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CONSTITUTIONAL CONCERNS IN SECTION 8 HOUSING: TRANSFER VOUCHER TERMINATIONS AND THE IMPACT ON PARTICIPANT FAMILIES

I. INTRODUCTION

Currently, there is a procedural due process void in the existing Section 8 housing regulations, which is having immediate, harmful effects on program participants. When a Section 8 Housing Assistance Program participant wishes to move, he receives a transfer voucher from the local Public Housing Agency (PHA). The PHA then has the discretion to choose not to extend the term of this transfer voucher, effectively terminating the family's participation in the program. Despite the ramifications of the local PHA's decision, the participant family has no right to a pre-termination hearing, where they can present their case and appeal to the PHA to reverse its decision.

Courts have consistently held that participants in the Section 8 Housing Program have a constitutionally recognized, protectable property interest in their program benefits.¹ In general, the fact that this is a constitutionally protected interest means that participants are entitled to proper due process before their participation in the program can be terminated.² However, when the PHA allows a participant's transfer voucher to expire, the U.S. Department of Housing and Urban Development's regulations allow a participant's housing benefits to be revoked without proper observance of their due process rights.³

In Parts II and III, this Note examines the legislative and judicial context of Section 8 Housing Assistance Vouchers, including judicial decisions requiring due process procedures within the context of public assistance. Part IV then analyzes a recent case in Illinois where the court found that the local PHA must satisfy due process procedures before terminating a Section 8 transfer voucher, a decision that challenged

1. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Simmons v. Drew*, 716 F.2d 1160, 1162 (7th Cir. 1983) (citing *Ferguson v. Metro. Dev. & Hous. Agency*, 485 F. Supp. 517 (M.D. Tenn. 1980); *Brezina v. Dowdall*, 472 F. Supp. 82 (N.D. Ill. 1979); and *Watkins v. Mobile Hous. Bd.*, No. 79-0067-P (S.D. Ala. May 14, 1979)).

2. *Ressler v. Pierce*, 692 F.2d 1212, 1216 (9th Cir. 1982) (affirming applicants for Section 8 benefits must be afforded Fifth Amendment due process protection in the application and selection process).

3. See 24 C.F.R. § 982.555(b)(4) (2002) (stating that "[a] PHA determination not to approve an extension of a voucher term" does not require an informal hearing).

persuasive precedent.⁴ Part V will then examine current legal and social trends toward greater accountability within housing assistance programs, and consider the opportunity presented by the Illinois case within that context. Finally, Part VI considers the implication of the Illinois court case and how this case might serve as a catalyst for judicial and legislative corrective response to this constitutional violation.

II. LEGISLATIVE CONTEXT

In 1937, Congress enacted the United States Housing Act to facilitate the construction of a public housing system in the United States.⁵ Over the next thirty years, Congress established housing assistance programs to assist “low-income families in obtaining a decent place to live and [to promote] economically mixed housing.”⁶ The U.S. Department of Housing and Urban Development (HUD) was given the responsibility of creating regulations for the administration of these programs.⁷ The resulting regulations are codified in 24 C.F.R. § 982.⁸

The Section 8 Housing Program, also known as the HUD Housing Choice Voucher Program, issues housing vouchers to program participants.⁹ To qualify for a voucher, typically a family’s income must be less than fifty percent of the median income for the area in which they live.¹⁰ Tenants must apply for the program and are placed on a waiting list until the local PHA has sufficient funds to accept new participant families into the program.¹¹ Tenants may remain on a waiting list for years waiting for acceptance into the program.¹²

4. *Pickett v. Hous. Auth. of Cook Cty.*, 114 F. Supp. 3d 663 (N.D. Ill. 2015).

5. Angela McNair Turner, *The Elephant in the Hearing Room: Colorblindness in Section 8 Voucher Termination Hearings*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 45, 46–47 (2011).

6. 42 U.S.C. § 1437f(a) (2012); *see also* Turner, *supra* note 5, at 47.

7. *See generally* 42 U.S.C. § 1437f (2012) and 24 C.F.R. § 982.52(a).

8. Although 24 C.F.R. §§ 982.554 and 982.555 were both amended in 2015, all of the court filings as well as the court’s opinion refer to the 2002 version of the regulations, as the amendments were not enacted until August 20th (after the court’s ruling). As there are no material changes in the 2016 version of the regulations, and since the court’s decision in this case rested in part on statutory interpretation, this Note will refer to the 2002 version of the regulations instead of the more current versions.

9. U.S. DEP’T HOUS. & URBAN DEV., HOUSING CHOICE VOUCHERS FACT SHEET, http://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8 (last visited Sept. 9, 2016). *See also* 24 C.F.R. § 982.1 (2016).

10. U.S. DEP’T HOUS. & URBAN DEV., *supra* note 9.

11. 24 C.F.R. § 982.204 (2016); U.S. DEP’T HOUS. & URBAN DEV., *supra* note 9.

12. In a national survey of Section 8 Housing, HUD found that the average time that a family waited to get public housing was eleven months in 1998. In large cities, the average wait time for Section 8 vouchers was 28 months. In New York, the average wait time for public housing was eight

Once they have been accepted into the program, the participant families are then permitted to find their own housing, subject to approval by their local PHA.¹³ The local PHA pays a housing subsidy directly to the landlord on behalf of the participant family, which assists with a portion of the family's rent.¹⁴ If the participant family later wants to relocate, the voucher program allows families to move within their local PHA's jurisdiction or to another PHA jurisdiction without losing their housing assistance.¹⁵ Generally, the requirements for moving are that the family notifies the PHA, terminates its existing lease,¹⁶ and finds acceptable new housing.¹⁷

While federal regulations govern the structure of the voucher program, the program is administered by the local PHAs.¹⁸ Every PHA is required to adopt a written administrative plan that establishes local policies, and the PHA is required to administer the program pursuant to this plan.¹⁹ The local PHA also has authority in accordance with federal regulations to terminate a family from the voucher program.²⁰ For each decision a PHA makes to terminate assistance, the federal regulations dictate whether an

years. John J. Ammann, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 311–12 (2000) (documenting the waiting times for public housing and vouchers).

13. 24 C.F.R. § 982.1(a)(2) (2016). Requirements for approval of a tenancy include: eligibility of the unit, inspection of the unit by the PHA, satisfaction of Housing Quality Standards, inclusion of the HUD tenancy addendum in the lease, reasonableness of the rent, and satisfaction of rent-to-monthly adjusted income ratio. 24 C.F.R. § 982.305(a) (2016).

14. 24 C.F.R. § 982.1(a) (2016). The amount of this subsidy is determined based on the participant family's financial needs. *Id.* Generally, the maximum subsidy available is the lesser of the payment standard (the average monthly rent for a moderate unit in the local housing market) minus 30% of the family's monthly adjusted income, or the gross rent for the rental unit less 30% of the family's monthly adjusted income. *Id.*

15. U.S. DEP'T HOUS. & URBAN DEV., *supra* note 9.

16. *See, e.g.*, CHICAGO HOUSING AUTHORITY, HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN Ch. 5, 10 (2016), available at http://www.thecha.org/assets/1/6/Admin_Plan_-_approved_11-17-15_effective_1-1-161.pdf. The requirement that a family must terminate their existing lease upon notifying the PHA of their intention to move has created some issues within the process. Primarily, some PHAs argue that because the family has terminated their Section 8-approved lease, they are no longer participants within the voucher program. Instead, the family has been downgraded to a more applicant-like status. Additionally, because the family must terminate their current lease before searching for alternate housing, they operate under a time constraint to find a new rental unit. While some landlords may agree to a month-to-month leasing situation, many landlords will begin searching for new tenants instead. Consequently, if the family is unable to find alternate housing, they have lost the option of remaining in their current housing accommodations because they have already given notice to their landlord. This contributes to families' unwillingness and inability to move within the voucher program.

17. *Id.*

18. *Id.*

19. *Id.*

20. 24 C.F.R. § 982.552 (2002).

informal hearing is required before the family can be terminated.²¹ According to federal regulations, the decision not to extend a participant family's transfer voucher does not require an informal hearing.²²

The initial term of a transfer voucher must be at least 60 days.²³ The local PHA then has the discretion to grant one or more extensions of the transfer voucher in accordance with its local administrative plan.²⁴ Additionally, if the participant family has submitted a request for approval of a new lease during the voucher term, the PHA must also grant a suspension of the voucher term while the request is processed.²⁵

21. 24 C.F.R. § 982.555 (2002).

22. 24 C.F.R. § 982.555(b)(4) (2002). However, according to 24 C.F.R. § 982.555(a)(1)(iv), a decision to terminate assistance because of a participant family's "failure to act" is a situation requiring an informal pre-termination hearing. Some plaintiffs have argued that their failure to obtain new acceptable housing before their transfer voucher expires is a "failure to act" under the definition of this regulation, and therefore an informal pre-termination hearing is required. *See, e.g., Ely v. Mobile Hous. Bd.*, 13 F. Supp. 3d 1228 n.14 (S.D. Ala. 2014). This is an alternate interpretation of the federal regulations that will not be discussed in this Note, but may bear further examination if legislative action is taken.

