sup> Eric A. Hanushek & Steven G. Rivkin, *Harming the Best: How Schools Affect the Black-White Achievement Gap*, NAT'L BUREAU OF ECON. RES. (Aug. 2008), <https://www.nber.org/papers/w14211>.

<sup>22</sup> *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, THE CENTURY FOUND. (Apr. 29, 2019), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms>.

Notably, white children benefited too—test scores for both Black and white students often improved during this time of integration.<sup>23</sup>

### C. Access to fair housing impacts nutrition for women and families.

When families with low incomes spend high portions of their income on rent, they struggle to pay for nutritious food. Indeed, food insecurity increases with housing costs.<sup>24</sup> One study shows that low-income households with children that pay over half of their monthly income on rent spend considerably less on other basic necessities, including about \$200 less per month on food.<sup>25</sup> In 2021, over 13 percent of women living alone and over 24 percent of families with children headed by a single woman faced food insecurity.<sup>26</sup>

In addition, historical residential segregation has restricted neighborhood access to healthy foods and inhibits a family's ability to engage in healthy eating behaviors.<sup>27</sup> This negatively impacts nutrition for families in neighborhoods of color and is correlated with an increased chance of obesity.<sup>28</sup> Meanwhile, evidence suggests that an increase in access, availability, or consumption of healthy foods was associated with a significant decrease in body mass index.<sup>29</sup>

### D. Access to fair housing impacts women's employment outcomes.

Eviction and involuntary displacement due to unjust and discriminatory housing policies make it hard for workers to be present during scheduled work hours and may lead to job loss and prolonged unemployment.<sup>30</sup> The eviction process is usually long, unpredictable, and arduous, and can span multiple weeks and require court appearances, necessitating multiple and unpredictable absences from work. Then there are additional barriers to employment if someone is evicted. The search for a new safe and affordable home can already be a lengthy process, and tenants with an eviction record on their rental history often struggle to find a new landlord. Consequently, an evicted tenant's housing opportunities are often limited to inconvenient or unsafe areas

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<sup>23</sup> See, e.g., Nat'l Ctr. for Educ. Statistics, *Trends in Academic Progress* U.S. DEP'T OF EDUC., 16 (2012) <https://nces.ed.gov/nationsreportcard/subject/publications/main2012/pdf/2013456.pdf>.

<sup>24</sup> Jason M. Fletcher, Tatiana Andreyeva & Susan H. Busch, *Assessing the Effect of Increasing Housing Costs on Food Insecurity* (Sept. 9, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1503043](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503043).

<sup>25</sup> Joint Ctr. for Hous. Studies, Harvard U., *The State of the Nation's Housing*, HARVARD U. 30, 32 (2018), [http://www.jchs.harvard.edu/sites/default/files/Harvard\\_JCHS\\_State\\_of\\_the\\_Nations\\_Housing\\_2018.pdf](http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf).

<sup>26</sup> Alisha Coleman-Jensen, Matthew P. Rabbitt, Christian A. Gregory & Anita Singh, *Household Food Security in the United States in 2021*, ECON. RES. SERV., U.S. DEP'T OF AGRIC. (Sept. 2022), <https://www.ers.usda.gov/publications/pub-details/?pubid=104655>. USDA defines "low food security" as "reports of reduced quality, variety, or desirability of diet" and "very low food security" as "reports of multiple indications of disrupted eating patterns and reduced food intake." *Definitions of Food Security*, ECON. RES. SERV., U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/definitions-of-food-security/> (updated Oct. 17, 2022).

<sup>27</sup> NWLC 2020 AFFH HUD Comment, *supra* note 4, at 7.

<sup>28</sup> *Id.* at 8.

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

<sup>30</sup> Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, 63 SOCIAL PROBLEMS 46-67 (Jan. 11, 2016), <https://scholar.harvard.edu/mdesmond/publications/housing-and-employment-insecurity-among-working-poor>.

and can result in workplace tardiness or absenteeism. This is especially true for poorly paid workers, who are less likely to have access to important supports, like paid leave or predictable or flexible work schedules.<sup>31</sup>

Furthermore, poor credit caused by housing instability more broadly can make it harder for individuals to obtain or maintain a job. Predatory lending and other discriminatory housing policies and practices may result in tarnished credit or rental histories, which can create barriers for individuals seeking employment. Credit and background checks are increasingly common in employment and can effectively bar individuals from job opportunities. According to one report, 25 percent of unemployed respondents said that a potential employer requested a credit check on the job application.<sup>32</sup> Consequently, 10 percent of unemployed respondents were notified they would not be hired due to information in their credit report.<sup>33</sup> Thus, access to safe and stable housing is critical to advancing employment and economic security.

In addition, addressing residential segregation is a key worker justice issue. For example, one study found that Black people living “in moderately segregated metropolitan areas have much better employment levels” than those in highly segregated metropolitan areas.<sup>34</sup> The Brookings Institution analyzed the 10 largest Black-majority cities<sup>35</sup> and found that Black unemployment rates in 2017 ranged from 3.9 percent to 10.8 percent higher than white unemployment rates.<sup>36</sup> In response to HUD’s 2020 Proposed Rule on Affirmatively Furthering Fair Housing, the Center analyzed 2018 unemployment data for some of the same cities and identified disparities by race and sex in most places:<sup>37</sup>

- **Disparities based on sex and race:** In Baltimore, the 2018 unemployment rate for white, non-Hispanic people was three percent. White, non-Hispanic men fared better with a two percent unemployment rate, while white, non-Hispanic women had a 4.2 percent unemployment rate and Black women had a 7.7 percent unemployment rate. In Hampton, VA, the unemployment rate for white, non-Hispanic men was 1.2 percent but was 5.1 percent for white, non-Hispanic women and 10.1 percent for Black women.
- **Disparities based on sex:** In Newark, NJ, the unemployment rate for white, non-Hispanic men was a 2.9 percent but 12.1 percent for white, non-Hispanic women and 11.3 percent for Black women.

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<sup>31</sup> *Id.*

<sup>32</sup> Amy Traub, *Discredited: How Employment Credit Checks Keep Qualified Workers Out of a Job*, DEMOS (Feb. 3, 2014), <https://www.demos.org/research/discredited-how-employment-credit-checks-keep-qualified-workers-out-job>.

<sup>33</sup> *Id.*

<sup>34</sup> Kimberly Quick & Richard D. Kahlenberg, *Attacking the Black-White Opportunity Gap That Comes From Residential Segregation*, THE CENTURY FOUND (June 25), <https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation/>.

<sup>35</sup> Defined as “cities with a population of 50% or more Black residents, including those who identify as mixed race or biracial.” Andre M. Perry, *Black Workers Are Being Left Behind by Full Employment*, BROOKINGS INST. (Jun. 26, 2019), <https://www.brookings.edu/blog/the-avenue/2019/06/26/black-workers-are-being-left-behind-by-full-employment/>.

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

<sup>37</sup> NWLC 2020 AFFH HUD Comment, *supra* note 4, at 9-10.

- **Disparities based on race:** In New Orleans, white, non-Hispanic women had an unemployment rate of 3.4 percent while Black women had an unemployment rate of 7.7 percent.

Research also indicates that jobs in predominantly white communities that are inaccessible by public transportation can be hard for people of color with low incomes in segregated neighborhoods to access.<sup>38</sup> Moreover, the disparities in educational outcomes for students of color in segregated neighborhoods, as discussed above, impact the ability for many people of color to access quality jobs.<sup>39</sup>

#### **E. Residential segregation makes it harder for women with low incomes to access public programs to meet basic needs for their families.**

Because of gender and racial inequities in our employment, housing, and broader economic systems, women of color, and women more generally, face a higher risk of economic insecurity throughout their lives.<sup>40</sup> As a result, public programs provide critical assistance to many women and families to help meet their basic needs.<sup>41</sup> However, some benefit offices may be inaccessible by public transportation. If programs have in-person requirements, or families are unable to access the internet to complete online applications, it can be hard for women with low incomes to access public benefits programs.<sup>42</sup>

#### **F. Access to fair housing impacts child care for both parents and providers.**

Lack of affordable, accessible, and stable housing, combined with the high cost of child care, exacerbate economic insecurity for working families with young children. Similarly, lack of access to affordable housing is a major challenge for child care providers, who are among the lowest-paid workers and made up largely of Black and Latinx women.<sup>43</sup>

Families need both stable, affordable housing and high-quality affordable child care, but the cost of each can stretch many family budgets beyond their breaking point—and lack of access to one can impede access to the other. This burden is particularly acute for working families with low-incomes and children under five as well as women raising children on their own. Often these families spend over 30 percent—and in many cases

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<sup>38</sup> See, e.g., Margery Austin Turner & Karina Fortuny, *Residential Segregation and Low-Income Working Families*, URBAN INST. (Feb. 2009), <https://www.urban.org/sites/default/files/publication/32941/411845-Residential-Segregation-and-Low-Income-Working-Families.PDF>.

<sup>39</sup> NWLC 2020 AFFH HUD Comment, *supra* note 4, at 8-10.

<sup>40</sup> Jasmine Tucker, Sarah Hassmer, Amy Matsui, Melissa Boteach & Clara Clafin, *By the Numbers: Data on Key Programs for the Well-Being of Woman and Their Families*, NAT'L WOMEN'S L. CTR 1 (Jun. 2021), <https://nwlc.org/resources/by-the-numbers-data-on-key-programs-for-the-well-being-of-women-their-families/>.

<sup>41</sup> *Id.*

<sup>42</sup> NWLC 2020 AFFH HUD Comment, *supra* note 4, at 11-12.

