Defending Families and Individuals threatened with Termination of Their Section 8 Housing Choice Voucher

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Note: This article presents an overview of voucher subsidy terminations, but housing advocates must have in their office (and use) the excellent comprehensive source available from the National Housing Law Project ("NHLP") titled *HUD Housing Programs: Tenants' Rights (4th ed. 2012)* and the 2014 Supplement. NHLP's telephone number is 415-546-7000. The fax number is 415-546-7007. The e-mail address for NHLP is: nhlp@nhlp.org, and the website is www.nhlp.org

Given the number of court opinions on voucher terminations, I have exercised some judgment with this latest update and have not attempted to cite every case. Also, our law firm switched from Lexis to Westlaw in 2014, and cases added since that time are cited to Westlaw. In addition, I have highlighted new cases in red font.

Table of Contents

I. Statutes, Regulations, and Guidebooks.

A. Statute. See 42 U.S.C.A. §1437f(o)(West 2012 & Supp. 2015). Congress did not specify grounds for which a public housing authority ("PHA") may terminate voucher assistance. HUD has identified those grounds in the regulations.

B. Regulations on Terminations. See 24 C.F.R. §982.551 - §982.555 (2015) (codification of the final regulations published July 3, 1995).

C. Guidebook. See United States Department of Housing and Urban Development, "Housing Choice Voucher Program Guidebook 7420.10G" (April 2001). Chapters 15 and 16 address terminations and the hearing process.

D. Resource for Advocates. See National Housing Law Project ("NHLP") *HUD Housing Programs: Tenants' Rights (4th ed. 2012)* and the 2014 Supplement. Chapter 11 at Section 11.4 discusses housing voucher termination actions. This is the best resource available of which I am aware. NHLP also publishes a monthly *Housing Law Bulletin* that provides up-to-date information on federal housing law changes, and I highly recommend that you subscribe. The *Housing Law Bulletin* can be ordered from NHLP at the number listed at the very beginning of this outline.

II. Voucher as Property Right. Section 8 housing voucher participants have a property interest in their Section 8 housing voucher. See, e.g., Davis v. Mansfield Metropolitan Housing Authority, 751 F.2d 180, 185 (6th Cir. 1984); Simmons v. Drew, 716 F.2d 1160, 1162 (7th Cir. 1983); Baldwin v. Housing Authority of City of Camden, 278 F.Supp. 2d 365, 378-380 (D. N.J. 2003); Chesir v. Housing Authority of the City of Milwaukee, 801 F.Supp. 244, 247-48 (E.D. Wis. 1992); Stevenson v. Willis, 579 F.Supp.2d 913, at *11-12 (N.D. Ohio 2008) ("Plaintiff's participation in the § 8 Housing Choice Voucher Program, administered by LMHA, is a property interest protected by the requirement of procedural due process."); Robinson v. District of Columbia Housing Authority, 660 F.Supp. 2d 6, 20 (D.D.C. 2009) ("There is no debate that the plaintiff's participation in the Section 8 program constitutes a property interest. .."); Rogers v. Housing Authority of Prince George's County, No. PWG-14-2940, 2015 WL 5287128, at *6 (D. Md. Sept. 8, 2015) (plaintiffs had property right in voucher program; entitled to notice and opportunity for

a hearing when PHA imposed new occupancy standards resulting in reduction from 4-bedroom to 3-bedroom voucher and adopted increase in minimum rent); Johnson v. Fort Walton Beach Housing Authority, No. 3:11CV506, 2012 WL 10688344, at *4 (N.D. Fla. Jan. 5, 2012) ("Continued receipt of housing benefits is a property interest, and arbitrary termination of those benefits contrary to the public housing authority's administrative plan violates federal law."); Badri v. Mobile Housing Board, No. 11-0328-WS-M, 2011 U.S. Dist. LEXIS 93767, at *9 (S.D. Ala. Aug. 22, 2011) (participation in public housing program is property interest); Nozzi v. Housing Authority of City of Los Angeles, No., 09-55588, 2011 U.S. App. LEXIS 6218, at **3-5 (9th Cir. March 25, 2011) (plaintiffs have property interest in Section 8 housing voucher benefits; planned reduction in voucher payment standards); Augusta v. Community Development Corp. of Long Island, Inc., No. 07-CV-0361 (JG) (ARL), 2008 U.S. Dist. LEXIS 103911, at *16-17 (E.D. N.Y. Dec. 23, 2008), aff'd., 363 Fed. Appx. 79 (2d Cir. 2010) (voucher participant has protected property interest in continuing to receive such assistance).