23. 24 C.F.R. § 982.303(a) (2016). A family's participation in the voucher program is otherwise not subject to a time constraint. Provided the family is not terminated from the program for cause, which is defined in the federal regulations, they may remain in the program as long as they remain income eligible. *See generally* 24 C.F.R. § 982.552 (2002) (PHA denial or termination of assistance can occur only for cause or for ineligibility).

24. 24 C.F.R. § 982.303(b) (2016). While the PHA has the discretion to extend the term of the transfer voucher, there is no guarantee that the PHA will choose to do so. Therefore, often families are working within the 60-day constraint of the original transfer voucher, as well as any time constraints imposed by their current landlord after they have given the landlord notice. This short period of time may cause families to settle for housing in "higher poverty neighborhoods with lower performing schools." POVERTY & RACE RESEARCH ACTION COUNCIL, THE URBAN INST., EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM 8 (2013) (suggesting a longer voucher term may be needed within "tight markets").

The practical effect of this is that families who are willing and able to move out of their current housing accommodations into a living situation that may be more beneficial to them economically, socially, and medically are choosing not to do so because of the fear that they might lose their housing assistance altogether. *See also* Stefanie DeLuca et al., *Why Don't Vouchers Do a Better Job of Deconcentrating Poverty? Insights from Fieldwork with Poor Families*, 21 POVERTY & RACE 1, 1–2 (2012).

25. 24 C.F.R. § 982.303 (2016). PHAs are now required to suspend the term of a transfer voucher while processing any request for tenancy approval. Housing Choice Voucher Program: Streamlining the Portability Process, 80 Fed. Reg. 50,564 (Sept. 21, 2015) (amending HUD regulations). However, in some cases, the PHA may fail to do so out of an administrative oversight, leading to a wrongful termination of a participant's housing subsidy. *See, e.g., Burgess v. Hous. Auth. of Alameda Cty.*, No. C01–04098 MJJ, 2006 WL 7347315, at *11 (N.D. Cal. Dec. 30, 2006).

III. CONSTITUTIONAL CONSIDERATIONS

A. *Constitutional Protection*

Procedural due process protects against the unjustified deprivation of property. However, the Supreme Court has held that “[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.”²⁶ The Supreme Court has found a constitutionally protected right in public assistance, meaning that due process rights and procedures apply.²⁷ Public assistance often provides recipients with the means by which they can obtain housing, food, clothing, or other living essentials.²⁸ Thus, termination of public aid before a matter is tried and resolved would deprive the recipient of the financial resources he needs to live and survive while the matter is pending.²⁹ This creates a deadlock situation that may be devastating to many recipients.³⁰ For that reason, before assistance can be terminated, a pre-termination evidentiary hearing is *required* in order to satisfy procedural due process.³¹

Housing benefits, such as the housing subsidies provided through the Section 8 program, have been recognized as protectable property interests under the Fourteenth Amendment.³² Thus, termination of a participant’s benefits without due process is a deprivation of property in violation of the participant’s constitutional rights.³³ The Seventh Circuit settled this issue

26. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972).

27. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

28. *Id.* at 264.

29. *Id.*

30. For a discussion of the practical and long-term consequences to families when they lose welfare benefits, see Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131 (2008) (“[L]ow-income families frequently face hunger, homelessness, disability, or lack of medical care following the loss of critical benefits . . .”). *See also* Turner, *supra* note 5, at 49 (“[L]osing a Section 8 voucher can be devastating for a participating family [L]oss of a Section 8 voucher can result in homelessness, food insecurity, and decreased access to appropriate medical care.”).

31. *See Goldberg*, 397 U.S. at 254 (1970).

32. “[I]t is plain that just as job tenure is a species of property protected by the Fourteenth Amendment, so too is ‘program tenure,’ the right of certificate holders to participate in a rent assistance program by seeking out persons willing and able to rent them housing pursuant to the rules of the program.” *Simmons v. Drew*, 716 F.2d 1160, 1162 (7th Cir. 1983) (citation omitted).

33. Even an applicant to the housing voucher program “has a sufficient ‘property’ interest in Section 8 benefits to entitle her to due process safeguards in the processing of her application.” *Ressler v. Pierce*, 692 F.2d 1212, 1216 (9th Cir. 1982) (affirming that applicants for Section 8 benefits must be afforded Fifth Amendment due process protection in the application and selection process).

in *Simmons v. Drew*.³⁴ In that case, plaintiffs had been terminated from a public housing program for allegedly violating their lease.³⁵ They did not receive a pre-termination hearing from the local PHA before they were expelled from the program and their benefits terminated.³⁶ The *Simmons* court held that the local PHA's actions were unconstitutional because the program participant had a protectable property right in the housing voucher, and the PHA was required to follow procedural due process before expelling the participant family.³⁷

B. Procedural Due Process Requirements

A recipient of public assistance, or similar constitutionally protected property interests, is entitled to specific due process procedures before that assistance can be terminated. The U.S. Supreme Court defined these procedures in *Goldberg v. Kelly*.³⁸ Before his benefits can be terminated, a recipient must “have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.”³⁹ Written submissions by the recipient are not sufficient, as welfare recipients often lack the writing skills to express the situation completely and coherently in writing.⁴⁰ Additionally, “the decision maker should state the reasons for his determination and indicate the evidence he relied on.”⁴¹ The decision maker must ensure that these procedures are followed to prevent an unconstitutional deprivation of a property interest.

34. 716 F.2d 1160 (7th Cir. 1983).

35. *Id.* at 1162.

36. *Id.* at 1163.

37. *Id.* at 1164.

38. 397 U.S. 254 (1970).

39. *Id.* at 267–68. The Court held that informal procedures are sufficient, thus affirming 24 CFR § 982.555, which allows for informal hearings upon termination of Section 8 benefits. *Id.* at 269.

40. *Id.* at 269. See also Turner, *supra* note 5, at 51 (discussing procedural barriers to *pro se* litigants, including that “Section 8 recipients may have lower education levels, limited English proficiency, or mental disabilities that make it more difficult for them to navigate a hearing and effectively explain their case”); April Kuehnhoff, *Holding on to Home: Preventing Eviction and Termination of Tenant-Based Subsidies for Limited English Proficiency Tenants Living in Housing Units with HUD Rental Assistance*, 17 GEO. J. ON POVERTY L. & POL’Y 221 (2010) (discussing challenges that limited English proficiency tenants face within the complaint and administrative process for Section 8 housing).

41. See *Goldberg v. Kelly*, 397 U.S. at 271 (1970). This due process requirement becomes especially important in termination of Section 8 housing benefits as the participant’s right to a hearing depends on the grounds for which he was terminated. See 24 CFR § 982.555 (2002) (listing when an informal hearing is or is not required).

While courts have universally applied due process protections to participants of Section 8 housing,⁴² there remains a void for holders of a transfer voucher. Courts have found transfer voucher holders to have a different status than Section 8 participants, and thus have held that termination of this transfer voucher does not create due process concerns or a separate cause of action.⁴³ Some courts have found that a participant family's property rights in the Section 8 housing subsidies expire upon receipt of the transfer voucher.⁴⁴ As a result, the participant family then has no right to an informal hearing in accordance with due process procedures before their benefits are terminated.⁴⁵

Courts have also declined to rule on the issue altogether, preferring not to decide whether a pre-termination hearing is required upon expiration of

42. See, e.g., *McCall v. Montgomery Housing Authority*, 809 F. Supp. 2d 1314, 1324 (M.D. Ala. 2011) ("recipients of public assistance, such as Section 8 assistance, have a protected property interest in continuing to receive such assistance"); *Swift v. McKeesport Housing Authority*, 726 F. Supp. 2d 559, 574 (W.D. Pa. 2010); *Stevenson v. Willis*, 579 F. Supp. 2d 913, 919 (N.D. Ohio 2008) ("Plaintiff's participation in the § 8 Housing Choice Voucher Program . . . is a property interest protected by the requirement of procedural due process."); *Escalera v. New York City Hous. Auth.*, 425 F.2d 853 (2d Cir. 1970); *Junior v. City of New York, Housing Preservation and Development Corp.*, 2013 WL 646464, *6 (S.D.N.Y. Jan. 17, 2013) ("It is well established that Section 8 tenants have a property interest in continuing to receive assistance payments.").