<sup>43</sup> Asha Banerjee, Elise Gould & Marokey Sawo, *Setting Higher Wages for Child Care and Home Health Workers Is Long Overdue*, ECONOMIC POL'Y INST. (Nov. 18, 2021), <https://www.epi.org/publication/higher-wages-for-child-care-and-home-health-care-workers>.

over 50 percent or more—of their income on rent.<sup>44</sup> As a result, many low-income families are left without safe, accessible, or affordable housing in integrated neighborhoods and forced into lower-quality or less stable child care arrangements.<sup>45</sup>

While the cost of housing has increased, so too has child care. Over the past 30 years, child care prices have risen more than twice the rate of inflation<sup>46</sup>—faster than the price of food and other items.<sup>47</sup> The pandemic has accelerated these trends, with child care inflation exceeding annual inflation in 2020 by nearly four percent.<sup>48</sup> These rising prices squeeze families, crowd out other expenses, and push parents—especially mothers—out of the labor force.<sup>49</sup>

Accessing affordable and stable child care is even more difficult for families experiencing homelessness. While child care and early education programs can mitigate some of the effects of housing instability, barriers such as providing proof of residency prevent families from enrolling. Recent data shows 92 percent of children experiencing homelessness are not participating in early childhood education programs, and only 10 percent of children experiencing homelessness under age six enrolled in Head Start or other McKinney-Vento programs that aim to support unhoused children.<sup>50</sup>

The child care workforce is similarly affected by a lack of affordable or stable housing options, compounded with low wages not sufficient to meet basic needs. Child care providers—disproportionately Black and Latinx women—are among the lowest-paid workers, with poverty rates substantially higher than among K-8 teachers.<sup>51</sup> Among providers surveyed on their experiences with housing, one in four reported difficulty

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<sup>44</sup> NWLC 2020 AFFH HUD Comment, *supra* note 4, at 2-4.

<sup>45</sup> Douglas Rice, Stephanie Schmit, & Hannah Matthews, *Child Care and Housing: Big Expenses With Too Little Help Available*, CTR. ON BUDGET AND POL'Y PRIORITIES & CLASP (Apr. 29, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/4-29-19hous.pdf>.

<sup>46</sup> Derek Thompson, *Why Child Care Is So Ridiculously Expensive*, THE ATLANTIC (November 26, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/why-child-care-so-expensive/602599/>.

<sup>47</sup> Kathryn Anne Edwards (@keds\_economist), TWITTER (Nov. 9, 2021, 10:03 AM), [https://twitter.com/keds\\_economist/status/1458087891071082513/photo/1](https://twitter.com/keds_economist/status/1458087891071082513/photo/1); *Picking Up The Pieces: Building a Better Child Care System Post COVID-19*, CHILD CARE AWARE OF AMERICA (2020), <https://info.childcareaware.org/hubfs/Picking%20Up%20The%20Pieces%20%E2%80%94%20Building%20A%20Better%20Child%20Care%20System%20Post%20COVID%2019.pdf>.

<sup>48</sup> *Demanding Change: Repairing Our Child Care System*, CHILD CARE AWARE OF AMERICA (2022), <https://www.childcareaware.org/demanding-change-repairing-our-child-care-system/#Affordability>.

<sup>49</sup> *Growing our Economy by Investing in Families: How Supporting Family Caregiving Expands Economic Opportunity and Benefits All Americans; Hearing before House Select Committee on Economic Disparity and Fairness in Growth*, 118th Cong. (Dec. 8, 2021) (statement of Melissa Boteach, Vice President, Income Security and Child Care/Early Learning, Nat'l Women's L. Ctr.), <https://docs.house.gov/meetings/EF/EF00/20211208/114295/HHRG-117-EF00-Wstate-BoteachM-20211208.pdf>.

<sup>50</sup> Sarah Shaw, *Current Data on Infants and Toddlers Experiencing Homelessness*, ZERO TO THREE (April 19, 2020), <https://www.zerotothree.org/resources/3394-current-data-on-infants-and-toddlers-experiencing-homelessness>.

<sup>51</sup> Jessica Mill, *Why Investing in Child Care Providers is Essential for Providers, Children, and Families*, CLASP (May 2022), [https://www.clasp.org/wp-content/uploads/2022/05/2022\\_Why-Investing-in-Child-Care-Providers-is-Essential-for-Providers-and-Families.pdf](https://www.clasp.org/wp-content/uploads/2022/05/2022_Why-Investing-in-Child-Care-Providers-is-Essential-for-Providers-and-Families.pdf).



affording housing expenses whether they rent or own their home.<sup>52</sup> The rate of housing hardship was even greater among Latinx (36 percent) and Black (35 percent) providers, as compared to white providers (21 percent).<sup>53</sup> In a similar survey, 63 percent of early childhood teaching staff reported worrying about paying for housing.<sup>54</sup>

Concerns about housing affordability, eviction, and foreclosure are prevalent among providers whether they be center-based or home-based. However, it is important to note that housing insecurity among home-based child care providers threatens both their place to live and their workplace. Home-based child care providers serve over 7 million children under the age of six, and are particularly essential for rural communities; babies, and toddlers; Black and Latinx families; children with disabilities; and children in families with low-incomes.<sup>55</sup>

### **G. Access to fair housing and community assets impacts opportunity and well-being for survivors.**

Domestic violence is a primary cause of homelessness for women and children in the United States, and HUD has repeatedly recognized housing discrimination against domestic violence survivors as a significant fair housing issue.<sup>56</sup> Women account for over 80 percent of domestic violence survivors.<sup>57</sup> Over 90 percent of unhoused women share that they experienced domestic abuse or sexual violence in their lives, and over 50 percent say that domestic violence caused their homelessness.<sup>58</sup> Housing access is critical for survivors, as lack of safe and affordable housing options is regularly reported as a primary barrier to escaping abuse.<sup>59</sup> Homelessness can also be a precursor to

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<sup>52</sup> *Child Care Providers Facing Housing Challenges*, STAN. CTR. ON EARLY CHILDHOOD (March 2023), [https://static1.squarespace.com/static/5e7cf2f62c45da32f3c6065e/t/64075f6801451c180f48becf/1678204776265/housing\\_challenges\\_factsheet\\_mar2023.pdf](https://static1.squarespace.com/static/5e7cf2f62c45da32f3c6065e/t/64075f6801451c180f48becf/1678204776265/housing_challenges_factsheet_mar2023.pdf).

<sup>53</sup> *Id.*

<sup>54</sup> Marcy Whitebook, Deborah Phillips & Carolee Howes, *Worthy Work, STILL Unlivable Wages: The Early Childhood Workforce 25 Years after the National Child Care Staffing Study*, CTR. FOR THE STUDY OF CHILD CARE EMPT. 45 (Nov. 1, 2014), <https://cscce.berkeley.edu/publications/report/worthy-work-still-unlivable-wages/>.

<sup>55</sup> Chrishana M. Lloyd, Maggie C. Kane, Deborah Seok & Claudia Vega, *Examining the Feasibility of Using Home Visiting Models to Support Home-Based Child Care Providers*, CHILD TRENDS (Sept. 20, 2019), <https://www.childtrends.org/publications/examining-the-feasibility-of-using-home-visiting-models-to-support-home-based-child-care-providers>; *Home-Based Child Care*, HOME GROWN (Dec. 2020), [https://homegrownchildcare.org/wp-content/uploads/2020/12/HomeGrown\\_Child-Care-Fact-Sheet\\_final.pdf](https://homegrownchildcare.org/wp-content/uploads/2020/12/HomeGrown_Child-Care-Fact-Sheet_final.pdf).

<sup>56</sup> See, e.g., Memorandum from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, U.S. Dep't of Hous. & Urban Dev. to FHEO Office Directors & FHEO Regional Directors (Feb. 9, 2011), <https://www.hud.gov/sites/documents/FHEODOMESTICVIOLGUIDENG.PDF>.

<sup>57</sup> Callie Marie Rennison, *Bureau of Justice Statistics Crime Data Brief: Intimate Partner Violence, 1993-2001*, U.S. DEP'T OF JUSTICE, OFF. OF JUST. PROGRAMS (Feb. 2003), <https://bjs.ojp.gov/content/pub/pdf/ipv01.pdf>.

<sup>58</sup> Monica McLaughlin & Debbie Fox, *Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking*, NAT'L LOW INCOME HOUS. COAL. (2019), [https://nlihc.org/sites/default/files/AG-2019/06-02\\_Housing-Needs-Domestic-Violence.pdf](https://nlihc.org/sites/default/files/AG-2019/06-02_Housing-Needs-Domestic-Violence.pdf).

<sup>59</sup> See Charlene K. Baker, Kris A. Billhardt, Joseph Warren, Chiquita Rollins & Nancy E. Glass, *Domestic Violence, Housing Instability and Homelessness: A Review of Housing Policies and Program Practices for Meeting the Needs of Survivors*, 15 AGGRESSION & VIOLENT BEHAVIOR 430 (2010), [https://b.3cdn.net/naeh/416990124d53c2f67d\\_72m6b5uib.pdf](https://b.3cdn.net/naeh/416990124d53c2f67d_72m6b5uib.pdf).

additional violence, because a survivor is at the greatest risk of violence when separating from an abusive partner.<sup>60</sup>

In addition, sexual assault is frequently identified as a significant factor in homelessness and housing insecurity.<sup>61</sup> This is particularly true for women, children, and families and even more so for LGBTQI+ individuals and communities of color.<sup>62</sup> While both domestic violence and sexual assault are critical gender justice issues to address, it is important to differentiate between the two and not implicitly group survivors of sexual assault with survivors of domestic violence (or exclude sexual assault survivors completely). A little over one fourth (26.8 percent) of women have experienced a completed or attempted rape in their lifetime.<sup>63</sup> Additionally, almost half of women have experienced other forms of unwanted sexual contact.<sup>64</sup> Furthermore, almost 9.5 million women have experienced an act of sexual violence in the past year.<sup>65</sup>

As is the case in domestic violence situations, survivors of sexual assault have difficulty finding secure and affordable housing. It is estimated that the average cost of a rape is \$122,461 per victim.<sup>66</sup> Under this study, these costs include “attributable impaired health, lost productivity, and criminal justice costs from the societal perspective.”<sup>67</sup> This cost does not include the cost of finding housing if the victim needs to do so.

Almost eight percent of women who have experienced intimate partner violence<sup>68</sup> and over seven percent of women who are survivors of rape have needed housing services.<sup>69</sup> Of this, 50 percent of the women who needed housing services did not get them.<sup>70</sup> Providing survivors with access to safe and affordable housing that is free from discrimination is critical to preventing sexual violence. The key word is “safe,” as women trying to leave dangerous situations often still face violence in shelters and apartments. In a recent study of 100 low-income women that were participating in a Section 8

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<sup>60</sup> See *id.* at 431.

