

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
LONNETTE GREENE,

Plaintiff,

No. 14 Civ. 3676 (AT)

vs.

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT;
DESHLER APARTMENT ASSOCIATES, L.P.,

Notice of Motion

Defendants.
-----X

PLEASE TAKE NOTICE that upon the accompanying declaration of Ellen Davidson and its accompanying exhibit, The Legal Aid Society will move this court for leave to participate as Amicus Curiae and file an Amicus Brief in this case.

Date: New York, New York
October 14, 2016

Respectfully submitted,

Seymour James, Esq.
Attorney-in-Chief
The Legal Aid Society
Adriene Holder, Esq.
Attorney in Charge, Civil Practice
Judith Goldiner, Esq. (JAG 3602)
Attorney in Charge, Law Reform
Unit
Director of Litigation
199 Water Street
New York, New York 10038
(212) 577-3339
Amicus Curiae

By: /s/ Ellen Davidson
Ellen Davidson, of Counsel (ED
4006)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
LONNETTE GREENE,

Plaintiff,

No. 14 Civ. 3676 (AT)

vs.

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT;
DESHLER APARTMENT ASSOCIATES, L.P.,

DECLARATION OF
ELLEN DAVIDSON

Defendants.
-----X

ELLEN DAVIDSON, pursuant to 28 U.S.C. § 1746, declares, under penalty of perjury and upon information and belief, as follows:

1. I am a staff attorney at the Legal Aid Society seeking to participate as Amicus Curiae in the above captioned case.
2. I have attached to this declaration Exhibit A, The Legal Aid Society's proposed Amicus brief.
3. The attached proposed amicus brief responds to this Court's August 16, 2016 order. The Court posed three questions as follows:

(1) Whether Plaintiff was a "Section 8 recipient" by virtue of her membership in the tenant family prior to her removal from the household composition; (2) whether individuals who are authorized members of a Section 8 tenant family have a legitimate claims of entitlement to the continued receipt of the family's subsidy; and (3) whether Plaintiff was entitled to due process prior to her initial removal from the family composition.

4. The Legal Aid Society ("The Society") is the oldest and largest program in the nation providing direct legal services to low-income families and individuals. The mission of the Society's Civil Practice is to improve the lives of low-income New Yorkers by providing legal representation to vulnerable families and individuals to assist them in obtaining and maintaining

the basic necessities of life — housing, health care, food and subsistence-level income or self-sufficiency. The Society’s legal assistance focuses on enhancing individual, family and community stability by resolving a full range of legal problems in the areas of housing and public benefits, foreclosure prevention, immigration, domestic violence and family law, employment, elder law, tax law, community economic development, health law and consumer law.

5. The Society’s housing unit primarily focuses its work on preventing evictions and preserving affordable housing. The housing unit represents low-income New York renters in all five boroughs in all types of housing. However, preserving tenancies in affordable housing, such as project based Section 8, public housing, rent stabilized and rent control apartments, is a priority.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
October 14, 2016

/s/ Ellen Davidson
Ellen Davidson, of Counsel

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
LONNETTE GREENE,

Plaintiff,

No. 14 Civ. 3676 (AT)

vs.

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT;
DESHLER APARTMENT ASSOCIATES, L.P.,

Defendants.

-----X

Amicus Curiae Brief of The Legal Aid Society

The Legal Aid Society
199 Water Street
New York, New York 10038
(212) 577-3339

By Ellen Davidson
Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii–iii

STATEMENT OF INTEREST 1

PRELIMINARY STATEMENT.....3

ARGUMENT4

 I. Prior to Her Removal From the Household Composition, Ms. Greene was an
 Authorized Member of the Household and the Household Had a Protective
 Property Interest to Continued Receipt of Assistance.....4