43. See, e.g., *Jackson v. Wilmington Hous. Auth.*, No. 7:13-CV-155-BO, 2014 WL 2506151, at *4 (E.D.N.C. June 3, 2014) (holding participant's property rights expired *upon receipt* of the transfer voucher). Similarly, some courts distinguish between applicants to the Section 8 Housing Program and participants in the program. Compare *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982) (finding that Section 8 applicants had property interests in the housing subsidies) with *Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984) (holding that applicants did not have property interests in the subsidies and thus due process procedures did not have to be implemented). The Supreme Court recognizes property rights when there is a legitimate claim of entitlement to the property interest; but the fact that the family is issued a voucher does not change their reasonable expectation that they will remain in the program. See 24 C.F.R. § 982.305 (procedures and requirements for PHA approval of a participant family's request for tenancy assistance); 24 C.F.R. § 982.355(b) ("A receiving PHA cannot refuse to assist incoming portable families or direct them to another neighboring PHA for assistance."). Thus, defining their status differently seems to be an arbitrary distinction.

44. *Jackson*, 2014 WL 2506151, at *4. See also *Burgess v. Alameda Hous. Auth.*, 98 F. App'x 603, 605 (9th Cir. 2004) (affirming the district court's dismissal of plaintiff's due process claim by finding no property interest in the transfer voucher). But see *Burgess v. Hous. Auth. of Alameda Cty.*, No. C01-04098 MJJ, 2006 WL 7347315, at *11 (N.D. Cal. Dec. 30, 2006) (on remand, finding plaintiff has a "recognized, protectable property interest in Section 8 benefits").

45. See, e.g., *Ely v. Mobile Hous. Bd.*, 13 F. Supp. 3d 1216 (S.D. Ala. 2014). A participant family who received a transfer voucher failed to submit an acceptable lease before the voucher expired. *Id.* at 1222. The housing authority terminated the family's transfer voucher and the family was removed from the voucher program. *Id.* at 1223-24. The court found that the participant family did not have a property interest *after their transfer voucher expired* and thus was not entitled to a due process hearing. *Id.* at 1226. This logic seems contradictory, however, as merely terminating any public assistance recipient's benefits would then allow the decision-maker to avoid having to follow due process procedures. In essence, the improper termination of a recipient's benefits protects the decision-maker from having to follow correct procedures for termination because it removes the participant's status as a property interest holder.

a transfer voucher.⁴⁶ This suggests that the issue has not yet been settled, and there might be constitutional issues implicated that courts have preferred not to touch.⁴⁷ Many times these challenges are brought in state court, even though they address a federal constitutional issue, meaning the courts may not want to rule on an issue more appropriately addressed in federal court.

IV. ANALYSIS OF *PICKETT*

The issue of the constitutionality of a participant's program termination for an expired transfer voucher was recently raised in the Northern District of Illinois. In *Pickett v. Housing Authority of Cook County*,⁴⁸ the court found that the local PHA's refusal to provide a hearing to a participant family whose transfer voucher expired constituted a violation of procedural due process rights.⁴⁹ This was the first case where a court found that the participant family's property interest in the Section 8 voucher required a due process hearing before it could be terminated.⁵⁰

In *Pickett*, Charlise Pickett and her family had been part of the Section 8 voucher program for nine years.⁵¹ At that time, Pickett sought to move to a new living space to accommodate her larger family, which had grown from two minor children to four.⁵² Pickett began looking for housing, but due to circumstances outside of her control, had to seek several extensions

46. See *Moore v. Hunt*, No. 14-CV-1101-JPS, 2015 WL 5008265 (E.D. Wis. Aug. 20, 2015). A program participant was issued a transfer voucher after her lease was terminated. *Id.* at *3. The participant requested but was denied a hearing when the local PHA terminated her transfer voucher and she was removed from the program. *Id.* at *4. The court declined to rule on whether termination for expiration of a voucher requires a written response or a hearing. *Id.* at *12 n.5.

47. See *Stevenson v. Willis*, 579 F. Supp. 2d 913, 923 (N.D. Ohio 2008) ("Just as tenants can challenge a rent calculation, they should also be able to challenge procedures for termination of the subsidy altogether."); David A. Thomas, *Fixing Up Fair Housing Laws: Are We Ready for Reform?*, 53 S.C. L. REV. 7 (2001) (critiquing the constitutional authority of the Fair Housing Act and arguing for changes to bring it into greater constitutional compliance). See also Michael Zmora, *Between Rucker and a Hard Place: The Due Process Void for Section 8 Voucher Holders in No-Fault Evictions*, 103 NW. U. L. REV. 1961 (2009) (discussing due process concerns in Section 8 housing that courts have declined to settle as of yet because of the complexity of the constitutional issue).

48. 114 F. Supp. 3d 663 (N.D. Ill. 2015). The participant was granted a transfer voucher but failed to find acceptable housing before the voucher expired. *Id.* at 666. The local housing authority found that the participant's property rights expired upon receipt of the transfer voucher and thus the participant had no right to a pre-termination hearing when the PHA declined to extend the terms of the voucher, thus terminating the participant's program participation. *Id.* at 667.

49. *Id.*

50. *Id.* at 670 n.6 ("The court acknowledges that its ruling diverges from precedent in other circuits.")

51. *Id.* at 665.

52. *Id.*

of her transfer voucher, all of which were approved by the Housing Authority of Cook County (HACC).⁵³

After several attempts to sign a new lease were unsuccessful, Pickett eventually located a new unit and submitted her tenancy request form to HACC on August 27, 2013, but her request was missing a form demonstrating ownership of the property.⁵⁴ Pickett was told by HACC that she had missed the deadline by a few days, but she could have three more days to submit all of the required documents.⁵⁵ Pickett attempted to obtain the necessary information from her landlord the next day, but discovered he had chosen to rent to a non-voucher family instead.⁵⁶

On August 30, 2013, Pickett returned to the HACC office to explain her situation and request additional time to submit the required documents.⁵⁷ HACC denied this request and gave her a notice of termination.⁵⁸ Pickett submitted a written request to appeal HACC's decision to terminate her voucher in September 2013.⁵⁹ Pickett received a response from HACC in December 2013.⁶⁰

The letter from HACC denied Pickett's request to appeal the decision terminating her participation in the Section 8 voucher program.⁶¹ The reason that the letter gave was: "Other: [Pickett was] issued five extensions on [her] voucher search and had moving papers from May 2012 until August 2013 and [she] did not successfully locate a unit for approval

53. *Id.* at 666. In September 2012, Pickett found a landlord willing to rent her a unit. Once HACC approved the property in January 2013, Pickett and her family moved into the house in February 2013. However, after moving in, Pickett learned that her landlord was unwilling to execute a lease or sign the required contract with HACC. Upon discovery of this information in May 2013, Pickett sought an extension of her voucher, which HACC approved for a term of thirty days. In July 2013, Pickett sought a second thirty-day extension, which HACC also approved. Later that month, Pickett located another rental unit and submitted the required paperwork to HACC. The landlord of that property wanted Pickett to move in immediately, but Pickett informed him that she could not until she received HACC's approval. The landlord subsequently decided not to rent to Pickett, leaving Pickett with twelve days remaining on her transfer voucher. *Id.*

54. *Id.* Pickett also alleged that HACC failed to suspend the term of her transfer voucher while her request for tenancy approval was pending. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 667. Although the letter from HACC was dated November 15, 2013, it had been sent to a location other than Pickett's residence. *Id.* at 666. In fact, it had been sent to one of the rental locations that Pickett had submitted to HACC for approval, but where she had never actually resided. *Id.*

61. *Id.* at 667.

before the extended expiration date of [her] voucher.”⁶² As a result of her termination, Pickett sued HACC⁶³ and the executive director of HACC for “terminat[ing] her housing voucher without cause and without an opportunity for hearing in violation of the Fourteenth Amendment to the United States Constitution and the Housing Act of 1937.”⁶⁴ She sought declaratory judgment,⁶⁵ injunctive relief,⁶⁶ and monetary damages.

A. *Count I: Violation of Due Process*

Pickett’s first allegation was that HACC’s decision to terminate her from the voucher program was a violation of the Due Process Clause of the Fourteenth Amendment.⁶⁷ The Due Process Clause requires a hearing prior to termination of a subsidy that provides benefits necessary for subsistence, such as a housing voucher.⁶⁸ Pickett argued that once she was accepted into the voucher program, she “possessed a property interest in continuing to receive rental assistance” and thus was entitled to due

62. *Id.* (citing Plaintiff’s Complaint). The court also stated that it was notable that the first two form reasons that HACC could have given for denying the termination were not checked in the letter to Pickett; namely that “[Pickett’s] request was received after the deadline for an appeal” or “[t]he reason for request does not require an informal hearing.” *Id.* at 669. This suggests that HACC made its decision to terminate based solely or primarily on the fact that Pickett failed to locate a suitable unit before expiration of the transfer voucher. This lends credence to the argument that Pickett later made that as a termination for “failure to act,” she properly should have been given an informal hearing under the guidelines of the federal regulations. *Id.* at 670.