III. Grounds for Termination.

A. Statutory Grounds. Although Congress identified certain grounds for which an owner may terminate a Section 8 family's tenancy, see 42 U.S.C.A. § 1437f(o) (7) (West 2012 & Supp. 2015), it did not, except in the context of incidents of domestic violence, identify the grounds for which a PHA may terminate voucher assistance. See generally id. at § 1437f(o).

1. Congress did, however, specifically provide that a PHA may not terminate voucher assistance on the basis of an incident of actual or threatened domestic violence, dating violence, or stalking against the participant. Id. at §1437f(o)(20).

2. In the context of the protections of victims of domestic violence, Congress made clear that the protections for victims of domestic violence do not limit a PHA's right to terminate voucher assistance (i) to persons who engage in criminal acts of physical violence against family members or others, (ii) to persons for any violation of a lease not

premised on the act or acts of violence against the tenant or a members of the tenant's household, and (iii) to persons who pose an actual and imminent threat to other tenants. Id. at § 1437f(o)(20)(D).

B. Grounds Set Forth in the Regulations. The grounds for which a participant's subsidy may be terminated are set forth at 24 C.F.R. §982.551, §982.552, §982.553 (2015).

C. Termination only for Grounds Listed in Regulations.

1. The law is well established that a public housing authority may terminate the Section 8 voucher subsidy of a participant only in accordance with the federal regulations and the grounds set forth there. See 24 C.F.R. § 982.552(a) (2015) ("[A] PHA may deny assistance for an applicant or terminate assistance for a participant under the program because of the family's action or failure to act as described in this section or § 982.553.")

2. Termination on the basis of a ground not identified in the regulations is illegal. See, e.g., Ellis v. Ritchie, 803 F.Supp. 1097, 1101 (E.D. Va. 1992) ("Termination decisions must be made in accordance with these regulations."); Hill v. Richardson, 740 F.Supp. 1393, 1398-99 (S. D. Ind. 1990), vacated and remanded on other grounds, 7 F.3d 656 (7th Cir. 1993) (approving settlement agreement and noting that regulations provide exclusive list of grounds on which Section 8 assistance may be terminated); Holly v. Housing Authority of New Orleans, 684 F.Supp. 1363, 1367-68 (E.D. La. 1988) (holding that housing authority wrongfully terminated plaintiff's Section 8 voucher for alleged fraud when facts showed she had not committed any act which could be said to constitute fraud); Ali v. Dakota County Community Development Agency, No. A08-0112, 2009 Minn. App. Unpub. LEXIS 235 (Minn. Ct. App. March 3, 2009) (unpublished)(reversing voucher termination for failure to attend recertification appointment on ground that failure to attend annual recertification appointment was not permissible ground to terminate assistance under federal regulations; refusing to hold that missing an appointment is per se failure to

cooperate in providing required information).

IV. Notice of Proposed Termination.

A. Historical Context. The voucher regulations requiring pre-deprivation notice and an opportunity for a hearing were originally promulgated at the direction of the court in Nichols v. Landrieu, No. 79-3094, (D.D.C. Sept. 12, 1980). See 47 Fed. Reg. 32169 (July 26, 1982)(proposed rule)(introductory comments); 49 Fed. Reg. 12215 (March 29, 1984) (final rule) (introductory comment);

B. Written Notice Before Termination. The PHA must give the family prompt written notice that contains a brief statement of reasons for the decision; that informs the participant that she may request an informal hearing on the decision; and that states the deadline for the family to request the hearing. 24 C.F.R. § 982.555(c)(2) (2015).