 II. Ms. Greene was Entitled to Due Process Prior to the Loss of Assistance5

CONCLUSION.....8

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| Cases | |
| <i>Baker v. Cincinnati Metropolitan Hous. Auth.</i> , 490 F. Supp. 520 (S.D. Ohio 1980), <i>aff'd</i> , 675 F.2d 836 (6th Cir. 1982) | 5 |
| <i>Baldwin v. Hous. Auth.</i> , 278 F. Supp. 2d 365 (D.N.J. 2003) | 5 |
| <i>Chesir v. Housing Auth. of Milwaukee</i> , 801 F. Supp. 244 (E.D. Wis. 1992) | 5 |
| <i>Davis v. Mansfield Metropolitan Hous. Auth.</i> , 751 F.2d 180 (6th Cir. 1984) | 5 |
| <i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970) | 7 |
| <i>Holbrook v. Pitt</i> , 643 F.2d 1261 (7th Cir. 1981) | 5, 6, 8 |
| <i>Mathews v. Eldridge</i> , 424 U.S. 319 (1965) | 7 |
| <i>McNair v. New York City Hous. Auth.</i> , 613 F. Supp. 910 (S.D.N.Y. 1985) | 5 |
| <i>Ressler v. Pierce</i> , 692 F.2d 1212 (9th Cir. 1982) | 5, 6, 8 |
| <i>Swann v. Gastonia Hous. Auth.</i> , 675 F.2d 1342 (4th Cir. 1982) | 5 |
| Statutes, Regulations and Policy Materials | |
| 42 U.S.C. § 1437f(a) | 4 |
| 42 U.S.C. §1437f(k) | 8 |
| 24 C.F.R. § 5.403 | 4 |
| 24 C.F.R. § 5.657 | 8 |
| 24 C.F.R. § 5.659(b) | 11 |
| 24 C.F.R. § 5.659 (d) | 6, 11 |

24 C.F.R. § 880.1014
HUD Handbook 4350.3 Chapter 3-27(D).....6

Other Authorities

Elyzabeth Gaumer, Dr. Sheree West, *New York City Housing and Vacancy Survey*
City of New York Department of Housing Preservation and Development,
<http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf>, 3 (last accessed October 13, 2016)2

Facts about NYCHA,
New York City Housing Authority,
<http://www1.nyc.gov/assets/nycha/downloads/pdf/factsheet.pdf>. (Last
accessed October 13, 2016)3

Homelessness, Coalition for the Homeless,
<http://www.coalitionforthehomeless.org/the-catastrophe-of-homelessness/facts-about-homelessness/> (Last accessed October 13, 2016)2

New York City’s Changing Neighborhoods, Community Service Society,
<http://www.cssny.org/publications/entry/making-the-rent-2016> (last accessed
October 13, 2016)2

This amicus brief is submitted in response to this Court’s August 16, 2016 order. The Court found that the parties generally agreed that recipients of Section 8 subsidies are entitled to the continued receipt of assistance and must be afforded due process prior to their benefits being terminated. The Court posed three questions to further explore Plaintiff’s rights to continued Section 8 benefits and what process was due prior to the termination of such benefits. The questions were as follows:

- (1) Whether Plaintiff was a “Section 8 recipient” by virtue of her membership in the tenant family prior to her removal from the household composition;
- (2) whether individuals who are authorized members of a Section 8 tenant family have a legitimate claims of entitlement to the continued receipt of the family’s subsidy; and
- (3) whether Plaintiff was entitled to due process prior to her initial removal from the family composition.

Statement of Interest

The Legal Aid Society (“The Society”) is the oldest and largest program in the nation providing direct legal services to low-income families and individuals. The mission of the Society’s Civil Practice is to improve the lives of low-income New Yorkers by providing legal representation to vulnerable families and individuals to assist them in obtaining and maintaining the basic necessities of life — housing, health care, food and subsistence-level income or self-sufficiency. The Society’s legal assistance focuses on enhancing individual, family and community stability by resolving a full range of legal problems in the areas of housing and public benefits, foreclosure prevention, immigration, domestic violence and family law, employment, elder law, tax law, community economic development, health law and consumer law.