<sup>61</sup> *What Are The Links Between Sexual Violence & Housing*, NAT’L SEXUAL VIOLENCE RESOURCE CTR. (Sept 14, 2020), [https://www.nsvrc.org/sites/default/files/2020-12/Whatarethelinks\\_Final508.pdf](https://www.nsvrc.org/sites/default/files/2020-12/Whatarethelinks_Final508.pdf).

<sup>62</sup> *Id.*

<sup>63</sup> Kathleen C. Basile, Sharon G. Smith, Marcie-jo Kresnow, Srijana Khatiwada & Ruth W. Leemis, *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*, CTR FOR DISEASE CONTROL (June 2022), <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>.

<sup>64</sup> *Id.*

<sup>65</sup> Press Release, National Alliance to End Sexual Violence, New Sexual Violence Data from the CDC Confirms: Sexual Violence Remains a Widespread and Devastating Public Health Crisis (June 14, 2022), <https://endsexualviolence.org/wp-content/uploads/2022/06/NISVS-SV-data-report-release-1.pdf>.

<sup>66</sup> Cora Peterson, Sarah DeGue, Curtis Florence & Colby N. Lokey, *Lifetime Economic Burden of Rape Among U.S. Adults*, 52(6) AM. J. PREV. MED. 691-701(2017) .

<sup>67</sup> *Id.*

<sup>68</sup> Ashley S. D’Inverno, Sharon G. Smith, Xinjian Zhang & Jieru Chen, *The Impact of Intimate Partner Violence: A 2015 NISVS Research-in-Brief*, CTR. FOR DISEASE CONTROL (Aug. 2019), <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvs-impactbrief-508.pdf>.

<sup>69</sup> Kathleen C. Basile, Sharon G. Smith, Jieru Chen & Marissa Zwald, *Chronic Diseases, Health Conditions, and Other Impacts Associated With Rape Victimization of U.S. Women*, 36 J. INTERPERSONAL VIOLENCE 23-24 (Jan. 23, 2020), <https://doi.org/10.1177%2F0886260519900335>.

<sup>70</sup> Matthew Joseph Breiding, Jieru Chen & Michele C. Black, *Intimate Partner Violence in the United States-2010*, CTR. FOR DISEASE CONTROL (Feb. 2014), [https://www.cdc.gov/violenceprevention/pdf/cdc\\_nisvs\\_ipv\\_report\\_2013\\_v17\\_single\\_a.pdf](https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf).

voucher program or were living in public housing, 16 percent of them experienced sexual harassment from their landlord.<sup>71</sup>

Unequal housing opportunities for survivors exacerbates other disparities. Women of color and disabled women face both increased barriers to housing and disproportionate rates of violence.<sup>72</sup> Rates of sexual violence are particularly high for Native American, Alaska Native, and multiracial women.<sup>73</sup> Additionally, LGBTQI+ individuals experience high rates of domestic violence, while 71 percent of survivors reported that they were denied shelter because of barriers related to gender identity.<sup>74</sup> Even if LGBTQI+ individuals are granted access to a shelter, they are much more likely to face violence because shelters often overlook the need to address sexual assault related trauma.<sup>75</sup> Twenty-six percent of transgender women have reported sexual assault in shelters in comparison to 15 percent of transgender men.<sup>76</sup> More generally, women and LGBTQI+ individuals who identify with more than one of the characteristics described above, or other, may face multiple forms of discrimination.

Many forms of discrimination against survivors violate the Fair Housing Act (FHA),<sup>77</sup> the Violence Against Women Act,<sup>78</sup> or both. The FHA prohibits housing providers from either engaging in, facilitating, or tolerating sexual harassment or violence.<sup>79</sup> HUD has appropriately recognized that such unlawful discrimination can include not only actual or constructive eviction, harassment, and other discriminatory actions by housing providers, but also to the enactment and enforcement of local laws and policies, such as nuisance and “crime-free” ordinances.<sup>80</sup>

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<sup>71</sup> Rigel C. Oliveri, *Sexual Harassment of Low-Income Women in Housing: Pilot Study Results*, 83 MO. L. REV. 600 (2018), <https://scholarship.law.missouri.edu/mlr/vol83/iss3/6>.

<sup>72</sup> See McLaughlin & Fox, *supra* note 58, at 1; see also Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, NAT’L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN (Mar. 2013), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_SVAAWomenRevised.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf).

<sup>73</sup> Andre B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT’L INST. OF JUST. (June 1, 2016), <https://www.ojp.gov/pdffiles1/nij/249822.pdf>.

<sup>74</sup> Emily Waters, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2015*, NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS (2016), [http://avp.org/wp-content/uploads/2017/04/2015\\_ncavp\\_lgbtqipvreport.pdf](http://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf).

<sup>75</sup> *What Are The Links Between Sexual Violence & Housing*, NAT’L SEXUAL VIOLENCE RESOURCE CTR. (Sept. 14, 2020), [https://www.nsvrc.org/sites/default/files/2020-12/Whatarethelinks\\_Final508.pdf](https://www.nsvrc.org/sites/default/files/2020-12/Whatarethelinks_Final508.pdf).

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., *Butler v. Sundo Cap., LLC*, 559 F. Supp. 3d 452 (W.D. Pa. 2021); *Antonelli v. Gloucester Cnty. Hous. Auth.*, No. CV1916962RBKAMD, 2019 WL 5485449 (D.N.J. Oct. 25, 2019); *Dickinson v. Zanesville Metro. Hous. Auth.*, 975 F. Supp. 2d 863, 872 (S.D. Ohio 2013); *Meister v. Kansas City*, No. 09-2544-EFM, 2011 WL 765887 (D. Kan. Feb. 25, 2011); *Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 678 (D. Vt. 2005).

<sup>78</sup> 34 U.S. Code § 12491 et seq.; Violence Against Women Act Reauthorization Act of 2022: Overview of Applicability to HUD Programs, 88 Fed. Reg. 321 (Jan. 4, 2023) (to be codified at 24 C.F.R. pt. 5).

<sup>79</sup> 24 CFR § 100.600. See also, e.g., *Quigley v. Winter*, 598 F. 3d 938, 946 (8th Cir. 2010); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Noah v. Assor*, 379 F.Supp.3d 1284 (S.D. Fla. 2019); *West v. DJ Mortgage, LLC*, 164 F.Supp.3d 1393 (N.D. Ga. 2016); *Salisbury v. Hickman*, 974 F.Supp.2d 1282 (E.D. Cal. 2013).

<sup>80</sup> *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other*

## H. Access to fair housing and community assets impacts opportunity and well-being for LGBTQI+ people.

LGBTQI+ individuals also face significant challenges in accessing safe and stable housing. For example, in 2019, LGBT households were more than twice as likely to receive housing assistance than cisgender, straight households (6.0 percent to 2.6 percent).<sup>81</sup> In addition, LGBTQI+ individuals—including LGBTQI+ youth—disproportionately experience homelessness and housing insecurity, facing discrimination in both homeless shelters and rental markets.<sup>82</sup> Transgender and nonbinary/genderqueer individuals are particularly likely to face barriers finding another shelter if they are denied service at a homeless shelter.<sup>83</sup> Housing insecurity and homelessness, in turn, subject LGBTQI+ individuals experiencing homelessness to future violence.<sup>84</sup> Research shows that LGBTQI+ people experience housing discrimination, including from seeking rental housing and mortgage loans to emergency shelter.<sup>85</sup>

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*Crime Victims, and Others Who Require Police or Emergency Services*, U.S. DEP'T OF HOUS. & URBAN DEV. (Sept. 13, 2016), <https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF>.

<sup>81</sup> Spencer Watson, Oliver McNeil & Bruce Broisman, *The Economic Well-Being of LGBT Adults in 2019*, CTR. FOR LGBTQ ECON. ADVANCEMENT & RES.12 (2019), <https://lgbtq-economics.org/wp-content/uploads/2021/06/The-Economic-Well-Being-of-LGBT-Adults-in-2019-Final-1.pdf>.

The report analyzed data from the 2019 Survey of Household Economics and Decisionmaking, in which respondents were asked whether they identified their sexual orientation as “bisexual,” “gay or lesbian,” “straight, that is, not gay,” or “something else,” and were asked whether they identified their gender identity as “cisgender,” “transgender,” or something “other” than those options. Hopefully future surveys will capture data specifically about “queer,” “nonbinary,” or “intersex” status to provide a more holistic data set about LGBTQI+ people. *Id.* at 3.

<sup>82</sup> Lindsay Mahowald, Matthew Brady & Caroline Medina, *Discrimination and Experiences Among LGBTQ People in the US: 2020 Survey Results*, CTR. FOR AM. PROGRESS (Apr. 2021), <https://www.americanprogress.org/issues/lgbtq-rights/news/2021/04/21/498521/discrimination-experiences-among-lgbtq-people-us-2020-survey-results/>; Samantha Friedman, Angela Reynolds, Susan Scovill, Florence R. Brassier, Ron Campbell & McKenzie Ballou, *An Estimate of Housing Discrimination Against Same-Sex Couples*, U.S. DEP'T OF HOUS. & URBAN DEV. (Apr. 2013), [http://www.huduser.org/portal/publications/pdf/Hsg\\_Disc\\_against\\_SameSexCpls\\_v3.pdf](http://www.huduser.org/portal/publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf); Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, THE NAT'L CTR. FOR TRANSGENDER EQUAL, (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; John Acker, Tim Aubry & John Sylbestre, *A Review of the Literature on LGBTQ Adults Who Experience Homelessness*, 66 J. HOMOSEXUALITY 297 (2018), <https://doi.org/10.1080/00918369.2017.1413277>; Maya Brennan, Ally Livingston & Veronica Gaitán, *Five Facts about Housing Access for LGBT People*, HOUSING MATTERS (June 13, 2018), <https://howhousingmatters.org/articles/five-facts-housing-access-lgbt-people/>; Soon Kyu Choi, Bianca D.M. Wilson, Jama Shelton & Gary J. Gates, *Serving Our Youth*, UCLA SCH. OF L. WILLIAMS INST. (June 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

<sup>83</sup> Lindsay Mahowald, Matthew Brady & Caroline Medina, *Discrimination and Experiences Among LGBTQ People in the US: 2020 Survey Results*, CTR. FOR AM. PROGRESS (Apr. 2021), <https://www.americanprogress.org/issues/lgbtq-rights/news/2021/04/21/498521/discrimination-experiences-among-lgbtq-people-us-2020-survey-results/>.