1. Prompt Notice. See Moore v. Hunt, No. 14-CV-1101, 2015 WL 5008265, at *10 (E.D. Wis. Aug. 20, 2015) (notice issued two months after termination date did not violate requirement for prompt notice; during the period of delay parties were discussing the termination and whether hearing would be given); Lawrence v. Town of Brookhaven Dep't of Housing, Community Development & Intergovernmental Affairs, No. 07-CV-2243, 2007 WL 4591845, at *18 (E.D. N.Y. Dec. 26, 2007) (noting that HUD regulations do not define "prompt" and finding six-month delay did not violate the regulations).

2. The notice must be sufficiently factually specific that it puts the family on notice of the factual underpinnings for the proposed termination. See e.g., McCall v. Montgomery Housing Authority, 809 F.Supp.2d 1314, 1324-25 (M.D. Ala. 2011) (ruling that a jury could find that a notice that quoted only the language of the regulations that the PHA believed plaintiff had violated and did not provide any facts violated the law); Edgecomb v. Housing Authority of the Town of Vernon, 824 F.Supp. 312, 313 (D. Conn. 1993); Boykins v. Community

Development Corp. of Long Island, No. 10-CV-3788 (JS) (ARL), 2011 U.S. Dist. LEXIS 28650, at **5-9 (E.D. N.Y. March 21, 2011) (ruling notice insufficient when it alleged only that plaintiff "had an unauthorized individual in your unit," and cited regulations and did not identify the person); Young v. Maryville Housing Authority, No. 3:09-CV-37, 2009 U.S. Dist. LEXIS 56539, at **15-18 (E.D. Tenn. July 2, 2009) ((PHA's failure to identify a specific charge in the notice, such as assault or trespass does not comply with the regulations); Pratt v. Housing Authority of City of Camden, No. 05-0544(NLH), 2006 U.S. Dist. LEXIS 70575, at **19-30 (D. N.J. Sept. 27, 2006); Bouie v. New Jersey Department of Community Affairs, 972 A.2d 401, at **19-24 (N.J. Super. Ct. App. Div. 2009) (notice that stated tenant had failed to repair conditions caused by tenant was insufficient because it did not identify the tenant-caused repairs or the date by which they were to have been completed); cf. Billington v. Underwood, 613 F. 2d 91 (5th Cir. 1980) (public housing notice of denial must be factually specific).

3. See Loving v. Brainerd Housing and Redevelopment Authority, NO. 08-1349 (JRT/RLE), 2009 U.S. Dist. LEXIS 8664, at *13-16 (D. Minn. Feb. 5, 2009) (notice that said only that "you have ... engaged in drug related or violent criminal activity" is insufficient to adequately inform plaintiffs of grounds for termination).

4. When the notice is conclusory, it is important to send the PHA written notice asking for the factual underpinnings of the proposed termination. If the PHA refuses and the termination decision is upheld by the hearing officer, the participant has set up a procedural due process claim and a claim for insufficient notice under the regulations.

5. Issues Relating to Whether Hearing Timely Requested. PHAs frequently deny hearings on the ground that the participant did not timely request a hearing, but the participant claims otherwise.

a. Depending on the facts, there may be sufficient evidence to challenge the denial. If so, the following language from Armstead v. U.S. Dep't of Housing and Urban Development, 815 F.2d 278 (3d. Cir. 1987), may be helpful. In Armstead the plaintiff claimed she had timely called HUD to request a conference on the assignment of her mortgage. HUD's records did not show she had called, and it denied her request for a conference. The court said:
"The weakness of HUD's defense is glaring. We need not cite authority to support our conviction that the "usual practice" is not always followed in offices, private or governmental, large or small. The people at work there are not automations; they are human beings, not immune from lapses in procedure because of distractions, overwork, forgetfulness, carelessness, or other foibles to which we are all vulnerable.