63. Although Pickett could have chosen to sue the Department of Housing and Urban Development instead, since HUD leaves the practicalities of implementing the federal regulations to the local PHAs, Pickett sued HACC on the basis of improper implementation of those regulations. Since all local PHAs must adopt these same regulations, this allows the *Pickett* decision to have applicability beyond the boundaries of Cook County, IL. See 24 C.F.R. §982.153 (“[t]he PHA must comply with . . . HUD regulations”).

64. *Pickett*, 114 F. Supp. 3d at 665.

65. Complaint at 1, *Pickett v. Hous. Auth. of Cook Cty.*, 114 F. Supp. 3d 663 (N.D. Ill. 2015) (No. 1:15-CV-00749) [hereinafter Complaint]. Pickett sought declaratory judgment on three issues: (1) Failure to provide a voucher program participant with notice and a pre-termination hearing is a violation of the participant’s due process rights; (2) Termination of participation in a voucher program for expiration of a transfer voucher on grounds other than those in 24 C.F.R. §§ 982.553 (b) and (c) violates the Due Process Clause of the Fourteenth Amendment; and (3) Failure to provide a voucher program participant with notice and a pre-termination hearing violates 42 U.S.C. § 1437d(k) and 24 C.F.R. §§ 982.553(b) and 982.555(a)(2) and (d)(2). Complaint at 12–13.

66. *Id.* at 12–13. Pickett sought to enjoin HACC from terminating her from the voucher program without granting her due process and without a proper basis for termination. *Id.* at 13. This injunction was important in her case because the loss of the housing subsidy while the case was proceeding could have had devastating effects. *Pickett*, 114 F. Supp. 3d at 673.

67. Complaint at 10.

68. *Simmons v. Drew*, 716 F.2d 1160, 1162 (7th Cir. 1983).

process before HACC effectively withdrew and terminated the subsidy.⁶⁹ Only a pre-termination hearing provides proper due process when benefits for essential needs are discontinued.⁷⁰ Thus, Pickett argued that she was entitled to a pre-termination hearing.⁷¹ Since HACC did not terminate her for one of the grounds enumerated in 24 C.F.R. §§ 982.553(b) and (c) and did not provide her with a pre-termination hearing, Pickett alleged that HACC acted under the color of law to deprive her of her property right, thus violating due process.⁷²

B. Count II: Violation of Housing Act of 1937

Second, Pickett alleged that HACC violated the Housing Act of 1937 by terminating her housing voucher without providing her with proper notice of its decision or an opportunity for a pre-termination hearing.⁷³ Furthermore, Pickett alleged that HACC did not terminate her for one of the grounds enumerated in 24 C.F.R. §§ 982.553(b) and (c), but rather on the basis of “expiration.”⁷⁴

HACC argued it had the discretion to decide whether to extend the voucher or not.⁷⁵ Furthermore, under federal regulations, HACC argued that a hearing is not required for a PHA determination to deny an extension or suspension of a voucher term.⁷⁶ In response to Pickett’s complaint, HACC filed a motion to dismiss.

69. Memorandum in Support of Plaintiff’s Request for Preliminary Injunction at 8, *Pickett v. Hous. Auth. of Cook Cty.*, 114 F. Supp. 3d 663 (N.D. Ill. 2015) (No. 1:15-CV-00749).

70. *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970).

71. *Pickett*, 114 F. Supp. 3d at 665.

72. Complaint at 10–11.

73. *Id.* at 10.

74. *Id.* at 10–11.

75. *Pickett*, 114 F. Supp. 3d at 671. HACC also made another argument based on the nature of the transfer voucher and Pickett’s status within the voucher program. HACC argued that once a transfer voucher was issued to a participant family, the family’s status as a program participant was technically suspended pending HACC approval of a new tenancy. Memorandum in Support of Defendants’ Motion to Dismiss at 10–12, *Pickett v. Hous. Auth. of Cook Cty.*, 114 F. Supp. 3d 663 (N.D. Ill. 2015) (No. 1:15-CV-00749). Thus, the family’s status was more similar to that of an “applicant,” or a family who had just been approved for the program from the wait list but had not yet found or been approved for a residence. *Id.* HUD regulations distinguish “applicants,” those who have not signed a lease approved by PHA, from “participants,” or those families who have already been living in PHA-approved and subsidized housing. Compare 24 C.F.R. § 982.554 (2002) (“[i]nformal review for applicant”) with 24 C.F.R. § 982.555 (2002) (“[I]nformal hearing for participant”). Participant families have greater rights than applicants, including the opportunity for a hearing prior to termination based on a family’s action or failure to act. For a more thorough discussion of this argument, and the idea that a participant’s property rights expire upon receipt of the transfer voucher, see *Jackson v. Wilmington Hous. Auth.*, No. 7:13–CV–155–BO, 2014 WL 2506151 (E.D.N.C. June 3, 2014); *Ely v. Mobile Hous. Bd.*, 13 F. Supp. 3d 1216 (S.D. Ala. 2014).

76. 24 C.F.R. § 982.555(b)(4) (2002).

C. Court's Memorandum Opinion and Order

The court denied HACC's motion to dismiss and granted Pickett's motion for a preliminary injunction, requiring HACC to hold a hearing on its decision to terminate Pickett's participation in the program.⁷⁷

1. Count I: Procedural Due Process

The court held that participants who have received rental assistance through the Section 8 Housing Program have a property interest in the assistance because they have a legitimate expectation of a continued benefit that was subject to expiration.⁷⁸ Thus, HACC's refusal to provide a hearing to a participant whose voucher expired constitutes a violation of procedural due process.⁷⁹ Instead, the court held that HACC must give a transfer voucher holder the right to a hearing before termination.⁸⁰

The court addressed HACC's argument that HUD regulations authorized it to deny Pickett a post-termination hearing.⁸¹ The court found this only makes sense where the participant passively allows the voucher to expire, which was not true in this case, as Pickett had actively tried to remain in the program.⁸²

The court also noted that HUD regulations require a PHA to provide a participant family an opportunity for a hearing when terminating program benefits on other grounds.⁸³ Thus, this decision not to extend the term of the transfer voucher, which had the effect of ending Pickett's participation in the voucher program, should be entitled to as much, if not greater, protection than other agency decisions.

Finally, the court noted that HACC had denied Pickett an extension of her transfer voucher based on a "failure to act," not because her request itself did not require an informal hearing.⁸⁴ Consequently, due process and federal regulations would require HACC to provide a hearing when

77. *Pickett*, 114 F. Supp. 3d at 665.

78. *Id.* at 668.

79. *Id.* at 670.

80. *Id.*

81. See 24 C.F.R. § 982.555(b)(4) (2002).

82. *Pickett*, 114 F. Supp. 3d at 668–69.

83. See 24 C.F.R. § 982.555(a)(i), (iv), and (v) (2002) (Such other grounds include: a decision to terminate based on a determination of the family's discontinued income eligibility, a decision to terminate for a family's "failure to act", and a decision to terminate because the family has been absent from their rental unit.).

84. *Pickett*, 114 F. Supp. 3d at 669 (citing HACC's letter to Pickett).

deciding to terminate Pickett from the voucher program.⁸⁵ The court also found that a participant actively seeking housing, and in compliance with policies, has a legitimate expectation of remaining in the program. Thus, terminating her participation in the program would deprive her of her property interest in the voucher without a hearing, violating due process.⁸⁶

So, the court posited that either HACC terminated Pickett because she failed to act, which required a hearing under 24 C.F.R. § 952.555(a)(iv), or HACC terminated Pickett under circumstances where she had a legitimate expectation of continued participation, which required a hearing on due process principles.⁸⁷ Therefore, Pickett was entitled to a hearing on any decision that ended her tenure.

2. *Count II: Housing Act of 1927*

The court also addressed HACC's argument that it had discretion to deny a transfer voucher extension. The court noted that this discretion could not be used arbitrarily or capriciously.⁸⁸ Here, Pickett was making every effort to comply with the requirements for the transfer voucher, and was unable to do so only due to circumstances she alleged were outside of her control. Thus, the court found that Pickett had a claim against HACC for "exercising its discretion arbitrarily and capriciously," given the facts and the rationale HACC gave for its decision to terminate.⁸⁹

The result of this case was that the court ordered HACC to grant Pickett a proper pre-termination hearing before HACC could decide

85. See 24 C.F.R. § 982.555(a)(iv) (2002).

86. *Pickett*, 114 F. Supp. 3d at 670. The court also addressed the risk of irreparable harm that an improper decision to terminate benefits created for Pickett. *Id.* at 672–73. Particularly, because Pickett relied on the housing assistance to afford her rental unit, the Court cited its concern that Pickett would be unable to find suitable alternative housing without the Section 8 subsidy. *Id.* at 673. Furthermore, even if Pickett were able to obtain alternative housing, she would be forced to pay the full cost of the rental unit herself while the case was pending, causing economic injury as well. *Id.* at 672–73.