<sup>84</sup> Les B. Whitbeck, Xiaojin Chen, Dan R. Hoyt, Kimberly A. Tyler & Kurt D. Johnson, *Mental Disorder, Subsistence Strategies, and Victimization Among Gay, Lesbian, and Bisexual Homeless and Runaway Adolescents*, 41 J. SEX RES. 329 (Nov. 2004) <https://www.ncbi.nlm.nih.gov/pubmed/15765273>.

<sup>85</sup> Adam P. Romero, Shoshana K. Goldberg & Luis A. Vasquez, *LGBT People and Housing Affordability, Discrimination, and Homelessness*, WILLIAMS INST. (Apr. 2020), <https://escholarship.org/uc/item/3cb5b8zj/>.

## II. The AFFH mandate is vital to overcoming barriers to fair housing for women, LGBTQI+ people, and families.

Since its enactment in 1968, the FHA has imposed a duty on all federal agencies and their funding recipients to affirmatively further fair housing.<sup>86</sup> This duty applies to all protected classes under the FHA: race, color, national origin, sex, disability status, familial status, and religion. One key element of this duty is addressing discrimination and segregation.

In *N.A.A.C.P. v. Secretary of HUD*, the court noted that the FHA’s legislative history “suggests an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to *assist in ending discrimination and segregation*, to the point where the supply of genuinely open housing increases.”<sup>87</sup> Other landmark cases acknowledge the role of housing as a platform for access to opportunity in all areas of life—highlighting the connection between housing and quality education, transportation, and environmental health.<sup>88</sup> In the 2021 Interim Final Rule and the 2023 Proposed Rule, HUD acknowledges the role that discriminatory policies and practices have historically played, and continue to play, in our nation’s communities.<sup>89</sup>

Discrimination and segregation are also closely related to other disparities in housing. For example, the inadequate supply of deeply affordable housing and subsequent high housing cost burden for people of color and women, who are also more likely to have low incomes, arises from historic disinvestment in communities of color.<sup>90</sup> Redlining created barriers to homeownership and wealth building for people of color, as have other racist and sexist practices in the lending space, such as subprime mortgage lending.<sup>91</sup> Today, racial segregation continues to depress property values and contribute to large and persistent racial and gender wealth gaps.<sup>92</sup> The location of employment and child care opportunities are also tied to residential segregation.

Despite the fact that HUD’s obligation to affirmatively further fair housing is enshrined in law, decades passed without effective, meaningful guidance on how jurisdictions could meet this obligation through taking concrete steps to tackle segregation and address fair housing issues.

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<sup>86</sup> 42 U.S.C. § 3608(e)(5).

<sup>87</sup> 817 F.2d 149, 155 (1st Cir. 1987) (emphasis added).

<sup>88</sup> See, e.g., *Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974); *Walker v. HUD*, 734 F. Supp. 1231 (N.D. Tex. 1989); *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005); *Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

<sup>89</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg 8516; Restoring Affirmatively Furthering Fair Housing Definitions, 24 CFR pts. 5, et. al. (June 10, 2021).

<sup>90</sup> Aibinder et al., *supra* note 2.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; see GEORGE LIPSITZ & MELVIN L. OLIVER, *INTEGRATION, SEGREGATION, AND THE RACIAL WEALTH GAP, in THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICA’S CITIES* 268–94 (C. Hartman and G. Squires, eds., 1st ed. 2010).

During the 27-year period after the FHA was enacted, HUD was sued several times for its failure to implement and enforce the AFFH provision of the FHA.<sup>93</sup> In 1995, HUD finalized the first AFFH regulation, which required jurisdictions to perform an Analysis of Impediments (AI) to fair housing, take actions to overcome the identified impediments, and document their analyses and actions taken. HUD did not provide much guidance or oversight of this AI process, and jurisdictions receiving HUD funds rarely took actions to address the impediments. In 2013, the Government Accountability Office reported that it found the AI process to be ineffective,<sup>94</sup> as did HUD, recipients of HUD funding, and other stakeholders.

In response to the shared conclusion that the 1995 AFFH regulation was ineffective and requests from jurisdictions for better guidance, HUD engaged with numerous stakeholders and the public through field testing and rulemaking, leading to a new AFFH Rule in 2015. The 2015 Rule defined “affirmatively furthering fair housing” as:

*Affirmatively furthering fair housing* means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.<sup>95</sup>

This definition formalizes the central aim of the FHA: active, affirmative anti-discrimination. It informs program participants and public housing authorities (PHAs) of the substantive statutory requirements they must meet and sets forth the expectation that grantees must actively redress segregation, discrimination, and further the FHA’s purpose. Each part of the regulatory definition is essential to ensuring that grantees take effective steps toward nondiscrimination and integration, including by disrupting the cycle of poverty, segregation, disinvestment, and housing insecurity that continues to damage many protected classes under the FHA, including women and people of color.

As part of the 2015 Rule, HUD recognized that it is impossible for grantees—and HUD, for that matter—to determine the appropriateness and efficacy of proposed fair housing measures without having a baseline of comparison and an understanding of underlying conditions, such as segregation and access to opportunity, that they should address. For this reason, HUD required that grantees must conduct some form of fair housing

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<sup>93</sup> See, e.g., *N.A.A.C.P., Boston Chapter v. Kemp*, 721 F. Supp. 361 (D. Mass. 1989); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

<sup>94</sup> *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans*, U.S. GOV’T ACCOUNTABILITY OFF. (Sep. 2010), <https://www.gao.gov/assets/gao-10-905.pdf>.

<sup>95</sup> *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8532.

planning. To address this need, HUD created Assessment of Fair Housing (AFH) tools for Local Governments and PHAs, providing guidance for communities to consider fair housing issues such as segregation, disparities in access to opportunity, and disproportionate housing needs. The tools listed contributing factors, such as loss of affordable housing, which can have a disproportionate impact on households headed by women, and displacement and lack of housing support for survivors of domestic violence.<sup>96</sup>

The 2015 AFFH Rule and its AFH tools created strong pathways to address historic and ongoing discrimination. Unfortunately, HUD suspended the 2015 Rule and then promulgated the 2020 Preserving Community and Neighborhood Choice (PCNC) Rule—actions that halted, and threatened to wipe out, the progress from the 2015 AFFH Rule.

### **III. The 2020 PCNC Rule was inconsistent with the FHA’s AFFH mandate and was promulgated without notice-and-comment.**

As the Center stated in its comment responding to the 2021 Interim Final Rule, the 2020 Rule’s definitions were contrary to the AFFH statutory obligation, it took the fair housing planning out of the certification process, and HUD ignored its own rules about notice-and-comment rulemaking.<sup>97</sup>

The PCNC created a definition of “fair housing” at 24 CFR § 5.150(a): “housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws.”<sup>98</sup> It then defined “affirmatively further” in 24 CFR § 5.150(b) to be “to take any action rationally related to promoting any attribute or attributes of fair housing as defined in the preceding subsection.”<sup>99</sup>

The Rule also amended 24 CFR § 5.151 AFFH Certifications to state, “A HUD program participant’s certification that it will affirmatively further fair housing is sufficient if the participant takes, in the relevant period, any action that is *rationally related* to promoting *one or more attributes* of fair housing as defined in section 5.150(a).”<sup>100</sup>

### **IV. The Proposed Rule contains important provisions to advance fair housing but could be improved.**

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<sup>96</sup> *Assessment of Fair Housing Tool for Local Governments*, U.S. DEP’T OF HOUS. & URBAN DEV. (2017), <http://web.mit.edu/afs/athena.mit.edu/org/f/fairhousing/background/Assessment-of-Fair-Housing-Tool-For-Local-Governments-2017-01.pdf> (this tool is currently not mandatory); *Assessment of Fair Housing Tool for Public Housing Agencies*, U.S. DEP’T OF HOUS. & URBAN DEV (2017), <http://web.mit.edu/afs/athena.mit.edu/org/f/fairhousing/background/Assessment-of-Fair-Housing-Tool-For-Public-Housing-Agencies-2017-01.pdf> (this tool is currently not mandatory).

<sup>97</sup> NWLC 2020 AFFH HUD Comment, *supra* 4.

<sup>98</sup> Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,905 (Aug. 7, 2020).

<sup>99</sup> *Id.*

<sup>100</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8532.

The Proposed Rule has some significant improvements over the 2015 Rule, and HUD should preserve these improvements in the Final Rule. However, the Center urges HUD to make some additional changes, as described below, to improve the effectiveness of the Final Rule. Also, HUD should make clear that this rulemaking does not represent the full scope of its own AFFH obligation—this rulemaking implements the AFFH obligation with respect to certain specified programs and activities. HUD needs policy to ensure that it incorporates AFFH into all of its policies, programs and activities. HUD must fully recognize its critical leadership role in coordinating with other federal agencies to ensure that all federal programs and activities related to housing and urban development advance fair housing. The Center urges HUD to strengthen its work in this coordinating leadership role.

### A. Improving definitions

The Center appreciates the opportunity to suggest the following improvements to the definitions for the Final Rule.