"That something should have been done does not prove that it was done, but that is precisely the fallacy on which HUD relies to deny plaintiff a hearing. Resting a decision on such an unsupportable ground is a classic example of arbitrary and capricious conduct."

Id. at 282.

b. No notice of Hearing. See Matter of Moorer v. NYC HPD Office of Housing Operation and Division of Tenant Resources, No. 403272/10, 2011 N.Y. Misc. LEXIS 1771 (N.Y. Sup. Ct. April 19, 2011) (reversing termination where PHA did not prove it had mailed participant notice of hearing; agency must comply with its own procedures).

c. Nonreceipt of Notice of Termination. See Speelman v. Bellingham/Whatcom County Housing Authorities, 273 P.3d 1035, 1040 (Wash. Ct. App. 2012) (reversing termination; PHA obligated to send notice of voucher termination to plaintiff at address in jail); Rayburn v. City of Phoenix Housing Department, No. 06-CV-1590-PHX-SRB, 2008 U.S. Dist. LEXIS 123675, at *13-17 (D. Ariz.

April 29, 2008) (PHA failure to send termination notice to plaintiff's attorney who had requested such notice violated regulations and due process); Matter of Tijani v. Cestero, No. 400948/10, 2010 N.Y. Misc. LEXIS 5913 (N.Y. Sup. Ct. Dec. 3, 2010) (reversing termination decision where participant swore she did not receive termination notices that the agency claimed it sent by certified mail and regular mail).

d. Nonreceipt of Notice of Termination: Non-Voucher Cases. Two non-voucher Fifth Circuit cases may be of help in attacking a termination when the notice of termination is returned and the PHA does not take additional steps to give notice to the voucher holder. See Echavarria v. Pitts, 641 F.3d 92 (5th Cir. 2011) (holding that when government has knowledge that initial attempt at notice failed, due process requires that it take additional reasonable steps to give notice; here notice by government to an obligor on a bond for undocumented person out on cash bond was returned as undeliverable; due process required that the government take additional steps to ensure notice before forfeiting the bond); Duron v. Albertson's LLC, 560 F. 3d 288 (5th Cir. 2009) (employment discrimination case; holding district court erred in granting summary judgment on ground suit was untimely where plaintiff claimed she never received notice of right to sue and there was no evidence of mailing of the letter). When a section 8 participant denies receipt of notice of termination, this case may be of some help. The court discusses the mailbox rule that creates a presumption of receipt of the notice, noting that a threshold question is whether there is sufficient evidence that the letter was actually mailed.

e. Mailbox Rule and Rebutting Presumption of Receipt of Properly Mailed Document. See Lupyan v. Corinthian Colleges Inc., 761 F.3d 314, 319-23 (3d Cir. 2014) (extensive discussion of the mailbox rule; holds that plaintiff's denial of receipt of letter creates a genuine issue of

material fact on receipt). This case can be used in those instances in which the participant asserts that notice from the PHA was not received.

C. Written Notice Required. When the written notice is insufficient, it does not matter that the participant had actual notice. Driver v. Housing Authority of Racine County, 713 N.W.2d 670, 673-75 (Wis. Ct. App. 2006). This is a very strong opinion on the importance of the adequacy of the notice.

D. Termination only on Grounds Stated in Notice. The PHA may terminate only on the basis of grounds set forth in the notice, not on other grounds. See e.g., Perkins-Bey v. Housing Authority of St. Louis County, No. 4:11CV310 JCH, 2011 U.S. Dist. LEXIS 25438, at *12-13 (E.D. Mo. March 14, 2011) (refusing to uphold termination of voucher for alleged failure to provide accurate information on application because this ground was not stated in the notice of proposed termination); State ex rel. Smith v. Housing Authority of St. Louis, 21 S.W.3d 854, 858 (Mo. Ct. App. 2000) (PHA could not terminate voucher for failure to notify of change in family composition when only ground for termination stated in the notice was son's drug activity); Burch v. Chicago Housing Authority, No. 1-13-3836, 2015 WL 5734453 (Ill. Ct. App. Sept. 30, 2015) (unpublished) (reversing termination decision when the termination notice stated one ground, but the CHA based its decision on ground not stated in the notice of termination).

