

Clearinghouse REVIEW

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BASED ON
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Sargent Shriver National Center on Poverty Law

Advocacy Stories

Justice Crosses the Tracks: Settlement Brings Katrina Funds to Low-Income Mississippi Residents

On the evening of August 28, 2005, when the Mississippi Gulf Coast residents who would later become plaintiffs in *Mississippi State Conference NAACP v. HUD*, No. 1-08-cv-02140-JR (D.D.C. filed Dec. 10, 2008), fell asleep, they each had a roof over their heads, four walls to hold it up, running water, and electricity. Twenty-four hours later, after Hurricane Katrina pummeled the Gulf Coast and damaged more than 220,000 Mississippi households, all that had changed. And so began the five-year odyssey of individual plaintiffs Dorothy McClendon, Rangisma Dilworth, and Pamela Landry; National Association for the Advancement of Colored People (NAACP) members Lubertha Haskin, James Johnson, and Ethel James; and tens of thousands of other coastal Mississippians left out of the housing recovery. Indeed, Mississippi repeatedly refused to allocate properly the \$5.5 billion of few-strings-attached dollars approved by Congress in 2005 and 2006 for post-Katrina recovery—an amount larger than the state's 2005 annual budget, and far more per damaged household than Louisiana initially received (Joint Legislative Budget Committee, State of Mississippi Budget: Fiscal Year 2006 at 2 (2005), <http://bit.ly/igWucN>; *The Role of the Community Development Block Grant Program in Disaster Recovery: Hearing Before the Ad Hoc Subcomm. on Disaster Recovery of the S. Comm. on Homeland Security and Governmental Affairs*, 111th Congress 29–30 (2009), <http://bit.ly/fjTkkD>).

Early in 2006, shortly after approval of the first federal appropriation, Gov. Haley Barbour set aside \$3.2 billion to help those homeowners with flood damage not paid for by insurance. However, Barbour's administration deemed those homeowners who were victimized by wind as opposed to flooding "ineligible" for any of that money. This exclusionary criterion deprived majority African American, poor communities of the help they needed only because of historic patterns of residential racial segregation that pushed them inland from Mississippi's beachfront. During the hurricane inland neighborhoods were often shielded from the flooding by the berm created by a nineteenth-century railroad track, but that berm did nothing to protect them from winds of 130 miles per hour.

Two years after the storm, when the funds allocated for housing remained unspent (in large part because of the restrictive eligibility criteria that Mississippi had imposed), the state sought to use these leftover funds to "reprogram" nearly \$600 million from housing assistance to a vast expansion of the State Port of Gulfport. The U.S. Department of Housing and Urban Development (HUD) did not stand in its way.

The plaintiffs got their relief in November 2010. After years of advocacy by Mississippi activists, in the face of mounting pressure from newly-in-control Obama appointees, and on the eve of oral argument in the U.S. Court of Appeals for the District of Columbia Circuit regarding plaintiffs' lawsuit, Mississippi agreed to provide \$132 million for the new Neighborhood Home Program. The program aims to meet the housing needs of low- and moderate-income households and renters. In exchange, plaintiffs agreed to drop their lawsuit challenging HUD's approval of the diversion of housing funds to the Port of Gulfport project.

On November 16, the day after Barbour, HUD Secretary Shaun Donovan, and Reilly Morse of the Mississippi Center for Justice announced the agreement, a *New York Times* editorial criticized Mississippi's failure to assist Katrina survivors sooner and noted that the Neighborhood Home Program had already identified 4,400 low-income residents in need of housing assistance (*For Katrina Victims, Relief at Last*, <http://nyti.ms/c3O4EB>). Ten weeks later more than 17,000 households—a population, according to prestorm census data, nearly the size of Biloxi—applied for assistance.

Represented by the Boston firm Mintz Levin Cohn Ferris Glovsky & Popeo PC (working pro bono), the Lawyers' Committee for Civil Rights Under Law, and the Mississippi Center for Justice, the plaintiffs achieved results by countering Mississippi's adherence to unfair policies with a resolve to see the right thing done, an understanding of the legal and political levers available, and a faith in good intentions prevailing over cynicism.