First, the Center urges HUD to modify the definition of discrimination based on sex to be more inclusive of the multiple forms of discrimination based on sex that exist. HUD should revise the definitions of “Fair housing choice,” “Protected characteristic,” and “Segregation” in § 5.152, as well as §§ 92.351(a)(1), 93.350(b)(1), and 570.206(c), to read in pertinent part: “sex (including, but not limited to, discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions, including termination of pregnancy; sexual orientation; transgender or nonbinary status; and gender identity).” These definitions are based on the Center’s recommended definition of discrimination on the basis of sex for the Department of Health and Human Services Section 1557 Proposed Rule.<sup>101</sup>

The addition of “sex characteristics” is consistent with Executive Order 14075 of June 15, 2022 (Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals), and with rules and guidance regarding sex discrimination from other agencies, including DOJ, ED, and HHS.<sup>102</sup> The inclusion of “sex characteristics” will ensure that individuals with intersex traits are protected from housing discrimination and violence. To date, there is little, if any, formal evidence about the housing experiences of intersex people, including experiences with housing discrimination and homelessness. However, evidence exists of disparities and discrimination, such as

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<sup>101</sup> *Comments in Response to Non Discrimination in Health Programs and Activities*, NAT’L WOMEN’S L. CTR 22 (Oct. 3, 2022) <https://nwlc.org/resource/nwlc-submits-comment-on-nondiscrimination-in-health-programs-and-activities-section-1557/>.

<sup>102</sup> See, e.g., Nondiscrimination in Health Programs and Activities, 7 FR 47824 (proposed Aug. 4, 2022) (to be codified at 42 CFR 438); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R.106; *Memorandum re: Interpretation of Bostock v. Clayton County Regarding the Nondiscrimination Provisions of the Safe Streets Act, the Juvenile Justice and Delinquency Prevention Act, the Victims of Crime Act, and the Violence Against Women Act*, DEP’T OF JUSTICE (Mar. 10, 2022), <https://www.justice.gov/crt/page/file/1481776/download>; *Title IX Legal Manual, Title IX Cover Addendum post-Bostock, Editor’s Note*, DEP’T OF JUSTICE, (2021), <https://www.justice.gov/crt/title-ix>.



health, education, and employment,<sup>103</sup> so intersex people may experience housing discrimination that has not been documented yet. Further, transgender and nonbinary people are especially vulnerable and including them is consistent with Executive Order 14075.

Also, HUD has long recognized that pregnancy discrimination in housing occurs, and may constitute both sex discrimination and familial status discrimination.<sup>104</sup> The Center notes that HUD's Proposed Rule mentioned, in a footnote, the FHA's explicit enumeration of pregnancy in the definition of familial status.<sup>105</sup> However, inasmuch as HUD is enumerating other well-recognized forms of sex discrimination using a parenthetical in this rule, HUD should also enumerate "pregnancy or related conditions, including termination of pregnancy" in the same manner to avoid confusion.

Second, the Center recommends HUD improve the definition of "Underserved communities" in § 5.152, as well as § 5.154(g)(3)(vi), in the following ways:

- Add "people with disabilities," "older adults," "survivors of sexual assault," and "immigrant communities" as additional examples of underserved communities.
- Change "LGBTQ+" to read "LGBTQI+." This is consistent with Executive Order 14075 of June 15, 2022 (Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals) and other documents from the White House and other agencies.<sup>106</sup>
- Make clear that program participants may not choose to focus only on certain groups that are not "protected class" groups (e.g., focusing only on rural communities while not examining fair housing issues for people of color or disability populations in particular).
- Make clear that program participants should acknowledge that many individuals will fall into more than one of the identified underserved communities (e.g., women of color, disabled women, older women, LGBTQI+ people of color, pregnant people of

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<sup>103</sup> See, e.g., Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, CTR. FOR AM. PROGRESS (Jan. 12, 2023), <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/>; *The Mental Health and Well-being of LGBTQ Youth who are Intersex*, THE TREVOR PROJECT (2021), <https://www.thetrevorproject.org/research-briefs/the-mental-health-and-well-being-of-lgbtq-youth-who-are-intersex-dec-2021/>; Amy Rosenwohl-Mack, et al., *A National Study on the Physical and Mental Health of Intersex Adults in the U.S.*, 15 PLoS ONE e0240088 (Oct. 9, 2020), <https://doi.org/10.1371/journal.pone.0240088>; See also, *EU-LGBTI II: A Long Way to Go for LGBTI Equality*, EUROPEAN UNION FUNDAMENTAL RTS. AGENCY (May 14, 2020), <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>.

<sup>104</sup> See, e.g., News Release, U.S. Dep't of Hous. & Urban Dev., HUD Acts Against Pregnancy Discrimination in Home Mortgages: Actions Involve Settlement with Compensation for Victims, and Enforcement Action (June 1, 2011), <https://archives.hud.gov/news/2011/pr11-108.cfm> (HUD argued that pregnancy discrimination can fall under sex discrimination as well as familial status).

<sup>105</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8517.

<sup>106</sup> See, e.g. *Resources for LGBTQI+ Students*, U.S. DEP'T OF ED., OFF. OF CIVIL RTS., <https://www2.ed.gov/about/offices/list/ocr/lgbt.html> (updated Aug. 4, 2022); *LGBTQI+ Health & Well-being*, DEP'T OF HEALTH AND HUM. SERV., <https://www.hhs.gov/programs/topic-sites/lgbtqi/index.html> (updated Aug. 1, 2022).

color, etc.) and include the needs of people at these intersections in their Equity Planning.

Third, the Proposed Rule does not define “affordable” but uses the term in multiple places. The closest HUD comes to defining this term is in § 5.152, where HUD proposes to define “affordable housing opportunities” as

(1) Housing that:

- (i) Is affordable to low- and moderate-income households;
- (ii) Has a sufficient number of bedrooms to meet the needs of families of various sizes, particularly large families; and
- (iii) Meets basic habitability requirements.<sup>107</sup>

The Center urges HUD to add a definition of “affordable,” meaning housing that requires a household to spend no more than 30 percent of its adjusted income on housing expenses (rent or mortgage payments) and utilities, to § 5.152. Households crossing the threshold of 30 percent, known as the “Brooke rule,” become “cost-burdened.”<sup>108</sup> Unfortunately, with the exception of public housing and Section 8 Housing Choice Vouchers, other HUD programs and the Treasury Department’s Low Income Housing Tax Credit (LIHTC) do not use the Brooke rule. Instead, they rely on a fixed number based on 30 percent multiplied by a fixed program-specific number related to Area Median Income (AMI), not a resident’s actual, adjusted income. The use of this fixed number means that many HUD- and LIHTC-assisted households can be cost-burdened or even severely cost-burdened (spending more than half of their adjusted income on housing and utilities) even after receiving housing assistance under some HUD programs.

In addition, HUD should revise the § 5.152 definition of “affordable housing opportunities.” The first prong, “Housing that...[i]s affordable to low- and moderate-income households”<sup>109</sup> could be interpreted to not account for extremely low-income (ELI) households (those with incomes at or below the federal poverty guideline or 30 percent of AMI, whichever is higher) or very low-income households (those with incomes between ELI and 50 percent of AMI). The housing needs of these households are often the most challenging to address, and these households may disproportionately be members of protected classes.<sup>110</sup> The Center recommends text such as the following:

- (i) Is affordable to households at a range of income levels including extremely low-income (less than 30% AMI or the federal poverty level), very low-income (less than 50% and greater than 30% AMI,) and low/moderate-income households (less than 80% AMI and greater than 50% AMI);

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<sup>107</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8557-58.

<sup>108</sup> 42 U.S.C. §1437a(a)(1).

<sup>109</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8557.

<sup>110</sup> See, e.g., Aibinder et al., *supra* note 2; *The Gap: A Shortage of Affordable Rental Homes*, NAT’L LOW INCOME HOUS. COAL. (Mar. 2023), <https://nlihc.org/gap>.

The Center also supports the consideration of the National Low Income Housing Coalition's recommendation to add another tier for households with income under 15% AMI to help identify people with income roughly equal to the amount of a recipient of Supplemental Security Income (SSI), as these disabled people often struggle to find accessible and affordable housing.

The other two prongs of the § 5.152 definition of "affordable housing opportunities" are (ii) has a sufficient number of bedrooms to meet the needs of families of various sizes, particularly large families and (iii) meets basic habitability requirements.<sup>111</sup> The Center recommends providing more specifics for the "basic habitability requirements," such as regulatory or other HUD guidance references to habitability standards for HUD-assisted housing and state or local habitability requirements for housing not assisted with a federal program.

Moreover, while it may be obvious that this definition is within the context of fair housing, HUD should consider language at the beginning of the definition of "affordable housing opportunities" noting that all that follows is based on the FHA's protected classes. This would reduce the chance of conflating "affordable" with "fair" housing, which was one of the weaknesses of the 2020 rulemaking.<sup>112</sup>

Fourth, the Center urges HUD to improve the definition of "community assets" in § 5.152, which currently reads as follows:

Community assets means programs, infrastructure, and facilities that provide opportunity and a desirable environment. Examples of community assets include: high performing schools (as well as quality daycare and childhood educational services), desirable employment opportunities, efficient transportation services, safe and well-maintained parks and recreation facilities, well-resourced libraries and community centers, community-based supportive services for individuals with disabilities, responsive emergency services (including law enforcement), healthcare services, environmentally healthy neighborhoods (including clean air, clean water, access to healthy food), grocery stores, retail establishments, infrastructure and municipal services, banking and financial institutions, and other assets that meet the needs of residents throughout the community.<sup>113</sup>

Based on the close connection between access to care, housing, and employment, the Center recommends HUD revise the second sentence of this provision in the Final Rule to read, "Examples of community assets include: high-performing schools (including early care and learning services), quality and affordable child and adult dependent care, desirable employment opportunities..." The term "daycare" is not preferred because care providers do not provide care for days—care providers provide care for children or certain adults with disabilities or older adults who need care services. In addition,

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<sup>111</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8557-58.

<sup>112</sup> NWLC 2020 AFFH HUD Comment, *supra* note 4, at 14-15.

<sup>113</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8558.

housing costs have outpaced wage growth, causing many parents and guardians to work multiple jobs and need care in the evenings, not just during the day.

In § 5.154(d)(4), HUD provides condensed examples of community assets: (A) Education; (B) Employment; (C) Transportation; (D) Low-poverty neighborhoods; (E) Environmentally healthy neighborhoods; and (F) Other community assets as defined in § 5.152.<sup>114</sup> The word “education” does not fully encompass care needs. The Center urges HUD to add another bullet for “Caregiving services.” Care work is the backbone of the U.S. economy and deserves a separate call-out.