E. Participants with Disabilities.

1. PHA Duty to Include in the Notice of Termination Notice of Right to Request Reasonable Accommodation. See Price v. Rochester Housing Authority, No. 04-CV-6301P, 2006 U.S. Dist. LEXIS 71092, at *27 (W. D. N.Y. Sept. 29, 2006)([D]ue process requires RHA to include language in termination letters issued to participants in the Shelter Plus Care Program notifying them of the right to request a reasonable accommodation of any disability in connection with the termination decision."). That same reasoning would also apply to PHAs seeking to terminate the

housing voucher of a tenant with disabilities.

2. PHAs must make their Housing Choice Voucher Program accessible to people with mobility disabilities. See 29 U.S.C. § 794, Section 504 of Rehabilitation Act; 42 U.S.C. § 12132, Title II of Americans with Disabilities Act); see also Taylor v. Housing Authority of New Haven, 267 F.R.D. 36, 75-76 (D. Conn. 2010), vacating earlier class certification order in Taylor v. Housing Authority of New Haven, 257 F.R.D. 23 (D. Conn. 2009), aff'd., 645 F.3d 152 (2d. Cir. 2011)(unsuccessful challenge by section 8 voucher participants with disabilities who either did not receive a list of available, accessible apartments or who did not receive mobility counseling services).

   But, public housing authorities do not violate the Rehabilitation Act and the Americans with Disabilities Act merely because there are not enough mobility disabled accessible units available in the private rental market. See Liberty Resources, Inc. v. Philadelphia Housing Authority, 528 F.Supp. 2d 553, * 37-46 (E.D. PA. 2007) (ruling in favor of the Philadelphia Housing Authority and finding that the plaintiff did not establish that mobility disabled participants had either been discriminated against or denied meaningful access to the benefits of the Housing Choice Voucher Program).

3. See Jordan v. Greater Dayton Premier Management, 9 F.Supp.3d 847 (S.D. Ohio 2014) (granting preliminary injunction ordering defendants to provide blind voucher participant with all correspondence on microcassette tapes); Williams v. Rhea, No. 10-CV-5440, 2012 WL 2921211 (E.D. N.Y. July 17, 2012) (refusing to dismiss case on mootness ground in which plaintiff, who is blind, contended that the PHA violated federal law in failing to send notice to him by audio CD).

4. See Young v. District of Columbia Housing Authority, 31 F.Supp.3d 90 (D.D.C. 2014) (refusing to dismiss on mootness grounds challenge asserting that PHA violated Section 504, the ADA, and the Fair Housing

Act in its administration of the Section 8 housing voucher program by failing to provide American Sign Language interpreters or other aids for effective communication to people with hearing disabilities).

5. See National Housing Law Project, *Housing Choice Voucher Program: Interpretation Requirements,* 43 Housing Law Bulletin 19 (Jan. 2013) (discussing Fair Housing Act conciliation agreement in complaint filed against PHA for failure to provide sign language interpreter at voucher termination hearing; PHA agreed to provide written notice to all employees reminding them to provide service for hearing impaired tenants and to pay back rent that accrued after termination).

V. Hearing Requirements.

A. Constitutional Principle: "The safeguards of 'due process of law' and the 'equal protection of the laws' summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. The history of American freedom is, in no small measure, the history of procedure." Malinski v. New York, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring).

B. Best Practices Article. See Eric Dunn, Ashley Fluhrer Greenberg & Anisha Sundarraj, *Housing Choice Voucher Termination Hearings: Best Practices for Public Housing Agencies,* 42 Clearinghouse REVIEW Journal of Poverty Law and Policy 134 (July - August 2008)(suggesting ideal practices for public housing authorities).