Where the Money Was Supposed to Go

Congress' supplemental appropriation on December 31, 2005, four months after Hurricane Katrina, included \$11.5 billion "for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in the most impacted and distressed areas related to the consequences of hurricanes in the Gulf of Mexico in 2005," to be administered by HUD through the Community Development Block Grant program (Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2779 (2005)). This was by far the biggest disaster emergency appropriation in U.S. history. Issuing its rules for allocating the \$11.5 billion in appropriated funds, HUD said: Community Block Development Grant "[f]unds allocated are intended ... to be used toward meeting unmet housing needs in areas of concentrated distress" (Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Disaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006, 71 Fed. Reg. 7666 (Feb. 13, 2006), <http://1.usa.gov/ePdEkZ>).

The Community Block Development Grant program was a logical conduit for this assistance. The program's "primary objective ... is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income" (42 U.S.C. § 5301(c)). HUD may make such grants only if "the grantee certifies," among other purposes, that (1) it will use the money to "affirmatively further fair housing" and (2) 70 percent of the money "shall principally benefit persons of low and moderate income" (*id.* § 5304(b)(2)–(3)). In this case Congress loosened the low- and moderate-income benefit requirement to 50 percent and permitted the state to seek HUD approval to waive it altogether upon a showing of "compelling need." Under this express congressional intent, the plaintiffs were prime examples of proper recipients.

An elderly resident of North Gulfport, James Johnson has severe health problems. He worked at a local lumberyard for over fifty years and retired on social security benefits. He left school at 9 years old to work and help his family buy the land where he still lived at the time of the storm; he inherited the land in 1946. The storm's wind totally destroyed his house, but all he got was a Federal Emergency Management Agency (FEMA) trailer and \$2,000 for his possessions. Johnson lived, in barely sanitary conditions, in that tiny trailer for nearly four years.

In North Gulfport Dorothy McClendon owned a house that was severely damaged by wind. She lived in a FEMA trailer while trying to make essential repairs. Because she was not given a handicap-accessible trailer (which she required), she was forced to switch back and forth between the trailer and her damaged house. Having lost its roof, the house had mold and mildew problems. And, because its foundation had shifted, the house had serious gas, electrical, and plumbing problems (Complaint ¶ 26, *Mississippi State Conference NAACP v. HUD*, 677 F. Supp. 2d 311 (D.D.C. 2010) (No. 1-08-cv-02140-JR), <http://bit.ly/enmW05>).

Lubertha Haskin and Ethel James were both unable to repair the massive damage to their homes. More than four years after the storm, both continued to live with broken windows, severe interior water damage, and major structural damage caused by shifting foundations. These plaintiffs, and the tens of thousands of others like them, are just the kind of storm victims for whom Congress' emergency appropriation was meant.

Where the Money Went

Mississippi's strategy for using its Community Development Block Grant funds was clear from the start—it would endeavor to take advantage of the relaxed low- and moderate-income requirements and a friendly Bush administration to exercise far more authority over its funds than what is generally given to grantees. All of the other states that received allocations for hurricane relief quickly submitted comprehensive spending plans. Mississippi's first move, by contrast, was to request a blanket waiver of the low- and moderate-income requirement for all of its more than \$5 billion. HUD rejected that, but Mississippi simply changed strategy to achieve a comparable result. It adopted a piecemeal approach, submitting numer-

ous "partial action plans," followed by amendments to those plans and reallocation of funds back and forth. In most of these "partial action plans" the state either requested that the low- and moderate-income benefit requirement be waived or promised that subsequent allocations would make up for the instant use of money not satisfying the statutory requirement. Without further investigation HUD approved each plan and each waiver and accepted each promise of compliance.

This state of affairs generated concerns not only in the affected communities but also within HUD. In an internal memorandum reported by MSNBC on December 10, 2008, a HUD officer complained that HUD's directive to spend Community Development Block Grant funds on the "compelling needs of the homeless, special needs and low-income populations as a first priority ... still has not been addressed fully" and warned that, "[i]n light of known disparities in the homeownership rates between whites and minority groups, particularly African Americans and Hispanics, [Mississippi's] waivers could result in violation of HUD's civil rights requirements" (Mike Stuckey, *HUD Sued Over Katrina Fund Diversion*, MSNBC.com, Dec. 10, 2008, <http://on.msnbc.com/dYJXmU>; Memorandum from Pamela Walsh, Acting Director, Office of Policy Legislative Initiatives and Outreach, U.S. Department of Housing and Urban Development, to Aaron Santa Anna, Assistant General Counsel for Regulations, U.S. Department of Housing and Urban Development (June 13, 2007), <http://bit.ly/gJCU8c>).