Women disproportionately bear caregiving duties.<sup>115</sup> Many LGBTQI+ people also have caregiving responsibilities. In a January 2017 survey, six percent of lesbians reported being a caregiver for minor children, and 10 percent of bi+ women and lesbians reported being caregivers for an adult family member or friend.<sup>116</sup>

Low wages for early educators are contributing to a child care shortage, with the industry still four percent below its pre-pandemic level.<sup>117</sup> A Wells Fargo report estimates that this leaves nearly half a million parents stranded without reliable care, contributing to the nation’s worker shortage.<sup>118</sup> Families with children under age six lost \$13 billion per year in income during the pandemic due to child care disruptions.<sup>119</sup> Access to child care is a critical community asset and the backbone of the U.S. economy.

In addition, many home-based child care (HBCC) providers—overwhelmingly women, particularly women of color—struggle with housing in connection to providing child care services. For example, Public Housing Authorities (PHA) may impose barriers to tenants conducting child care businesses in subsidized homes. Zoning, Homeowner Associations or covenants may prohibit, or not specifically permit, the provision of child care services in covered housing. HBCC providers must consider strict requirements for licensing, Early Head Start, and more when finding a home to rent or own, making the home search even harder. Removing barriers to finding a decent home and providing care from their home for HBCC providers can affirmatively further fair housing for

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<sup>114</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8563.

<sup>115</sup> Women perform the majority of caregiving. See, Bureau OF LABOR STATISTICS, *American Time Use Survey, Table 1 Time spent in primary activities and percent of the civilian population engaging in each activity, averages per day by sex, 2017 annual averages*, U.S. DEP’T OF LABOR (2018), <https://www.bls.gov/news.release/atus.t01.htm>.

<sup>116</sup> Shabab Ahmed Mirza, *Disaggregating the Data for Bisexual People*, CTR. FOR AM. PROGRESS (Sept. 2018), <https://www.americanprogress.org/article/disaggregating-data-bisexual-people/>.

<sup>117</sup> Jasmine Tucker, *Men Have Now Recouped Their Pandemic-Related Labor Force Losses While Women Lag Behind*, NAT’L WOMEN’S L. CTR. (Feb 2022), <https://nwlc.org/wp-content/uploads/2022/02/January-Jobs-Day-updated.pdf>.

<sup>118</sup> Sarah House, Michael Pugliese & Karl Vesely, *Who Cares? How the Childcare Industry’s Problems Are Every Employer’s Problem*, WELLS FARGO (March 1, 2022), <https://wellsfargo.bluematrix.com/docs/html/3f0d1aae-6a00-472a-8a4c-6f9fe2d6c4e6.html>.

<sup>119</sup> Clive Belfield & Julie Kashen, *Families with Young Children Are Losing \$13 Billion a Year While Child Care Sector Struggles during the Pandemic*, THE CENTURY FOUND. (Feb. 2, 2022), <https://tcf.org/content/commentary/families-with-young-children-are-losing-13-billion-a-year-while-child-care-sector-struggles-during-the-pandemic/>.

women, people of color, and other protected classes, as well as increase access to this critical community asset for the entire community.

HUD should also consider issuing guidance including more examples of community assets. For example, guidance could elaborate that health care services including gender-affirming health care and reproductive health care, including but not limited to timely access to abortion services, are critical community assets to women and LGBTQI+ people. Access to legal resources for low-income members of communities is another example of a community asset that would be valuable to list in guidance.

## B. Improving Data

HUD's attempts to streamline the required data analysis compared to the 2015 Rule should not come at the cost of omitting key data on protected classes, such as disability and sex. The Center urges HUD to explore ways to add data on more protected classes to the AFFH Data and Mapping Tool, in consultation with key stakeholders. If data for certain protected classes is not available to be specifically added, then HUD should add an explanation as to *why* the data is not available to be added—either in the tables that omit the data or in other guidance—so that jurisdictions do not skip over analyzing those protected classes. This explanation should emphasize that jurisdictions need to secure local data or local knowledge to fill in the data gaps.

In addition, the Center urges HUD to revise the demographic analysis required for local governments, States, and insular areas (§ 5.154(d)(1)(i)) and public housing agencies (§ 5.154(e)(1)(i)) to add language similar to the following: “sex (including gender identity, sexual orientation, and sex characteristics, when available).” Currently, HUD and local communities have access to only limited sex-related demographic, economic, and housing-related data. For example, to date HUD's AFFH data analysis regarding sex, including sexual orientation, gender identity, and sex characteristics (SOGISC) data, focuses less on patterns of geographic segregation and more on other factors related to equal housing opportunities, including disparities in housing needs; disparities in access to affordable housing opportunities and community assets such as employment, education, child care, health care, and other community services; and patterns of discrimination (including harassment) and civil rights enforcement with respect to housing and community assets.

The Center urges HUD to consider identifying potential data sets for patterns of geographic segregation based on SOGISC data, recognizing it may take some time to develop systematic measurements. Moreover, while HUD may reasonably choose to focus its efforts, at least in the near-term, with respect to its AFFH Mapping Tool on other demographics that are widely associated with patterns of geographic segregation and integration, HUD should nevertheless work to provide other types of data resources and guidance to local communities with respect to sex-related data, including SOGISC and pregnancy data. This should include, but not be limited to, highlighting or compiling relevant sex-related data, including SOGISC data, from federal surveys and data collections (such as HUD's American Housing Survey and the Census Bureau's Household Pulse Survey and American Community Survey, as well as HUD program

data) as it becomes available.<sup>120</sup> The Center further encourages increased inclusive data collection efforts for SOGISC and pregnancy status within federal surveys while still ensuring participant privacy so that data cannot be tracked to a single individual. In addition, HUD should make clear in the Final Rule that it expects local communities and PHAs to consider local data and local knowledge, including information obtained from community engagement and from enforcement activity, regarding all aspects of fair housing choice and equitable access, including with respect to pregnancy and sex-stereotyping discrimination.

### C. Improving Equity Plans

The Proposed Rule requires program participants to develop an “Equity Plan” to overcome local fair housing issues by conducting an analysis that identifies fair housing issues in their geographic area of analysis.<sup>121</sup> That analysis must also identify the circumstances and factors that cause, increase, contribute to, maintain, or perpetuate those fair housing issues.<sup>122</sup> The analysis must be informed by community engagement, HUD-provided data, and local data and local knowledge.<sup>123</sup> After engaging the community, program participants must prioritize the identified fair housing issues in order to set one or more fair housing goals to overcome those prioritized fair housing issues<sup>124</sup>. Program participants submit Equity Plans to HUD for review.<sup>125</sup> If HUD accepts the Equity Plan, a program participant must incorporate the Equity Plan’s fair housing goals, strategies, and actions necessary to implement the goals into its Consolidated Plan (ConPlan), Annual Action Plans of the ConPlan, or public housing agency (PHA) PHA Plan.<sup>126</sup> Program participants submit an Annual Program Evaluation to HUD describing progress toward achieving each fair housing goal.<sup>127</sup> Under the Proposed Rule, this cycle will happen at least every five years.<sup>128</sup>

#### Equity Plan General Content: § 5.154(c)

In the Proposed Rule, a program participant’s Equity Plan must include its fair housing goals, including strategies and meaningful actions—all of which must be incorporated into the program participant’s ConPlans, Annual Action Plans, PHA Plans, and community plans, including but not limited to, education, transportation, or environment and climate related plans.<sup>129</sup>

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<sup>120</sup> See National Science Technology Council, *Progress on Implementation of the Recommendations of the Equitable Data Working Group*, EXECUTIVE OFF. OF THE PRESIDENT (Mar. 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/03/Progress-on-Equitable-Data-Mar2023.pdf> (outlining plans to test new measures for ACS, NHS, and other surveys); HUD, 60-Day Notice of Proposed Information Collection: Family Report, MTW Family Report, MTW Expansion Family Report, 88 FR 8301 (Apr. 10, 2023) (program data collection).

<sup>121</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8518.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 8519.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 8529.

<sup>129</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8562.

An Equity Plan's identification of fair housing issues and goals must address, at a minimum, the following seven fair housing goal categories, which HUD considers to be the core areas of the AFFH analysis:

- (i) Segregation and integration;
- (ii) Racially or ethnically concentrated areas of poverty (R/ECAPs);
- (iii) Disparities in access to opportunity;
- (iv) Inequitable access to affordable housing and homeownership opportunities;
- (v) Laws, ordinances, policies, practices, and procedures that impede the provision of affordable housing in well-resourced areas of opportunity, including housing that is accessible for people with disabilities;
- (vi) Inequitable distribution of local resources, which may include municipal services, emergency services, community-based supportive services, and investments in infrastructure; and
- (vii) Discrimination or violations of civil rights law or regulations related to housing or access to community assets based on the FHA's protected classes.<sup>130</sup>

Two fair housing goal categories (v & vii) address the legal and policy framework and the practices at the local level that affect the provision of affordable housing and discrimination or violations of civil rights laws that impede equitable access to community assets. Generally, these two goal categories are stronger than those in the 2015 Rule. However, these two goal categories do not capture a key requirement from the 2015 rule, an assessment of the jurisdiction's fair housing enforcement and fair housing outreach capacity. This is an essential component of the jurisdiction's ability to promote fair housing, which cannot be accomplished through laws, etc. alone. It is also of particular importance to fair housing organizations, which constitute a central element of the local fair housing infrastructure.

In addition, the Center urges HUD to revise § 5.154(c)(3)(vii), regarding discrimination and civil rights violations, to either track, or simply incorporate by reference, the definition of "Protected characteristics" in § 5.152. HUD should also clarify that an Equity Plan's identification of discrimination against protected classes should include identifying acts of violence against protected classes. LGBTQI+ people, for example, are disproportionately unhoused<sup>131</sup> and are more likely to face violence in emergency shelters.<sup>132</sup> And so, the Final Rule should specify that an Equity Plan should identify discrimination and violence against all people with protected characteristics, transgender and nonbinary people among them.