C. Challenges to Voucher Termination Hearings. See National Housing Law Project, *Seattle Housing Authority Agrees to Broad Reforms for Voucher Termination Hearings*, 38 Housing Law Bulletin 175 (August 2008). This article describes the settlement reached in the Hendrix litigation. The trial court had issued two opinions in the case. See Hendrix v. Seattle Housing Authority, No. C07-657MJP, 2007 U.S. Dist. LEXIS 70773, at *22-23 (W.D. Wash. Sept. 25, 2007, order on motion for preliminary injunction); Hendrix v. Seattle Housing Authority, No. C07-657MJP, 2007 U.S. Dist. LEXIS 85516,

at *12-19 (W.D. Wash. Nov. 9, 2007, order on motion to dismiss). In Hendrix the court ruled that the plaintiff had raised "a serious question" on whether the HUD Section 8 regulations are constitutionally adequate. The court preliminarily enjoined the housing authority from proceeding with an informal termination hearing pending a ruling on this issue.).

See also Wilson v. Seattle Housing Authority, No. 2:09-CV-00226-MJP, 2011 U.S. Dist. LEXIS 33111 (W.D. Wash. March 29, 2011)(holding that plaintiffs' complaints that the PHA's Section 8 voucher hearing procedures do not pass muster under Goldberg v. Kelly, 397 U.S. 254 (1970), are not fairly traceable to HUD and thus they lack standing to assert the claims against HUD); Thompson v. Altoona Housing Authority, No. 3:10-CV-312, 2012 U.S. Dist. LEXIS 108975 (W.D. Pa. Aug. 3, 2012) (certifying class in suit challenging PHA's voucher termination policies).

D. Pre-Termination Hearing Required.

1. The PHA must give the opportunity for an informal hearing before the PHA terminates housing assistance payments for the family under an outstanding housing assistance payments ("HAP") contract. 24 C.F.R. § 982.555(a)(2) (2015); Department of Housing and Urban Development, *Housing Choice Voucher Program Guidebook*, chp. 15, § 15.4 (on p. 15-6) ("Prior to terminating assistance, however, the PHA must give the family the opportunity to request a hearing."); Johnson v. Fort Walton Beach Housing Authority, No. 3:11CV506, 2012 WL 10688344, at *9 (N.D. Fla. Jan. 5, 2012) (granting preliminary injunction ordering reinstatement of § 8 benefits, although the termination had been effective for over one year); Miles v. Phenix City Housing Authority, No. 3:11-CV-216-WKW[WO], 2011 U.S. Dist. LEXIS 69814 (M.D. Ala. June 29, 2011 (granting preliminary injunction ordering PHA to reinstate plaintiff's subsidy retroactive to date of termination because PHA illegally denied plaintiff's request for a hearing); DeProfio v. Waltham Housing Authority, No. 07-1498, 2007 Mass. Super. LEXIS 306, at *14-15 (Mass. Super. Ct. July 17, 2007). But, under the regulations, if

the HAP contract has expired, the PHA may stop the payments and refuse to issue a new voucher, or enter into a new housing assistance payments contract, or approve a new lease pending a hearing. See id.; Moore v. Hunt, No. 14-CV-1101, 2015 WL 5008265, at *11 (E.D. Wis. Aug. 20, 2015) (no pre-termination hearing required because no outstanding HAP contract in effect because it ended when lease was terminated); Eslin v. Housing Authority of the Town of Mansfield, No. 3:11-cv-134, 2013 WL 3279804, at *9 (PHA not obligated to continue to make HAP payments prior to informal hearing on proposed termination when HAP contract has ended). This means for tenants in these circumstances that they may face eviction for nonpayment. Thus, in such cases, it is important to push the PHA to quickly grant the hearing on the proposed termination. When the regulations do not require a pre-termination hearing, it may be possible still to craft a due process argument for a pre-termination hearing.