87. *Id.* at 670.

88. In general, "[a]n agency action, finding, or conclusion cannot be 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'" *Id.* at 671 (citing 5 U.S.C. § 706(2)(A)). See, e.g., *In re Application of Rivera*, No. 2010-33479, 2010 BL 350051, at *3 (N.Y. Sup. Ct. Dec. 2, 2010) (finding the PHA's decision not to reinstate petitioner's transfer voucher was not arbitrary or capricious because the PHA had "relied on its internal policies" and "provided a rational basis for its determination").

89. *Pickett*, 114 F. Supp. 3d at 671. The court noted that Pickett had located not just one, but two acceptable units within the term of the transfer voucher. Thus, HACC's rationale for terminating Pickett based on the fact that she had failed to locate *any* acceptable units was flawed and contradictory. The court also noted that HACC might have failed to follow its own procedures when it failed to suspend the term of Pickett's transfer voucher after she submitted an application for a tenancy and was waiting on HACC's approval. *Id.* See *supra* note 53 for the circumstances leading to the expiration of Pickett's transfer voucher.

whether or not to terminate her housing subsidy. The court did not rule that Pickett's termination was necessarily improper, or that HACC could not, upon the hearing's completion, choose to terminate Pickett's voucher once again.⁹⁰ However, the importance of this opinion was that the court ruled due process had to be observed before Pickett's voucher could be terminated, in accordance with constitutional principles.

V. RELEVANCE OF *PICKETT* IN HOUSING ASSISTANCE PROGRAMS

A. *Current Legal and Social Trends Within the Public Assistance Context*

Pickett is only the most recent case to raise a constitutional concern about the administrative procedures within the Section 8 voucher program. Voucher recipients and legal scholars alike have challenged the lack of due process within the administrative process in recent years.⁹¹ One explanation for this increased scrutiny within the housing context may be the recent housing crisis, and the resulting public and congressional focus on the need for, yet unavailability of, affordable housing. This may have caused a change in public understanding of housing as a luxury to housing as a constitutionally protected right.

In 2014, for example, there were 46.7 million people living in poverty in the United States.⁹² This statistic has not changed significantly in the past four years.⁹³ In contrast, only about 10 million citizens were able to participate in housing assistance programs in 2012,⁹⁴ meaning only a

90. Ironically, the court denied Pickett's motion for a preliminary injunction for immediate receipt of a transfer voucher, but addressed the risk of irreparable harm from denial of a hearing in regards to the multi-prong test for a preliminary injunction. *Id.* at 665, 673–74. In particular, the court noted a participant's improper termination from the voucher program could result in difficulties locating new housing, difficulties locating affordable housing, and even homelessness, all of which were risks that the Pickett family faced on an immediate basis during litigation. *Id.* at 672–73. Thus, although the court ordered that HACC hold a pre-termination hearing to address Pickett's termination, it did not require a reinstatement of Pickett's voucher in the intervening time period. *Id.*

91. *See, e.g.,* Lahny R. Silva, *Criminal Histories in Public Housing*, 2015 WIS. L. REV. 375, 388 (2015) (arguing that while courts have traditionally deferred to local PHAs on admission decisions based on criminal history, recently there has been a shift in this deference). For a discussion of a similar trend that manifested in the 1960s within the public housing context, *see* Zmora, *supra* note 47, at 1966–68 (analyzing the emphasis on due process that occurred as a result of the judiciary's decision to recognize public housing benefits as a protectable property interest).

92. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014 12 (Sept. 2015), <http://www.census.gov/library/publications/2015/demo/p60-252.html>.

93. *Id.*

94. SHELLEY K. IRVING & TRACY A. LOVELESS, U.S. CENSUS BUREAU, DYNAMICS OF ECONOMIC WELL-BEING: PARTICIPATION IN GOVERNMENT PROGRAMS, 2009–2012: WHO GETS

quarter of those in need were actually served. This demonstrates the dire lack of affordable housing in the U.S. and thus the need to ensure that those entitled to receive housing assistance actually do so.

Another rationale for this focus on constitutional protections for public assistance recipients may be the current social focus on fighting discrimination based on sexual orientation, immigration status, gender, and/or race.⁹⁵ The recent Supreme Court decision recognizing disparate impact as a cause of action under the Fair Housing Act is a further indication that these concerns of discrimination are timely and important ones.⁹⁶

Legal scholar Goodwin Liu provides a philosophical rationale for this movement within the housing context, positing that judicial recognition and protection of welfare benefits will continuously change in a democratic society because constitutional doctrine is “properly informed by . . . the ongoing evolution of our fundamental values as reflected in our culture and politics.”⁹⁷ Thus, as social sentiment toward welfare benefits as property rights changes over time, so will the judicial interpretation of those rights.⁹⁸ So this current trend of challenging due process in the Section 8 voucher program may be the result of a shift in the public’s understanding and acceptance of the need for welfare benefits.⁹⁹ If this hypothesis is true, then it is imperative that legal advocates take advantage of current public sentiment to push for substantive change within the welfare programs.

ASSISTANCE? 22 (May 2015), <http://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>.

95. See Thomas, *supra* note 47, at 33 (arguing that there is need for reform of the FHA in order to address instances of race discrimination within the housing context).

96. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015) (recognizing the importance of plaintiffs being able to address discriminatory intent and unconscious prejudices).

97. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 247 (2008).

98. *Id.* For a compelling argument in favor of recognizing housing as a fundamental right, see Shelby D. Green, *Imagining a Right to Housing, Lying in the Interstices*, 19 GEO. J. ON POVERTY L. & POL’Y 393 (2012).

99. These constitutional issues are not limited to the Section 8 voucher program. Similar concerns have been raised regarding the Fair Housing Act. See generally Thomas, *supra* note 47 (critiquing the Fair Housing Act, specifically its questionable constitutional authority and arguing that since the Fair Housing Act is vulnerable to constitutional challenge, it needs to be amended). Again, the recent Supreme Court decision interpreting the Fair Housing Act to include a disparate impact claim shows that there is a calling for greater accountability within the housing context. *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. 2507.

B. Due Process Concerns in Public Housing

In the housing context, this trend has manifested in a number of ways. One example is the One-Strike Policy, which allows participants to be terminated from the housing program for a single criminal violation.¹⁰⁰ The termination procedures for these participants have been accused of violating constitutional procedures, as local PHAs often conduct these hearings without strict adherence to due process requirements.¹⁰¹ Additionally, even outside the criminal context, some PHAs terminate families from the voucher program based on hearsay evidence alone.¹⁰² These situations highlight the dangerous amount of discretion that local PHAs have in accepting families into or terminating them from the voucher program, and raise concerns about possible unchecked biases and prejudices that may be inherent in the administrative system.

In every situation, legal and social advocates are seeking a remedy in the form of congressional action to amend HUD regulations to bring the regulations more in line with constitutional due process requirements.¹⁰³ In the criminal context, advocates are asking Congress to require local PHAs to review each tenant's individual circumstances before making a decision.¹⁰⁴ For informal termination hearings, advocates argue that Congress should place restrictions on the use of evidence within termination hearings in accordance with due process procedures.¹⁰⁵ These remedies are very similar to the decision reached by the *Pickett* court, which required an informal hearing in accordance with due process procedures before the participant's voucher could be terminated.¹⁰⁶ Again,

100. Zmora, *supra* note 47, at 1971–72 (discussing the One Strike policy).

101. *Id.* at 1985–86. Additionally, thousands of ex-offenders are being released from jails as a result of America's attempt to remedy the harsh sentencing that occurred during the "War on Drugs." Silva, *supra* note 91, at 375. These individuals require affordable housing and often end up in the public housing system. *Id.* at 376. This may explain why reentry scholars and even the American Bar Association have focused in recent years on improving the constitutional and administrative protections for these individuals in obtaining and keeping affordable housing. *See, e.g., id.* at 393.

102. Margaretta E. Homsey, *Procedural Due Process and Hearsay Evidence in Section 8 Housing Voucher Termination Hearings*, 51 B.C. L. REV. 517, 550 (2010) (noting that common evidence used in termination hearings includes phone calls, letters, police reports, and news articles containing hearsay).

103. For a discussion of how food stamp eligibility underwent a similar process in the 1970s, see Liu, *supra* note 97, at 255–60. Liu demonstrates that rather than interpreting the relevant statutes literally, the Supreme Court instead redefined food stamp eligibility in order to more fully achieve Congress' policy goal. *Id.* at 258.

104. Zmora, *supra* note 47, at 1987.

105. *See, e.g.,* Homsey, *supra* note 102, at 546–47.

106. *Pickett v. Hous. Auth. of Cook Cty.*, 114 F. Supp. 3d 663, 674 (N.D. Ill. 2015). The court did not rule that the Pickett family was entitled to retain their housing voucher as a matter of law; rather,

this demonstrates that the *Pickett* decision is representative of the objectives of the current legal and social movements.