The Society’s housing unit primarily focuses its work on preventing evictions and preserving affordable housing. The housing unit represents low-income New York renters in all five boroughs in all types of housing. However, preserving tenancies in affordable housing, such

as project based Section 8, public housing, rent stabilized and rent control apartments, is a priority. New York City is in the midst of an affordable housing crisis. In the most recent report, the Housing and Vacancy Survey of 2014, the United States Census Department determined that New York City's vacancy rate was 3.45% by surveying rents and incomes from three months in 2014. See Elyzabeth Gaumer, Dr. Sheree West, *New York City Housing and Vacancy Survey* (HVS), City of New York Department of Housing Preservation and Development, <http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf>, 3 (last accessed October 13, 2016). Apartments are even harder to come by at the lower end of the market -- for units with rents of less than \$800 the vacancy rate is just 1.8%. *Id.*

In addition to an extremely low-vacancy rate, New York renters also suffer from high rent burdens. Over fifty percent of renter households pay more than thirty percent of their income towards their rent and almost thirty percent of renter households pay more than fifty percent of their income toward their rent. *Id.* at 7. New Yorkers find their rent growing faster than their incomes, and for households with incomes of twice the poverty rate, the median income to rent ratio is forty-nine percent. See Victor Bach & Tom Waters, *Making the Rent 2016: Tenant Conditions in New York City's Changing Neighborhoods*, Community Service Society, <http://www.cssny.org/publications/entry/making-the-rent-2016> at 2 (last accessed October 13, 2016). Meanwhile, the population of homeless families and individuals has skyrocketed. Approximately 61,000 individuals were sleeping in New York City's homeless shelters as of August 2016. See *Fact about Homelessness*, Coalition for the Homeless, <http://www.coalitionforthehomeless.org/the-catastrophe-of-homelessness/facts-about-homelessness/> (Last accessed October 13, 2016). As of March 31, 2016, there were 258,880 families on the waiting list for Conventional Public Housing and 147,033 families on the waiting

list for Section 8 housing. That list has been closed since 2007. *See Facts about NYCHA*, New York City Housing Authority, <http://www1.nyc.gov/assets/nycha/downloads/pdf/factsheet.pdf>. (Last accessed October 13, 2016).

Under these circumstances, Project Based Section 8 apartments are a valuable resource for low income New Yorkers. The Society has a long history of representing project based Section 8 tenants and tenants associations in state and federal court. The questions posed by the Court in its order of August 16, 2016 are of utmost importance to the Society's clients.

Preliminary Statement

Both Plaintiff, Lonnelle Greene (Ms. Greene), and Defendant, United States Department of Housing and Urban Development, (HUD) are in agreement as to the answer to the first two questions posed by the Court. Ms. Greene was a Section 8 recipient by virtue of her membership in the tenant family prior to her removal from the household composition. Additionally, individuals who are authorized members of the project based Section 8 tenant family have a legitimate claim of the entitlement to the continued receipt of the family subsidy.

Ms. Greene and HUD disagree about their response to question number three. The question posed by the Court is whether Ms. Greene had the right to procedural due process before the tenant of record improperly removed Ms. Greene from the family composition and the private property owner, Defendant Deschler's predecessor in interest, approved the removal by recertifying the family without Ms. Greene and her income. Ms. Greene argues that she was entitled to some due process protection prior to being improperly removed from the family composition. In opposition, HUD argues that Ms. Greene's loss of subsidy was due to her mother's actions and thus Ms. Greene cannot expect the Defendants to put procedures in place to protect her interests. For the reasons stated in Plaintiff's brief, Ms Greene was due some process

prior to her removal. However, in the alternative, if the Court were to determine that no process was due, this Court should find that Ms. Greene was entitled to due process at the time that defendant Deschler terminated assistance to Ms. Greene as a remaining member of the tenant family. At that hearing, if Ms. Greene is able to show that she was an authorized member of the household and that she continuously occupied the Section 8 unit as a member of the family after removal, the burden should shift to Defendant Deschler to demonstrate that its predecessor in interest properly followed HUD's rules and regulations in approving her removal.