The Port Project

In late 2007, only months after the HUD officer's admonitions, Mississippi proposed and HUD accepted a plan to "re-program" \$600 million (later amended to \$570 million) away from housing assistance to expand the State Port of Gulfport. The port had been damaged by Hurricane Katrina, but only in the amount of about \$50 million (according to the Mississippi Legislature), and, in fact, the entire assessed value of the port at the time of the storm was only \$127.6 million (MISSISSIPPI JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, *THE IMPACT OF HURRICANE KATRINA ON MISSISSIPPI'S COMMERCIAL PUBLIC PORTS AND OPPORTUNITIES FOR EXPANSION OF THE PORTS 23* (June 20, 2006), <http://bit.ly/dXknGQ>).

The state's move to use housing money for this purpose was simply its last resort after having been stonewalled by Congress. In March 2006, while Congress was considering its second hurricane appropriation, Barbour suggested in testimony that the port's "rebuilding and redevelopment" was an "integral transportation project" (Testimony of Gov. Haley Barbour Before the U.S. Senate Committee on Appropriations (March 7, 2006), <http://bit.ly/e15fO1>). Congress did not agree, and nearly all of its second recovery appropriation was apportioned to Louisiana.

There was widespread agreement in the press, on Capitol Hill, and even at HUD, that the port plan was improper. The *Washington Post* and *New York Times*, among others, ran critical reports (Peter Whoriskey, *Biloxi's Recovery Shows Divide*, WASHINGTON POST, Nov. 25, 2007, <http://wapo.st/fryCkC>; Leslie Eaton, *In Mississippi, Poor Lag in Hurricane Aid*, Nov. 16, 2007, <http://nyti.ms/eDyMw5>). *Bill Moyers Journal* profiled Mississippi low-income housing activists who were working to secure funds for affordable housing (*Bill Moyers Journal: Re-*

covery *Gone Wrong?* (PBS television broadcast Nov. 16, 2007), <http://to.pbs.org/hLXn19>). On January 23, 2008, Reps. Barney Frank (D-Mass.) and Maxine Waters (D-Cal.), chairman and chairwoman of the House committees overseeing HUD and the Community Development Block Grant program, wrote to HUD Secretary Alphonso Jackson that “[w]e strongly believe that approving this diversion is a mistake and would violate the intended purpose of these CDBG funds to benefit the Gulf Coast’s low and moderate income families” (Letter from Rep. Barney Frank Chairman, U.S. House Committee on Financial Services, and Rep. Maxine Waters, Chairwoman, U.S. House Subcommittee on Housing and Community Opportunity, to Alphonso Jackson, Secretary, U.S. Department of Housing and Urban Development (Jan. 23, 2008), <http://bit.ly/fxcVOH>). Two days later Jackson wrote to Barbour to accept the plan. However, “I remain concerned that this expansion does indeed divert emergency federal funding from other more pressing recovery needs, most notably affordable housing” (Letter from Alphonso Jackson to Haley Barbour (Jan. 25, 2008), <http://bit.ly/hwzYSh>).

The criticism did not stop after HUD rubber-stamped the state’s plan. The *New York Times* editorial board wrote, “The plan for shifting Katrina relief money from housing to the port was clearly a terrible one—and it was not what Congress had in mind when it allocated this disaster aid” (*Mississippi: Keeping Katrina Aid Away from Katrina Victims*, NEW YORK TIMES: THE BOARD, Dec. 18, 2008, <http://bit.ly/fNiX3q>). Jackson did not disagree. At Frank’s oversight hearing, Jackson said, “I don’t think that everything has been provided to low- and moderate-income people that should be provided for housing or infrastructure. So I totally agree with you. But had I had my d’ruthers, I probably would have said, sir [to Barbour], I don’t think we should be using this money and I would not approve it. But I didn’t have that kind of authority” (*Oversight of the Department of Housing and Urban Development: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 30 (2008), <http://1.usa.gov/f94rji>).