Another due process concern that has been raised about the voucher program is the hearing termination officers' qualifications.¹⁰⁷ These officers, who have the responsibility of deciding whether to terminate a family's vouchers, "are generally not legally trained."¹⁰⁸ This creates constitutional concerns on two fronts. First, the officers may not know evidentiary rules, a fact that creates due process concerns in itself.¹⁰⁹ Additionally, unlike judges, hearing officers may not be aware of program participants' legal rights or the facts surrounding their case; thus, a decision may be made without regard to the legal or practical consequences for the participant.¹¹⁰ This lack of legal training may explain why so many constitutional concerns have been raised about the administrative procedures.

Another issue that has been raised by legal scholars is the limited number of situations in which a voucher program participant has the right to an informal hearing.¹¹¹ Oftentimes, the informal hearing may be a program participant's only opportunity to raise due process or administrative process concerns. When this right is denied to them, participants who are wrongly terminated are left without legal recourse.¹¹²

the court merely found that the PHA had to give *Pickett* an opportunity to be heard before termination could be considered. *Id.*

107. See *Turner*, *supra* note 5, at 50.

108. *Id.* at 50. Additionally, the termination officers are appointed by the local PHA, which may lead to a feeling of indebtedness by the officer to the PHA, making it much more difficult for the officer to be fair and just in resolving participant/PHA disputes. *Id.* at 50–51.

109. *Id.* For example, "most hearing termination officers in northern California are given 1–2 days of formal training that includes some training on the evidentiary rules attendant to the hearings and HUD/agency regulations and procedures." *Id.* at n.32 (based on testimony from one hearing officer).

110. For an example of how a hearing officer's lack of training may lead to constitutional violations, see also *Carter v. Lynn Hous. Auth.*, 880 N.E.2d 778 (Mass. 2008) (holding that tenant's due process rights were violated by hearing officer's failure to consider all relevant facts and circumstances, failure to make any factual findings, and failure to use discretion in light of mitigating circumstances).

111. 24 C.F.R. § 982.555(a)(i)-(v) (2002) (situations in which an informal hearing is required include a decision to terminate for a family's "failure to act," a decision to terminate because the family has been absent from their rental unit, and a decision to terminate based on a determination of the family's discontinued income eligibility). See also John M. Lerner, *Private Rights Under the Housing Act: Preserving Rental Assistance for Section 8 Tenants*, 34 B.C. J.L. & SOC. JUST. 41, 50 (2014) ("The list of decisions that *must* be given an opportunity for a hearing, however, is quite limited."). In the context of housing quality standards, this means that participants do not have a right under HUD regulations to seek judicial review of a PHA's decision. *Id.* at 51.

112. *Lerner*, *supra* note 111, at 75. Lerner advocates for an explicit private right so that participants can "challenge a housing authority's termination of funding caused solely by a landlord's failure to comply with the regulatory standards." *Id.* at 74. This would allow participants to obtain judicial review of their case before they are wrongly removed from their homes.

This leads into the final due process concern within the voucher program being debated today. There is currently a lack of emphasis on the importance of legal counsel within the housing assistance program.¹¹³ This deficiency is important in light of the many legal and constitutional challenges currently being brought against local PHAs and HUD regulations.¹¹⁴ In *Pickett*, Pickett may not have even known she had a constitutionally protected right in her housing voucher if she had not consulted a legal aid lawyer. Attorneys' involvement within welfare programs is essential in order to identify and address constitutional and due process concerns such as these.¹¹⁵

The *Pickett* decision is representative of a growing legal and social movement that is challenging the constitutionality of the housing assistance program's policies and regulations. There is a greater public awareness today of the many flaws within the housing assistance program. The *Pickett* decision, which recognizes the importance of due process within the context of the voucher program and provides a practical solution for protecting this property interest, demonstrates the type of substantive change for which legal scholars and program participants alike are currently advocating.

VI. DISCUSSION OF *PICKETT* AND ITS IMPLICATIONS

A. *Necessity of Pre-Termination Hearing*

It is important to recognize, nevertheless, that the *Pickett* court's decision was a marked departure from the view held by courts that have previously considered this matter.¹¹⁶ While the *Pickett* court did not hold

113. See Risa E. Kaufman et al., *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772, 811 (2014) (advocating the expansion of the right to housing by promoting the right to counsel within housing assistance programs).

114. Kaufman et al. argue that "access to counsel is critical to the successful expansion of the underlying right to be free of discrimination." *Id.* at 811. Additionally, the authors raise due process arguments based on "the need to maintain equality in access to the courts." *Id.* at 812. Again, this emphasizes the role that legal advocates must take in fighting for a housing assistance program that better protects the participants' constitutional and due process rights.

115. Kaufman et al. also point out that "[i]ncorporating the due process arguments into the housing rights agenda, then, invites broader participation in the right to housing coalition by groups that are primarily concerned with procedural fairness and recognizes that, as a practical matter, housing rights are worth little if enforcement mechanisms perpetuate inequalities." *Id.* at 813. See also Ammann, *supra* note 12, at 324–25 (advocating for attorney involvement with low-income families to ensure they receive and retain the public assistance that they deserve).

116. *Pickett v. Hous. Auth. of Cook Cty.*, 114 F. Supp. 3d 663, 670 n.6 (N.D. Ill. 2015) ("The court acknowledges that its ruling diverges from precedent in other circuits."). See also *Jackson v.*

that the participant family had a de facto right to keep the transfer voucher, it did find that a pre-termination hearing was required before the PHA could terminate the voucher.¹¹⁷ This is inconsistent with prior courts' decisions, which have held that a pre-termination hearing is not required to satisfy due process requirements.¹¹⁸

However, previous courts may have been interpreting the federal regulations literally, rather than considering the goals of the housing assistance program, the individual participant's circumstances, or the effects that implementing the regulation actually may have on the participant. For example, some courts have held that termination of a transfer voucher does not require an informal hearing because it is not one of the enumerated situations in the regulations where such a hearing is required before termination.¹¹⁹ While this may be a literal interpretation of the regulations, these courts have not considered, as the *Pickett* court did, whether that interpretation is consistent with the principle that a housing voucher is a protected property interest.¹²⁰ If a court accepts the principle that a housing subsidy or housing voucher is a constitutionally protected property interest, then any unexpected termination of that property interest should be protected by due process procedures.¹²¹

B. Dangers of a Wrongful Voucher Termination

The purpose of recognizing a property interest in a housing subsidy is so the voucher cannot be revoked without proper due process, as the voucher holder has a reasonable expectation that he will retain the

Wilmington Hous. Auth., No. 7:13-CV-155-BO, 2014 WL 2506151 (E.D.N.C. June 3, 2014) (holding participant's property rights expired upon receipt of the transfer voucher); *In re Application of Rivera*, No. 2010-33479, 2010 BL 350051 (N.Y. Sup. Ct. Dec. 2, 2010) (finding the Housing Authority's decision not to extend the term of petitioner's transfer voucher was not arbitrary or capricious, and thus was permissible).

117. *Pickett*, 114 F. Supp. 3d at 674.

118. *See Ely v. Mobile Hous. Bd.*, 13 F. Supp. 3d 1216, 1227–28 (S.D. Ala. 2014) (holding participant did not have property interest after transfer voucher expired and thus was not entitled to due process hearing); *Burgess v. Alameda Hous. Auth.*, 98 Fed. App'x 603, 605 (9th Cir. 2004) (finding no property interest in the transfer voucher).

119. *See* 24 C.F.R. § 982.555(a) (2002). *See also* *Augusta v. Cmty. Dev. Corp. of Long Island*, No. 07-CV-0361 (JG) (ARL), 2008 WL 5378386, at *6–7 (E.D.N.Y. Dec. 23, 2008) (holding participant's termination from the program for expired voucher does not require a hearing under the regulations); *In re Application of Gwynn*, No. 06350–03, 2003 WL 22134901 (N.Y. Sup. Ct. Aug. 21, 2003) (holding federal regulations did not require a pre-termination hearing and finding expiration of a transfer voucher was not a valid cause of action for a constitutional violation).

120. *Pickett*, 114 F. Supp. 3d at 667–68.