ARGUMENT

I. Prior to Her Removal From the Household Composition, Ms. Greene was an Authorized Member of the Household and the Household Had a Protective Property Interest to Continued Receipt of Assistance.

Congress created the Section 8 program “[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing.” 42 U.S.C. § 1437f(a). The regulations implementing the program agree stating that “the purpose of the Section 8 program is to provide low-income families with decent, safe, and sanitary rental housing.” 24 C.F.R. § 880.101. HUD defines families in its regulations as a group of persons residing together, and such group includes but is not limited to: . . . (vi) The remaining member of a tenant family.” 24 C.F.R. § 5.403. There is agreement between the parties to this action that prior to Ms. Greene’s improper removal, she was an authorized member of a tenant family receiving assistance and as such she was entitled to continued receipt of assistance. Because her family received Section 8 assistance, they had a protectable property interest under the due process clause. *See Holbrook v. Pitt*, 643 F.2d 1261, 1278 (7th Cir. 1981).

Case law supports Ms. Greene’s and HUD’s response to the first two questions. Courts have held that families receiving Section 8 assistance, have a property interest in the assistance that is

protected by the Due Process Clause. *See Swann v. Gastonia Hous. Auth.*, 675 F.2d 1342, 1346 (4th Cir. 1982) (“It is now beyond question that such statutory entitlements [Section 8 vouchers] are protected by the due process clause”); *Davis v. Mansfield Metropolitan Hous. Auth.*, 751 F.2d 180, 185 (6th Cir. 1984) (affirming Section 8 participants’ property interest requires a hearing prior to termination or denial of recertification); *Baldwin v. Hous. Auth.*, 278 F. Supp. 2d 365, 379-80 (D.N.J. 2003); *Chesir v. Housing Auth. of Milwaukee*, 801 F. Supp. 244, 248 (E.D. Wis. 1992); *McNair v. New York City Hous. Auth.*, 613 F. Supp. 910 (S.D.N.Y. 1985); *Baker v. Cincinnati Metropolitan Hous. Auth.*, 490 F. Supp. 520, 532 (S.D. Ohio 1980), *aff’d*, 675 F.2d 836 (6th Cir. 1982).

Thus prior to her improper removal, Ms. Greene had a protected property interest and as such due process rights attached.

II. Ms. Greene was Entitled to Due Process Prior to the Loss of Assistance

For the reasons stated in Plaintiff’s brief, Ms Greene was due some process prior to her removal. However, if this court finds that no process was due prior to removal, Ms. Greene was entitled to due process prior to Defendant Deschler terminating Section 8 assistance.

Courts have recognized that where Section 8 benefits are provided through the project based Section 8 program, a private property owner’s action or inactions may violate a tenant’s due process rights. *See Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982), *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981). In *Ressler*, the private property owner had limited discretion in the Section 8 application and selection process. *Ressler* at 1215. HUD regulations dictated what percentage of units must be rented to very low income families. *Id.* HUD created administrative guidelines which determined eligibility standards, application forms and rules for calculating applicants incomes and allowances. *Id.* *See Also Holbrook v. Pitt*, 643 F.2d 1261, 1280 (7th Cir.

1981) (“although the owner may have limited discretion with regard to the initial selection of tenants who are to be subsidized under the Contracts . . . the owner may properly exercise no discretion with regard to retroactive certification”).