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<sup>130</sup> *Id.*

<sup>131</sup> Jaime M. Grant, Lisa A. Mottet & Justin Tanis, *National Transgender Discrimination Survey Report on Health and Health Care*, NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY AND LESBIAN TASK FORCE (Oct. 2010), <https://cancer-network.org/wp-content/uploads/2017/02/National-Transgender-Discrimination-Survey-Report-on-health-and-health-care.pdf>.

<sup>132</sup> *Id.* at 18.

## Equity Plan Content: Analysis—Local Governments, States, and Insular Areas

Moreover, the Center urges HUD to improve § 5.154(d)(7) (questions related to Local and State policies and practices impacting fair housing). HUD should revise § 5.154(d)(7)(iii) to read in pertinent part:

“...existing zoning and land use policies or ordinances, the presence or lack of source of income anti-discrimination laws, eviction policies and practices, criminal or civil penalties or enforcement patterns related to behaviors associated with homelessness or poverty, and other State and local policies or practices.”

This is consistent with proposed § 5.154(g)(3)(vi), which references “the removal of barriers that exist in local laws such as nuisance or crime free ordinances, which may limit access to affordable housing because of protected characteristics.”<sup>133</sup> This is also consistent with the administration’s support for Housing First approaches, for criminal justice reform broadly, and for reform of laws and practices that criminalize homelessness and poverty in particular. Executive Order 14074 calls for HUD and other federal agencies to develop plans for “safely reducing unnecessary criminal justice interactions, including by advancing alternatives to arrest and incarceration [and] supporting effective alternative responses to ... people experiencing homelessness or living in poverty.”<sup>134</sup> HUD has identified reducing the criminalization of homelessness as a priority for its Continuum of Care Program grants.<sup>135</sup> Currently, the Department of Justice (DOJ) is investigating the city of Phoenix and its police department to determine, in part, whether it is unlawfully targeting individuals experiencing homelessness.<sup>136</sup> DOJ has previously taken the position in guidance and court briefs that policies and practices criminalizing homelessness and poverty raise grave civil rights and constitutional concerns.<sup>137</sup>

Also, consistent with proposed § 5.154(g)(3)(vi), the administration’s support for Housing First approaches, and criminal justice reform efforts more broadly, the Center urges HUD to require Equity Plans to analyze local and state laws and ordinances, as well as zoning bylaws, that target women, LGBTQI+ individuals, and other underserved communities. State program participants have influence over both state and local laws, and local program participants similarly can influence both local and state laws. An Equity Plan should examine how such state and local laws limit access to fair and

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<sup>133</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg 8566.

<sup>134</sup> Exec. Order No. 14,074 87 Fed. Reg. 32945 (May 25, 2022) (Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety).

<sup>135</sup> Press Release, U.S. Dep’t of Hous. & Urban Dev., Off. of Public Affairs, HUD Announces \$2.8 Billion to Help People Experiencing Homelessness (Aug. 1, 2022), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_22\\_140](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_22_140).

<sup>136</sup> Press Release, Dep’t of Just., Off. of Public Affairs, Justice Department Announces Investigation of the City of Phoenix and the Phoenix Police Department (Aug 5, 2021), <https://www.justice.gov/opa/pr/justice-department-announces-investigation-city-phoenix-and-phoenix-police-department>.

<sup>137</sup> See, e.g., *Bell v. Boise*, Statement of Interest of the United States, No. 1:09-cv-540, Doc. 276 (D. Idaho Aug. 6, 2015); *Reducing Homeless Populations’ Involvement in the Criminal Justice System*, DEP’T OF JUST. (May 8, 2012), <https://www.justice.gov/sites/default/files/atj/legacy/2012/05/09/doj-resource-guide.pdf>.



community assets for underserved communities, such as women, LGBTQI+ individuals, and people of color. For instance, some states have laws preempting localities from passing critical tenant protections or other housing policies that promote fair housing for women, LGBTQI+ individuals, people of color, and more.<sup>138</sup> In addition, some jurisdictions propose to prohibit transgender people from using public restrooms consistent with their gender identity.<sup>139</sup> Such a law would pose a barrier to fair housing and community assets. Additionally, “drag bans,” which are a form of discrimination based on sex stereotyping, prohibit drag performers from participating in the public square and may therefore limit their choices in where to live. Some drag bans, despite their purported focus on drag shows/“adult” entertainment, may also be deployed against trans people living their day-to-day lives.<sup>140</sup>

In addition, state and local laws can create barriers to accessing community assets such as health care, including reproductive care and gender-affirming care, and education. States that have been implementing abortion bans are also rejecting Medicaid expansion, continuing to make health care unaffordable for many women, LGBTQI+ people, and families. In Mississippi for example, where *Dobbs v. Jackson Women’s Health Organization* originated, Medicaid has not been expanded, leaving roughly 43,000 women of reproductive age uninsured.<sup>141</sup> These policy decisions exacerbate the current crisis, as people who become pregnant are forced to bear the lifelong health and economic consequences of unwanted pregnancies. Additionally, Florida recently banned teaching about gender identity and sexual orientation in public schools across the state.<sup>142</sup> These laws not only impact access to community assets for protected classes, but they often force individuals and families to consider relocating to a safer and more inclusive locality or state.

For these reasons, the Center recommends that HUD require Equity Plans to account for and assess the state and local laws, ordinances, and bylaws that target vulnerable communities, including facially neutral laws that have a discriminatory effect, in the Final Rule.

#### Equity Plan Content: Fair Housing Goals: § 5.154(g)

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<sup>138</sup> Solomon Greene, Kriti Ramakrishnan, and Jorge Morales-Burnett, *State Preemption of Local Housing Protections*, URB. INST. (Sept. 2020), [https://www.urban.org/sites/default/files/publication/102981/state-preemption-of-local-housing-protections\\_1.pdf](https://www.urban.org/sites/default/files/publication/102981/state-preemption-of-local-housing-protections_1.pdf).

<sup>139</sup> See, e.g., Arizona Accommodations for All Children Act, S.B. 1040, 56th Leg. Sess. (Ariz. 2023).

<sup>140</sup> See, e.g., An Act to Prohibit Minors from Attending Drag Shows, H.B. 0359.2, 68th Leg. Sess. (Mont. 2023).

<sup>141</sup> Gideon Lukens & Breanna Sharer, *Closing Medicaid Coverage Gap Would Help Diverse Group and Narrow Racial Disparities*, CTR. ON BUDGET AND POL’Y PRIORITIES (June 14, 2021), <https://www.cbpp.org/research/health/closing-medicaid-coverage-gap-would-help-diverse-group-and-narrow-racial>; Emily Badger, Margot Sanger-Katz & Claire Cain Miller, *States With Abortion Bans are Among Least Supportive for Mothers and Children*, NY TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/upshot/abortion-bans-states-social-services.html>.

<sup>142</sup> Hannah Natanson, *Florida Bans Teaching About Gender Identity in all Public Schools*, WASH. POST (April 19, 2023), <https://www.washingtonpost.com/education/2023/04/19/florida-bans-teaching-gender-identity-sexuality/>.

As an initial matter, the Center endorses the Proposed Rule's statement that fair housing goals must:

- (i) Identify the fair housing issue(s) the goal is designed to address;
- (ii) Explain how the goal, alone or along with other goals, will overcome the fair housing issue(s) it is designed to address;
- (iii) Set timeframes for achieving the goal, including metrics and milestones; and
- (iv) Describe the specific steps or actions needed to achieve the goal and the amount of funding needed to achieve the goal.<sup>143</sup>

The Center appreciates these requirements so that program participants are setting meaningful goals that can be measured and cannot attempt to just "check the boxes" as they seek to meet their statutory AFFH requirements. HUD should maintain these requirements in the Final Rule.

The Center urges HUD to revise § 5.154(g)(3)(vi), regarding fair housing goals for equitable opportunities, along the lines of the following: "may include amending local laws to include additional, more explicitly enumerated, or more expansive protections for certain underserved populations, such as LGBTQI+ persons or survivors of domestic violence or sexual assault." HUD has worked for years to clearly communicate that laws such as the FHA and the Violence Against Women Act (VAWA) contain important protections for these populations. Nevertheless, because these federal protections are often not well understood, and some are limited in scope, the Center urges HUD to add this provision, which encourages additional steps at the local level. These steps may include ensuring that local laws explicitly enumerate, and provide a full range of remedies, for SOGISC discrimination; as well as providing additional substantive protections for survivors that go beyond those established by FHA and VAWA. This clarification would advance HUD's purpose of encouraging efforts to strengthen and clarify local laws, while avoiding the misperception that existing laws, including federal law, do not contain important protections for populations such as LGBTQI+ people and survivors of domestic or intimate partner violence.

In addition, the Center urges HUD to note in the Final Rule that fair housing goals must not require residents of racially or ethnically concentrated areas of poverty to move away from those areas if they prefer to stay as a matter of fair housing choice. While some may choose to move out of high-poverty neighborhoods, many may wish to stay and seek equitable investments in these historically underfunded communities.

#### Additional Equity Plan Feedback

Under the Proposed Rule, as part of its Equity Plan, a program participant must include a summary of community engagement activities; a description of how comments received through community engagement were addressed; and an attachment of all written comments received and transcripts or audio or video of hearings held during the

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<sup>143</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8567.

development of the Equity Plan.<sup>144</sup> The Center urges HUD to also require attachments of content from “meetings.”

The Center is grateful for HUD posting Equity Plans on a HUD-maintained website, but HUD should require program participants to post their draft and submitted Equity Plans, as well as Annual Progress Evaluations, on an easy-to-find webpage that meets accessibility standards.

The Center also appreciates that the Proposed Rule expressly includes the opportunity for the public to submit information directly to HUD regarding an Equity Plan under HUD’s review.

#### **D. Improving the Community Engagement Provisions**

First, the Center recommends that the community engagement provisions be incorporated into the regulation itself so as to eliminate the need for program participants to cross-reference multiple regulations in order to understand what is required.