121. In fact, the *Pickett* court ruled that HACC's basis for terminating *Pickett's* participation in the voucher program was unconstitutional. *Id.* at 670.

voucher.¹²² However, local PHAs currently have complete and unilateral discretion as to whether to approve or deny an extension of the transfer voucher.¹²³ It is important to have legal checks in place when this amount of discretion is given to an administrative body.¹²⁴ Courts recognize property interests and “require due process only to minimize substantially ‘unfair and mistaken deprivations’ of entitlements conferred by law.”¹²⁵ This “means that a court will provide due process safeguards only when the government inaccurately distributes benefits.”¹²⁶ When a welfare recipient has improperly had his benefits revoked or terminated, this “implies that the government is not properly distributing benefits.”¹²⁷ This level of discretion also raises concerns—especially within the welfare program—of inherent race, gender, or class-based bias in benefit distribution and termination.¹²⁸

Additionally, this creates an immediate danger for Section 8 participants requesting transfer vouchers, as participants may not be aware that if their transfer voucher expires, their participation in the program is terminated.¹²⁹ Alternatively, even if participants are aware of the potential

122. See *Simmons v. Drew*, 716 F.2d 1160, 1162 (7th Cir. 1983).

123. This discretion remains subject to the court’s finding that the PHA’s decision to terminate was not arbitrary or capricious. See *In re Application of Rivera*, No. 2010-33479, 2010 BL 350051 (N.Y. Sup. Ct. Dec. 2, 2010). Additionally, the Supreme Court’s recent decision in *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015) to allow disparate impact claims within the context of the Fair Housing Act may also give rise to such claims in the context of Section 8 housing decisions. The judiciary currently seems more willing to explore the possibility of unconscious discriminatory intent. This may lead to more challenges in the future by program participants against their local PHA’s use of discretion in approving and terminating program benefits. This could serve as an additional internal check on the decision-making process. *But see Lerner, supra* note 111, at 72 (“[I]t is unclear whether disparate impact claims will be an adequate substitute for an explicit private right.”).

124. A model of how this discretion can be checked would be the application process for the voucher program. There, HUD provides guidelines to the local PHAs as to what information is relevant, what information can be considered, and how to weigh this information to make an informed decision. See generally *Silva, supra* note 91 (discussing admission guidelines in the context of ex-criminal program applicants).

125. Beth R. Greenberg, *Are Applicants for Section 8 Housing Subsidies Entitled to the Benefits*, 1985 U. ILL. L. REV. 757, 778 (1985).

126. *Id.*

127. *Id.* at 779.

128. While there are officers who act as checks on the system by reviewing decisions to ensure neutrality, these actors often work for or with the local PHA themselves, raising questions of their ability to effectively remain unbiased in their review. *Turner, supra* note 5, at 50–51.

129. A family whose housing assistance benefits are revoked must reapply to the voucher program. This is not a short process; the wait for a particular voucher program may be several years. For many families, such a long wait is not economically feasible. For a discussion of the current state of local PHAs, see, e.g., Joe Augustine, *Section 8 Housing Options Limited in Richfield*, ABC KSTP (Nov. 14, 2015). Of the 36,000 people who applied to the Section 8 program in the Richfield area, only 2,000 were placed on the waiting list. Those on the waiting list will expect to wait about a year

loss of their housing subsidy, this creates extremely high stakes for moving, which may discourage participants from doing so.¹³⁰ The loss of a Section 8 voucher can be economically devastating for a participant family, leading to an inability to pay for food or medical care.¹³¹ Furthermore, since participants often need the Section 8 voucher to afford housing, “loss of a subsidy combined with the virtual impossibility of finding affordable housing on short notice is almost certain to lead to homelessness.”¹³²

This issue becomes even more significant in light of the position that some courts have taken that a family’s participation in the voucher program is terminated upon their receipt of a transfer voucher. If this argument holds true, then a family could not move residences without losing their housing subsidies at least temporarily; while they are in possession of the transfer voucher, they no longer enjoy the rights and benefits of a voucher program participant. This creates a greater risk that the family may lose their benefits permanently because they are not entitled to the same protections they would be as actual participants. This interpretation is contrary to HUD’s objective to improve families’ living situations.¹³³

and a half to actually receive benefits. *Id.* As a result of these long waiting lists, it is possible that some families may choose to remain in unsafe or uninhabitable housing rather than risk losing their benefits by applying for a transfer voucher. *See also* *Goldberg v. Kelly*, 397 U.S. 264 (1970) (discussing the practical implications for a participant whose aid is terminated pending resolution of a dispute over eligibility).

130. This may discourage participant families from moving even when their living conditions are uninhabitable. This issue of the commonality of poor living conditions in public housing has been addressed in other areas of the HUD Voucher Program. *See* Lerner, *supra* note 111, at 49–51 (discussing the prevalence of poor housing conditions for Section 8 participants and the likelihood that participants will lose their benefits as a result of those conditions); Ammann, *supra* note 12, at 311–12 (documenting the average waiting times for Section 8 housing vouchers in various jurisdictions); DeLuca et al., *supra* note 24, at 1–2.

131. Turner, *supra* note 5, at 49.

132. *Id.* For a discussion of the importance of recognizing a property interest in housing subsidies, *see* Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315 (1991). Additionally, since HUD regulations currently do not require an informal hearing when a participant is terminated for his landlord’s failure to comply with regulations, *see* 24 C.F.R. § 982.555(b)(6) (2002), landlords have little incentive to ensure that their units meet regulatory standards. For a discussion of the current substandard condition of many Section 8 apartments, *see* Lerner, *supra* note 111, at 65–66. This contributes to a voucher holder’s difficulty in obtaining suitable housing within the voucher term that meets his local PHA’s approval.

133. *See* Lerner, *supra* note 111, at 49 (discussing the advantages of mobility within the voucher program, including a family’s ability to relocate with their “changing needs”). Additionally, poor mobility for participant families “contribute[s] to the prevalence of housing segregation” within communities. *Id.* at 66. “Whereas HUD and the housing authorities cannot be blamed for the community barriers, they do little to encourage voucher recipients to search for housing in better quality areas.” *Id.*

At a minimum, local PHAs should grant an informal hearing such as the one required by the *Pickett* court. Without a due process hearing, a participant is unable to explain his failure to acquire new housing within the transfer voucher term. In the case of *Pickett*, where the local PHA's actions might have caused or contributed to the participant's lack of success,¹³⁴ this hearing becomes even more important if an unjust termination is to be avoided.¹³⁵ For this reason, HUD itself has acknowledged the importance of a hearing when the local PHA is making a final decision on a participant's benefits, in order to correct any decisional error the PHA may have committed.¹³⁶ Outside of an informal hearing, it may be impossible for a participant to raise these arguments. Furthermore, if the local PHA is able to revoke the voucher without satisfying due process, this is inconsistent with the purpose of recognizing a property interest in the voucher in the first place.¹³⁷

One of the goals of the voucher program, and the American welfare program in general, is to help families better themselves by providing resources and opportunities that they may lack, so that they have a chance at economic advancement.¹³⁸ The ability of a participant family to move to

134. See *Pickett v. Hous. Auth. of Cook Cty.*, 114 F. Supp. 3d 663, 666 (N.D. Ill. 2015). The *Pickett* court noted that the CHA failed to suspend the terms of *Pickett's* transfer voucher while her submission for housing approval was pending. *Id.* at 671. Without the opportunity to present this argument in an informal hearing, there would be no check on the PHA's own failure to follow internal regulations, resulting in an improper termination of benefits. *Id.*

135. Section 8 vouchers are also extended to many tenants who have limited English proficiency. These tenants may have additional difficulties obtaining alternative housing due to their limited language skills, such as their inability to understand notices from the PHA or their difficulty communicating with potential landlords. To deny these tenants the opportunity to appear before the PHA and communicate their difficulties would create a great injustice in the system. For a more detailed analysis of the obstacles that tenants with limited English proficiency face, see Kuehnhoff, *supra* note 40.

136. This need for a check on the local PHA's authority has been recognized by HUD in the guidebook it publishes for local PHAs on implementing the federal regulations. U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK (June 2003), <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf>. See also Turner, *supra* note 5, at 49 (discussing inherent biases within the decision-making process).

137. For a discussion of the importance of recognizing a property interest in housing subsidies, see generally Berger, *supra* note 132.

138. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). Justice Brennan, writing for the majority, classified welfare benefits as "devices to aid security and independence." *Id.* at 262 n.8. Additionally, Justice Brennan noted:

a better neighborhood is important because it may provide them with health, social, or educational benefits.¹³⁹ The local PHA should make every effort to protect participants, including those seeking to move to a new housing location. As courts have recognized, public assistance recipients may lack the legal or literary knowledge to protect themselves; thus, it is necessary for the local PHA to assume that role.¹⁴⁰

C. *Appropriate Judicial and Legislative Response*

Since the procedure regarding transfer vouchers has been defined by federal regulations and has been interpreted by courts, either legislative or judicial action is needed to rectify this unconstitutional process.¹⁴¹ First, courts should recognize the constitutional violation that has been raised by the regulations, and should follow the lead of the *Pickett* court by requiring a pre-termination hearing.¹⁴² This would protect participants' due

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

Id. at 265.

139. Turner, *supra* note 5, at 49 (2011) ("[V]ouchers may give low-income families the opportunity to move to neighborhoods with less poverty, less criminal activity and better schools.")

140. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (requiring a hearing rather than written submissions for due process procedures so that welfare participants who lack the writing skills to express the situation are given full constitutional protections).