While Ms. Greene’s mother submitted a false certification improperly removing Ms. Greene from the household composition, it was clearly the property owner’s responsibility to verify the information, where, as here, the removal of Ms. Greene affected the determination of adjusted income. See 24 C.F.R. § 5.659 (d) (4) (“(d) Owner responsibility for verification. The Owner must obtain and document in the family file third party verification of the following factors or must document in the file why third party verification was not available . . . (4) other factors that affect the determination of adjusted income”). The HUD Handbook suggests best practices to verify the departure of a family member reported to have moved out. See HUD Handbook 4350.3 Chapter 3-27(D). The suggestions include reviewing new leases, driver’s licenses and signed affidavits from the remaining family members. *Id.* There has been no indication that any verification was done here by Deschler or any predecessor in interest.

From the time Ms. Greene moved into the subject premises, she was a member of a tenant family that received Section 8 benefits. Indeed, she was an authorized member of the household as she was listed on the family composition until 2005. Although she has continuously remained in the household up until present time, in 2005 Ms. Greene’s mother improperly removed her and the property owner processed the certification and recalculated the family’s rent. Under these circumstances, Ms. Greene had a property interest in continued receipt of assistance. However, Deschler terminated her assistance without proper notice or an opportunity to be heard.

The Supreme Court has set forth a three-part balancing test for determining whether an

individual has received due process: (1) the private interest at stake; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value (if any) of alternative procedures; and (3) the government’s interest, including the possible burdens of alternative procedures. *Mathews v. Eldridge*, 424 U.S. 319 (1965). The balancing of the *Mathews* factors weighs decidedly in favor of Ms. Greene.

First, Ms. Greene’s “private interest” is considerable; without the Section 8 subsidy Ms. Greene is at risk of eviction and homelessness. In the seminal case of *Goldberg v. Kelly*, the Court observed that state-provided benefits based on financial need require timely pre-termination protections for recipients:

[W]e agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. For qualified recipients, welfare provides the means to obtain essential food, clothing, **housing**, and medical care. Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is **that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits**. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Goldberg, 397 U.S. 254, 263-64 (1970) (citations omitted) (emphasis added).

As to the second prong, the risk of an erroneous deprivation of the property interest is great because in contravention of HUD’s promulgated regulations, here there was seemingly no process to ensure that her removal was proper. Where, as here, the property owner has completely failed to comply with its own obligations under the program, Ms. Greene was erroneously deprived of her property interest.

Finally, the third *Matthews v. Eldridge* prong considers the Government's interest and the possible burdens of additional procedures. One way to limit the possible burdens of additional procedures is to require the former authorized Section 8 beneficiary to submit evidence documenting that she was at one time an authorized member and that she continuously remained a member of the tenant household up until the time that the property owner proposes to terminate Section 8 assistance. Only where a remaining member of the tenant family is able to produce such evidence would the burden shift to the owner to demonstrate that the removal was proper.

HUD as the government entity which regulates the annual and interim household and income certification process is obligated to provide due process protections to Ms. Greene. HUD acknowledges that Congress required that it "establish procedures which are appropriate and necessary to assure that income data provided to public housing agencies and owners by families applying for or receiving assistance under this section is complete and accurate." 42 U.S.C. §1437f(k). Clearly, HUD regulates household composition issues. See 24 C.F.R. §§ 5.657, 5.659(b) & (d). Courts have held that where HUD promulgated regulations which set forth guidelines limiting discretion, HUD was obligated to ensure tenants received procedural protections. See *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982), *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981)

Thus, under these singular circumstances, due process requires that Ms. Greene should have been given the opportunity to challenge the owner's decision to terminate the Section 8 benefits prior to termination of those benefits.

Conclusion

For the reasons stated above, Ms. Greene lost her Section 8 benefits without the procedural protections required by the due process clause

Dated: October 14, 2016
New York, NY

Respectfully submitted,

Seymour James, Esq.
Attorney-in-Chief
The Legal Aid Society
Adriene Holder
Attorney in Charge, Civil Practice
Judith Goldiner, Esq. (JAG 3602)
Attorney in Charge, Law Reform Unit
Director of Litigation
199 Water Street
New York, New York 10038
(212) 577-3339
Amicus Curiae

By: _____
Ellen Davidson, of Counsel (ED 4006)