The Lawsuit

But the secretary did have that “kind of authority,” plaintiffs asserted in their complaint, which they filed in district court in Washington, D.C., in December 2008 (*Mississippi State Conference NAACP v. HUD*, No. 1-08-cv-02140-JR (D.D.C.)). Indeed, the secretary had an obligation to do what everyone knew was right, but instead he shrank from his duty to say “no” to Mississippi and its powerful governor.

As plaintiffs alleged, Mississippi’s proposal to divert \$570 million to the Port Project could not satisfy the 50 percent low- and moderate-income benefit requirement. The state did not even ask for a waiver of that requirement. Instead the state only proffered job “projections”—and HUD never questioned those projections. But, as deficient as the low- and moderate-income certification was, it was more than Mississippi could muster regarding the unwaivable, statutorily required fair housing certification. Mississippi said absolutely nothing about the fair housing certification in its proposal, and HUD asked for nothing in response.

In court HUD’s motion to dismiss was granted on January 8, 2010. Bypassing any oral argument, in a cursory opinion, the court ruled that the plaintiffs’ complaints “may be well founded as a policy matter,” but, because the plaintiffs were ineligible for Mississippi’s original assistance programs, they lacked standing to challenge regarding its failure to question Mississippi’s diversion of funds (*Mississippi State Conference NAACP v. HUD*, 677 F. Supp. 2d 311, 314 (D.D.C. 2010)). The court so decided even though the Congress members who wrote the emergency appropriation and the offending HUD secretary himself had explained that the Community Development Block Grant program was meant to benefit people just like the plaintiffs. Then the plaintiffs appealed to the District of Columbia Circuit; they also indicated that they might file an administrative complaint directly with HUD against the state.

Mississippi Housing Advocates

While the plaintiffs’ appeal went forward and the new residents of the White House slowly changed the attitude at HUD, housing advocates in Mississippi were instrumental in moving all parties to a posture where resolution was possible.

This process started not long after the storm when Mississippi housing advocates created the Steps Coalition. In the summer of 2007, shortly before the state proposed the port project, Steps forced Mississippi to disclose its quarterly disaster recovery grant reports. When released, the reports demonstrated that HUD had allowed Mississippi to ignore the low- and moderate-income benefit requirement with regard to approximately 78 percent of its funds—a shockingly high number at the time.

In the fall Steps unveiled its “People Before Ports” campaign, gathered over 2,000 citizen complaints about the proposal, and submitted them to HUD and the Mississippi Development Authority. By the summer of 2008, Steps’ profile was high enough that the Gulf Coast Business Council asked it to support a recommendation to Barbour for the appointment of a coast housing and redevelopment czar. In turn, Barbour chose former Biloxi Mayor Gerald Blessey for the job. Shortly thereafter Steps released its second annual report, which showed that over 75 percent of Mississippi’s funds continued to be exempt from the low- and moderate-income benefit requirement (Steps Coalition, Hurricane Katrina: Is Mississippi Building Back Better than Before? Problems and Solutions Regarding Mississippi’s Use of CDBG Disaster Recovery Funds (Aug. 29, 2008), <http://bit.ly/dShKL6>). Conversely Louisiana—whose Hurricane Katrina response had been lambasted in the national media while Mississippi’s had generally been praised—had spent a far greater percentage of its funds on programs meant to benefit poor storm victims. In its third report Steps showed for the first time that the state had spent less on lower-income residents than on wealthier ones (Steps Coalition, Hurricane Katrina: Has Mississippi Fallen Further Behind? Trends and Challenges in Mississippi’s Disaster Recovery (Sept. 24, 2009), <http://bit.ly/hrtSkI>). The *New York Times* cited Steps’ conclusions in an editorial (*Mississippi’s Failure*, NEW YORK TIMES, Sept. 20, 2009, <http://nyti.ms/23rrTQ>).

The Road to Resolution

In December 2009 HUD's newly appointed assistant secretary of community planning and development, Mercedes Marquez, invited plaintiffs' and Barbour's representatives to Washington for an all-hands meeting—the first of its kind among these parties. At the April 16, 2010, meeting the parties resolved that, with HUD's expertise and advice, they would develop agreed-upon estimates of the unmet housing needs to guide them to a potential resolution. While the diversion of funds to the port project was the focus of the plaintiffs' lawsuit, the plaintiffs' advocates' primary goal always had been to get the plaintiffs and the thousands like them the assistance they still needed, whether that money came directly from the port funds or elsewhere.