2. The PHA must proceed with the hearing in a "reasonably expeditious" manner upon the request of the family. Id. at § 982.555(d); Lowery v. District of Columbia Housing Authority, No. 04-1868 (RMC), 2006 U.S. Dist. LEXIS 13319, at *28 (D. D.C. March 14, 2006) ("However, Ms. Lowery was entitled to a "reasonably expeditious" hearing on the matter so that she would not be stuck in limbo: without a voucher, without access to a voucher, without a hearing on her eligibility for a voucher, and, therefore, without housing.").

3. Applicability of State Administrative Procedure Act. In an interesting case turning on state law, the Maryland Court of Appeals held that section 8 voucher termination cases are contested cases within the meaning of Maryland's administrative procedure act and require compliance with those procedural requirements. See Walker v. Department of Housing and Community Development, 29 A.3d 293 (Md. 2011). This may be an avenue to explore in other states.

E. Discovery.

1. Discovery by the Family. The PHA must give the family the opportunity to examine any PHA documents that are "directly related" to the hearing. 24 C.F.R. § 982.555(e)(2)(i) (2015). The family must be allowed to copy any such documents at its own expense. Id. If the PHA does not make a document available for examination upon request, it may not rely on the document at the hearing. Id. It is extremely important in every case to send a written request to the PHA for discovery to prevent surprises at the hearing.

2. Discovery by the PHA. The PHA may provide as part of its hearing procedure that the PHA must be given the opportunity to examine at the PHA offices before the hearing any family documents that are directly relevant to the hearing. Id. at § 982.555(e)(2)(ii) (2015). The PHA must be allowed to copy any such document at the PHA's expense. Id. And, if the family does not make the document available, the family may not rely on the document at the hearing.

3. HUD defines "documents" to include records and regulations. Id. at § 982.555(e)(2)(iii).

4. PHA Duty to Provide Copy of Criminal Records. See 24 C.F.R. § 982.553(d)(2) (2015); Carter v. Montgomery Housing Authority, No. 2:09-cv-971-MEF-CSC (WO), 2009 U.S. Dist. LEXIS 102352 (M.D. Ala. Nov. 3, 2009) (granting preliminary injunction because PHA failed to provide plaintiffs with their criminal records prior to termination hearing). If the PHA proposes to terminate assistance for criminal activity as shown by a criminal record, the PHA must provide both the tenant and the person who is the subject of the criminal record with a copy and provide the family with the opportunity to dispute the accuracy and relevance of that record. 24 C.F.R. § 982.553(d)(2). The PHA may not charge the tenant for the costs of any criminal records check. Id. at § 982.553(d)(3).

F. Right to Legal Representation.

1. The family has the right, at its own expense, to be represented by an attorney or other representative. Id. at §982.555(e)(3); see In the Matter of the Application of Smith, No. 403147/11, 2013 N.Y. Misc. LEXIS 4606, (N.Y. S. Ct. Oct. 11, 2013) (holding that it was arbitrary for the PHA to deny a continuance of voucher termination hearing since the participant had submitted a letter from the Legal Aid Society indicating it was considering the case and requesting additional time to make a decision on representation).

2. Tenants with Mental Disabilities. See Vance v. Housing Opportunities Comm. of Montgomery County, 332 F.Supp.2d 832, 841-42 (D. Md. 2004)(indicating that hearing defective because tenant with mental disabilities not told where he could go to obtain free legal services for representation at hearing on termination of supportive housing benefits).

   See Chavis v. City of Poughkeepsie Office of Social Development, 860 N.Y.S.2d 200 (N.Y. App. Div. 2008.) In this case, the hearing officer had excluded from the hearing the advocate for the participant, who was disabled because of mental retardation, because of the possibility the advocate might be a witness. The hearing officer terminated the voucher on the ground that the participant had intentionally failed to report that her ex-husband resided with her. The appellate court reverses and remands for a hearing at which the participant could have legal representation.

G. Hearing Officer. The PHA appoints the hearing officer, and must appoint someone other than the person who made or approved the decision or a subordinate of this person. 24 C.F.R. § 982.555 (e)(4)(i) (2015); see Evans v. Hous. Auth. of City of Raleigh, N.C., No. 5:04-CV-291-BO(1), 2006 U.S. Dist. LEXIS 100847, at *10-12 (E.D. N.C. Jan. 28, 2006) (holding that the hearing officer was not an impartial decision maker because she made the initial decision to terminate the voucher; granting plaintiff summary judgment on this basis).