141. It is necessary for courts to initiate a judicial response to this issue because litigants in these cases are usually participants of the Section 8 voucher program, meaning they are receiving financial assistance in order to make their housing payments. So, by virtue of their situation, these litigants will almost always be financially unable to retain an attorney to represent them. Thus, courts cannot rely on attorneys to recognize the constitutional issue and present it before the court; instead, some form of judicial activism will be needed. For a further discussion of how the financial limitations of Section 8 participants affect outcomes in termination hearings, see Turner, *supra* note 5, at 51. For a discussion of the judicial role in determining constitutional rights, see Liu, *supra* note 97, at 252 (positing that the judiciary has a role in recognizing social movement, which "authorizes courts, when applying broad constitutional guarantees such as equal protection or due process, to identify and interpret the normative principles that guide extant welfare policies and to use those principles as a basis for assessing the validity of program eligibility criteria, *procedures for terminating or reducing benefits*, or unequal or inadequate levels of benefit provision") (emphasis added).

142. But see Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001) (analyzing the effectiveness of policy lawyering and suggesting an alternative model called "law and organizing": a community based approach to progressive lawyering that combines legal advocacy and grassroots action). It is worth noting that even the requirement of a pre-termination hearing will not rectify due process violations currently prevalent in the system. Since the local PHA selects the termination officers to oversee these informal hearings, there is a lack of objectivity in the way the hearings are conducted and decided. Additionally, the litigants in these hearings are recipients of Section 8 housing benefits, who are often in a difficult financial position.

process rights by providing them the right to be heard before their benefits can be revoked completely by the local PHA.¹⁴³ Yet, this would still allow local PHAs to deny an extension of a transfer voucher when justified, as there are cases where the participant has demonstrated bad faith in failing to obtain appropriate housing.

Second, courts should recognize that a participant's property rights in his Section 8 benefits do not expire when he is issued a transfer voucher.¹⁴⁴ The mere decision to move from one Section 8 approved living situation to another should not cause a family to lose their protected status as a program participant.¹⁴⁵ If courts were to recognize that a participant's property interest in benefits continues even after the issuance of a transfer voucher, then logically, the participant's right to a due process pre-termination hearing will be triggered.¹⁴⁶

Thus, many participants attend these hearings without the benefit of legal counsel, who may be able to frame the situation differently or bring legal arguments of which the participants are unaware. For a further discussion of the inherent injustice in termination hearings, see Turner, *supra* note 5, at 49–52.

143. See Robyn Minter Smyers, *High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime*, 30 URB. LAW. 573 (1998) (discussing the importance of due process procedures to protect participants from unjustly losing their program benefits); Lerner, *supra* note 111, at 74–75 (advocating for granting tenants the right to private action to challenge landlord wrongdoing, in order to prevent participant families from wrongly being removed from their housing while the dispute is being resolved).

144. See *Jackson v. Wilmington Hous. Auth.*, No. 7:13-CV-155-BO, 2014 WL 2506151 (E.D.N.C. June 3, 2014) (finding participant's property rights expired upon receipt of the transfer voucher); *Burgess v. Alameda Hous. Auth.*, 98 Fed. App'x 603 (9th Cir. 2004) (finding no property interest in the transfer voucher). *But see Burgess v. Hous. Auth. of Alameda Cty.*, No. C01-04098 MJJ, 2006 WL 7347315 (N.D. Cal. Dec. 30, 2006). While judicial deference to the legislature would be appropriate if Congress had made a conscious decision to limit a participant family's due process rights, such a decision seems to be lacking here. Instead, "[t]he less evidence there is that the legislature has made a conscious and considered policy choice, the less deference the product of the legislative process is entitled to receive in the courts." Liu, *supra* note 97, at 259. In the past, when the Court acted as interpreters of welfare rights, "the Court began its analysis by identifying the broad, expressly stated purpose of the welfare program and treated that purpose as a deliberate, democratic expression of public values to which implementing provisions are presumed to be aligned." *Id.* at 263.

145. A family's protected interest in their Section 8 benefits should not depend on which "stage" in the process they are in. Thus, their shift from participants with already approved Section 8 housing to participants searching for new Section 8 housing should not cause a loss of benefits. See *Ressler v. Pierce*, 692 F.2d 1212, 1216 (9th Cir. 1982) (affirming applicants for Section 8 benefits must be afforded Fifth Amendment due process protection in the application and selection process). See also Stefanie DeLuca et al., *supra* note 24, at 1–2 (discussing the need to improve mobility and portability for families within the Section 8 voucher program); POVERTY & RACE RESEARCH ACTION COUNCIL, THE URBAN INST., EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM (2013), <http://www.pprac.org/pdf/ExpandingChoice.pdf> (giving solutions to mobility problems within local PHAs in order to promote mobility and deconcentrate poverty).

146. See *Simmons v. Drew*, 716 F.2d 1160, 1164 (7th Cir. 1983) (holding that the local PHA was constitutionally required to grant participant a hearing before it expelled her because participant had a property right in the housing voucher).

In turn, this judicial interpretation of the federal regulations as unconstitutional may lead to a legislative response to amend the regulations.¹⁴⁷ The judiciary often acts as “interpreters of social norms,” and will change the law in accordance with the shift in normality that it sees in the American culture.¹⁴⁸ This provides an opportunity for the legislature to respond. Here, the legislature should revoke 24 C.F.R. § 982.555(b)(4), which allows the PHA the discretion to choose not to approve an extension of the transfer voucher term without providing the participant with an opportunity for an informal hearing.¹⁴⁹ Instead, Congress should recognize the importance of protecting participants’ property interest in housing vouchers by ensuring that due process procedures are implemented. By requiring a pre-termination hearing, Congress could limit the risk that participant families will be wrongfully terminated from the voucher program.

VII. CONCLUSION

There is an inherent contradiction between courts’ recognition of a property interest in a housing voucher while also allowing this voucher to be unilaterally terminated without satisfaction of due process procedural requirements. There is evidence that this matter is not yet settled in the courts, and *Pickett* may demonstrate a judicial movement toward recognizing that informal pre-termination hearings are necessary to protect participants’ constitutional rights.¹⁵⁰

147. Although it is possible for HUD to address these concerns internally, there are several reasons why a legislative response would produce a better result. First, HUD may address these complaints by merely initiating a compliance review of one of its funding recipients. Kuehnhoff, *supra* note 40, at 243. With respect to the *Pickett* case, given the sheer number of complaints against the Chicago Housing Authority (CHA), it would be logical for HUD to begin with a review of the CHA’s compliance with its own internal policies, as well as HUD regulations and policies. However, because the CHA has an internal policy of disallowing informal hearings for transfer voucher terminations, it is not technically in violation of any internal or external regulations. *See supra* note 16, HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 5–6 (“[t]he PHA’s decision to deny a request for an extension of the voucher term is not subject to informal review”). What is really at stake here is whether such an internal policy is in violation of constitutional principles. This is a matter better addressed by the judiciary or the legislature. *See also* Liu, *supra* note 97, at 253–55 (recognizing that the legislature, as the people’s representative, may be better suited for addressing shifts in social values than the judiciary).

148. Liu, *supra* note 97, at 255, 259 (recognizing that “judicial review can promote transparency and rationality in the legislative process without imposing rigid boundaries on legislative outcomes”).

149. Since failure to obtain approval of suitable housing within the voucher term is a “failure to act” by the participant, this situation should be recognized under 24 CFR § 982.555(a)(1)(iv) where a pre-termination hearing is not required.

150. Since the *Pickett* decision, at least thirteen separate complaints have been filed (by the same legal assistance attorney) in Cook County Circuit Court, a lower court in the Northern District of

Additionally, the *Pickett* decision may be representative of a larger trend toward greater accountability and transparency within the housing assistance program in order to combat instances of discrimination or abuse of discretion. If courts recognize this public concern about the lack of due process, this provides an opportunity for rulings that align with shifting social norms, which have emphasized the importance of recognizing housing assistance as a protectable property right. However, since case law is yet unsettled on this matter, and the majority of district courts have ruled contrary to *Pickett*, there is a present and immediate danger of program participants losing program benefits without due process protections. Program participants and legal advocates alike must continue to challenge the law and PHA practices in this area in order to bring about substantive, lasting change.

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Illinois. These cases allege similar factual patterns and constitutional violations, as well as violations of the local CHA Administrative Plan. The fact that these cases have been filed *in spite of* the CHA's decision not to give tenants the right to a hearing demonstrates that there are growing concerns about a lack of due process protections for participants within the voucher program. As of the publishing of this Note, not all of these cases have been decided. Even so, their existence suggests that other practitioners have recognized the opportunity presented by the *Pickett* decision and are seeking to solidify the court's decision. *See, e.g.*, Complaint, Hughes v. Chicago Hous. Auth., No. 2015-CH-12260 (Ill. Cir. Ct. filed Aug. 14, 2015).

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