During the summer of 2010 all parties set to work. The state analyzed the case files of prior program applicants who had been turned away because they were deemed ineligible. The plaintiffs' lawyers developed maps to show the geographic patterns of the unmet needs; such needs were clustered north of the railroad in overwhelmingly African American and poor communities, where flood damage was minimal but wind damage was widespread. HUD's experts, using data from the state, generated their own global estimates of the remaining need and underlying demographics.

In July the Mississippi Center for Justice reported that the bulk of the remaining housing need was in low-income African American communities north of the railroad tracks and called for aid to approximately 5,000 still unassisted households (Mississippi Center for Justice, *Hurricane Katrina: How Will Mississippi Turn the Corner?* (July 2010), <http://bit.ly/bFGpaw>). National Public Radio and the *Washington Post* covered the center's report (Debbie Elliott, *A Hard Fight for a Political Voice in Biloxi, Mississippi* (National Public Radio Aug. 23, 2010), <http://n.pr/9hwLjd>; Michael A. Fletcher, *Uneven Katrina Recovery Efforts Often Offered the Most Help to the Most Affluent*, WASHINGTON POST, Aug. 27, 2010, <http://wapo.st/duj0X6>).

In light of the growing pressure, HUD officials' continuing close attention, and the impending oral argument on plaintiffs' appeal, Barbour agreed in the fall to what would become the Neighborhood Home Program. The state dropped its exclusion of those with wind damage and those without insurance, set aside \$93 million for housing assistance to 4,400 households that the parties had identified as having been denied assistance, agreed to conduct an expansive outreach program to find more needy households, and agreed to reserve an additional \$40 million for the needs of those as-yet-unidentified storm victims. Furthermore, the state agreed that eligible households would include those in counties as far as a hundred miles inland—the extent of the hurricane's wind damage.

On November 15 Donovan, Barbour, and Morse announced the end of the plaintiffs' long fight in front of a room full of advocates, residents, and press with the plaintiffs in the front row. After the press conference, Donovan said: "[I]t's always better rather than fighting in court while families are still suffering to put our heads together and say, you know what, [the plaintiffs] had a point.... [U]nder the prior administration, there was a decision made that we didn't agree with; we went back and said you know what, we need to admit we were wrong, made a change and we're moving in a new direction ..." (*WLOXtra*:

HUD Secretary Shaun Donovan on MS Housing Money (WLOX television broadcast Nov. 15, 2010), <http://bit.ly/eFCyXJ>). The thousands of low-income Mississippians left out of the recovery are the beneficiaries of this new direction and now have the opportunity to receive housing assistance long overdue.

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Medical-Legal Partnership Helps Suspended Kindergarten Students Receive Special Education Services

Eric's and David's first year in school was not successful. They were from separate families and had different teachers and different classrooms, but their attendance records for the 2009–2010 school year were remarkably similar. They both enrolled in kindergarten at a charter school on the north side of St. Louis City in the fall of 2009, but they rarely attended. In their first year of school, Eric and David were suspended for more than nine weeks each because of behavioral problems. The suspensions were always fewer than ten consecutive days; this meant that the boys did not have the more expansive due process afforded students suspended or expelled for long periods. Instead Eric and David would serve a suspension, return to school for a few weeks or less, serve another suspension, and repeat. Eric's mother and David's mother both asked the school to conduct special education evaluations of their children, but the school never followed through. Luckily Eric's and David's mental health teams recognized these school problems as legal issues. The providers referred them to Legal Services of Eastern Missouri through the Children's Health Advocacy Project, the medical-legal partnership located on-site at the health center. Working together, the attorneys, physicians, psychologists, and social workers were able to use their professional expertise to obtain the evaluations and additional education services that Eric and David needed to succeed in school.

Factual Background

Eric and David each served their first suspension in October 2009 and served more frequent suspensions as the school year progressed. From January to April, Eric was suspended for a total of six weeks of school. The suspensions were for behavior such as running out of the classroom, turning over desks, kicking a teacher, yelling profanities, and being disruptive. In April the principal suggested to Eric's mother that Eric should



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