HUD has several requirements in place for program participants in the Proposed Rule. Program participants must engage the public during the development of the Equity Plan in order to identify the fair housing issues that arise and to help set up fair housing goals in order to remedy the identified issues. Facilitating community engagement must be proactive to ensure that program participants receive and address critical information from the community.<sup>145</sup> During the five-year period that an Equity Plan is in effect, program participants must engage the community at least annually.<sup>146</sup> The purpose of the annual engagement must be to obtain community input on whether a program participant is taking necessary and effective actions to implement the Equity Plan’s fair housing goals, whether adjustments to these goals are needed, or whether a change in the circumstances calls for a revision in the Plan.<sup>147</sup>

#### **Expansions of Phrase “Wide Range of Diverse Community Members”**

The Center believes that these Community Engagement provisions are critical and underscore the importance of seeking input from a wide range of diverse community members. However, the Proposed Rule should expand this section and include details of what is meant by a wide range of diverse community members. The Center asks that the Final Rule specify that the range should include the following:

- Organizations that represent members of protected classes;<sup>148</sup>
- Fair housing and legal services organizations and others engaged in fair housing enforcement;

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 8568.

<sup>146</sup> *Id.* at 8569.

<sup>147</sup> *Id.*

<sup>148</sup> Organizations including tenants’ rights groups, community-based organizations, civil rights organizations, and religious organizations.

- Organizations that provide health, education, housing, and social services to members of protected classes; and
- Organizations representing and/or serving the LGBTQI+ community, immigrants and non-citizens, youth, survivors of gender-based violence, home-based community care providers as well as others. These groups may be represented in one of the categories above but may be overlooked by grantees unless they are specifically noted in the Rule.

### Timing and Audience of Community Engagement

The Center recommends that community engagement should be active at all times during the creation of the Equity Plan, not just identifying fair housing issues and setting fair housing goals.<sup>149</sup> Additionally, it is recommended that HUD include in the Final Rule that there should be no part of the process where the general public is not engaged and providing input. However, the Final Rule should especially emphasize the critical nature of community engagement when:

- Identifying the full range of fair housing issues in the community;
- Setting priorities among the issues that are likely to be addressed in the Plan;
- Creating meaningful strategies and goals; and
- Reviewing annual progress to see if any changes are needed.

Program participants are required to use communication methods that are designed to reach the broadest possible audience, including members of protected class groups and underserved communities.<sup>150</sup> These communication methods should be varied to allow for the broadest reach. This includes, but is not limited to, newspaper notices, postings on the grantee's website, community newspapers, local radio stations, community organization newsletters, social media, and postings in libraries, government offices, and public spaces.<sup>151</sup> When possible, announcements and postings should be in both English and non-English channels to reach the widest possible audience.<sup>152</sup> It is important to note that different outreach and media platforms are more or less accessible based on the assistive technology offered, so a multi-modal approach can reach a larger audience.

Program participants have the ability to choose any methods that are effective in engaging their communities but must still follow certain requirements.<sup>153</sup> All aspects of community engagement must be conducted in compliance with fair housing and civil rights requirements. This includes Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act.<sup>154</sup>

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<sup>149</sup> Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8568

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 8569.

<sup>152</sup> *Id.* at 8578

<sup>153</sup> *Id.* at 8569.

<sup>154</sup> *Id.*

For the development of an Equity Plan, at least three public meetings must be held at various accessible locations and at different times.<sup>155</sup> This is to ensure that protected class groups and underserved communities have the opportunity to provide their input. At least one of the meetings must be held where underserved communities disproportionately live.<sup>156</sup> Additionally, program participants must make the effort to obtain input from the underserved populations that do not live in underserved neighborhoods.<sup>157</sup> Depending on the populations that a particular program participant is serving, the Center believes that more than three meetings may be required to ensure the Plan is as equitable as possible.

For annual engagement, a program participant must hold at least two public meetings in different locations. One of the locations must be in an area where underserved communities predominantly live.<sup>158</sup>

The Center urges HUD to consider expanding the number of meetings for both the Equity Plan and annual engagement to include focus groups and allow for smaller community meetings. When meetings are smaller and with a single demographic, it can provide a safe space for individuals to provide input when they would not otherwise feel comfortable doing so.

The Center would like to commend HUD for using the term “public meeting” rather than “public hearing”. This suggests to community members that program participants are seeking input and that community members will be engaged in discussion, rather than providing input that program participants “hear” and receive but do not engage with community members about.

Program participants must then use the provided input in a manner that promotes fair housing and will lead to positive change.<sup>159</sup>

The Center recommends that before the Equity Plan is finalized and submitted to HUD, program participants should provide at least 60 days for public comment. Moreover, the drafts and final Equity Plan should be posted on the program participant’s website, along with the annual progress evaluations. Only posting the documents on HUD’s website is insufficient to ensure that community members can easily access them and does not allow the community to be fully informed. Additionally, the program participants should share with the community what feedback was included, what was not included, and why. This ensures that there is constant community engagement.

### Ensuring Community Engagement Is Accessible for All Individuals

The Center appreciates the opportunity to make recommendations to ensure that community engagement is accessible. Any in-person or virtual meetings for the Equity Plan and/or community engagement should also include a mechanism for community

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 8536

members to submit written feedback if they cannot attend the meeting live. Community members must also be given at least a one-month notice prior to any meeting to ensure that they have ample time to make alternative arrangements for work or caregiving responsibilities, etc. Program participants may need to provide child care or other supports in order to facilitate participation from the community. People like to know that their input is valued, moreover, and program participants can show this by providing food or gift cards. Food and/or gift cards are especially important to community members if they are taking time off work and potentially losing income to attend meetings. Several HUD programs provide funding that can be used for community engagement, but increasing the funding could improve these efforts.<sup>160</sup>

Additionally, the Center recommends that HUD require program participants to have at least one virtual meeting, which should include closed captioning as a minimum accessibility feature. There should also be the opportunity for participants to request interpretation services for Deaf/deaf/hard-of-hearing community members and translation services for non-English speaking community members. In order to ensure that accessibility features are used properly, HUD should be providing program participants with training on how to interact with people with disabilities, creating accessible documents, and assistive technology.

### Expanding Outreach and Involving Community Leaders

Beyond formal meetings, the Center recommends that program participants conduct outreach and listening sessions in high-traffic areas such as outside of grocery stores, libraries, schools, and places of worship. Feedback can also be solicited at already existing events like community fairs and school events. The burden to get this critical input should *not* be placed on community members and instead should be placed on the program participants.

Program participants should also be engaging with trusted local community groups and organizers. Participation amongst well-known community members and groups can help the general public better understand what AFFH is and how it connects to their everyday lives. These groups and individuals should receive compensation for helping organize and carry out outreach and feedback sessions. Additionally, the program participants should be providing these organizations and community organizers with the resources required to carry out the work.

As noted above, the Center urges HUD to include in the Final Rule the range of stakeholders whom program participants should be engaging in order to give them a better idea of how to carry out engagement. This should be consistent throughout the Rule.

### Keeping Community Engagement Separate for Equity Plan and ConPlan or PHA

The Center joins the view of many others that program participants should not combine the community engagement process for the Equity Plan with that for the ConPlan or the

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<sup>160</sup> 24 CFR § 570.206(c).

PHA plan because that would reduce the effectiveness of the Equity Plan process. Fair housing issues need adequate time. The engagement process contemplated for the Equity Plan is very different from the process for the ConPlans and the PHA plans and likely involve a different set of players.<sup>161</sup> The Center recommends that HUD eliminate this provision in the Final Rule.

As with compliance with fair housing and civil rights statutes, the Final Rule should clearly state the steps that must be taken at all stages of the community engagement process to ensure people with disabilities and people with limited English proficiency can fully participate. Title VI, the ADA, and Section 504 may be referenced as the statutes requiring those accommodations. Neither program participants nor the general public should have to go look up these statutes to understand what is required. The Center urges HUD to make the guidance that accompanies these statutes readily available because it may be helpful to the program participants and/or general public.

#### **E. Feedback on compliance**

The Center appreciates that the Proposed Rule provides the opportunity for the public to file complaints directly with HUD regarding a program participant's AFFH-related activities, which will enable HUD to open a compliance review in response to a complaint about a feature of the AFFH requirement. This complaint process will provide an important extra level of accountability for women, people of color, LGBTQI+ people, disabled people, and other protected classes. HUD can improve the complaint process in the Final Rule by explicitly incorporating reasonable accommodation issues as a type of complaint, as failure to follow reasonable accommodation requirements is materially at odds with affirmatively furthering fair housing for people with disabilities. The Center also appreciates that HUD can open compliance reviews on its own initiative too. HUD must maintain these critical accountability features in the Final Rule.

The Center urges HUD to strengthen compliance procedures in the Final Rule by detailing the remedies available to complainants, which should include the full array of those authorized under the FHA, including injunctive relief, policy changes, monetary damages, and attorney's fees. The Proposed Rule does not have sufficient clarity about the types of remedies available and how they can be tailored to address AFFH complaints.

#### **F. Feedback on additional questions HUD posed in the NPRM**

In Question 29, HUD requests information about how States can utilize federal funds flowing through States to local jurisdictions in ways that affirmatively further fair housing. The Center agrees with the Consortium for Citizens with Disabilities ("CCD") comment that states should be maximizing the federally funded benefits that households receive and ensure equity in regard to access to these benefits by removing the administrative hurdles that prevent this access and/or lead to wrongful denials and terminations. There should be cooperation amongst federal agencies to provide resources regarding policies of each benefits program. The enrollment process for various benefits should

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<sup>161</sup> NWLC 2020 AFFH HUD Comment, *supra* note 4, at 16-17.

also be streamlined to reduce the burden that the application and enrollment process has on many individuals.

**V. The Center generally supports the Proposed Rule and urges HUD to swiftly make the recommended improvements and issue a Final Rule.**

HUD's Proposed Rule is another positive step toward fair housing for women, LGBTQI+ people, and their families, and other members of protected classes. It provides much needed clarity for program participants on their statutory duty to affirmatively further fair housing. The Center supports the Proposed Rule, with the improvements listed above, and calls upon HUD to swiftly issue a Final Rule so program participants can begin implementation, getting us closer to a nation in which there is fair housing access for *all*.

Thank you for the opportunity to submit comments on the Proposed Rule. Please do not hesitate to contact Sarah Hassmer at [shassmer@nwlc.org](mailto:shassmer@nwlc.org) to provide further information.

Sincerely,



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