1. The hearing officer may not also serve as the

advocate presenting the case for the PHA. See Stevenson v. Willis, 579 F.Supp. 2d 913, 920 (N.D. Ohio 2008) (ruling that plaintiff stated a due process claim under § 1983 in alleging that the hearing officer also acted as the advocate for the PHA.); Woods v. Willis, No. 3:09CV2412, 2010 U.S. Dist. LEXIS 108197, at *14-17 (N.D. Ohio Sept. 27, 2010) (when single individual performs dual functions of advocate and adjudicator, it raised "serious constitutional concerns").

2. See Costa v. Fall River Housing Authority, 903 N.E.2d 1098, 1106-07 (Mass. 2009)(because one of the persons on five person grievance panel had approved the termination, the voucher participant had not been given a proper hearing before an impartial hearing officer). Advocates should scrutinize the PHA's file before the hearing for signs that the designated hearing office participated in the decision. If it is discovered that the hearing officer had a role in the decision to terminate, a written objection should be lodged with the PHA.

3. Hearing Officer May not Engage in Post-Hearing Fact Finding. See 24 C.F.R. § 982.555(e)(6) (2015); Anderson v. Lowell Housing Authority, No.11-10580, 2012 U.S. Dist. LEXIS 120277, at *50-53 (D. Mass. Aug. 24, 2012)(granting plaintiff summary judgment because hearing officer engaged in factual research after the hearing and plaintiff was not given the opportunity to respond to it); Loving v. Brainerd Housing and Redevelopment Authority, No. 08-1349 (JRT/RLE), 2009 U.S. Dist. LEXIS 8664, at *19-22 (D. Minn. Feb. 5, 2009) (refusing to dismiss claims asserting that hearing officer improperly communicated with HUD officials following the hearing); Lyons v. Tuscarawas Metropolitan Hous. Auth., No. 2007AP080051, 2008 Ohio App. LEXIS 2697 (Ohio Ct. App. 2008) (reversing voucher termination because the hearing officer independently gathered evidence after the hearing).

H. Subpoenas. No subpoena power exists. Tomlinson v. Machin, No. 8:05-cv-1880-T-30MSS, 2007 U.S. Dist. LEXIS 3032, at *20 (M.D. Fla. Jan. 16, 2007). Thus, if a

witness is unwilling to attend the hearing, the advocate should attempt to obtain an affidavit from the witness to present to the hearing officer.

I. Evidence at the Hearing.

1. Right to Confront Witnesses. The family has the right to question any witnesses. 24 C.F.R. § 982.555(e)(5)(2015); see also 55 Fed. Reg. 28538, 28541 (July 11, 1990) (final rule on termination for drug-related and violent criminal activity) ("Participants have the right to cross examine any witnesses upon which a PHA relies."); Edgecomb v. Housing Authority of the Town of Vernon, 824 F.Supp. 312 (D. Conn. 1993) (right to cross-examine adverse witnesses); but see, Costa v. Fall River Housing Authority, 903 N.E.2d 1098, 1108-09 (Mass. 2009)("[T]he clear import of the regulations' first sentence [24 C.F.R. § 982.555(e)(5)]is that the PHA and the recipient have a right to "question" only those persons who actually appear and testify as "witnesses."). (brackets added); Robinson v. District of Columbia Housing Authority, 660 F.Supp. 2d 6, 14-17 (D.D.C. 2009)(right to cross examine witnesses applies only to witnesses who actually testify at the informal hearing).

In Trust v. St. Louis Housing Authority, No. 4:13CV1686RLW, 2015 WL 901464 (E.D. Mo. March 3, 2015), the court upheld a hearing officer's decision terminating plaintiff's voucher for violent criminal activity. The plaintiff had stabbed her brother and was arrested and charged with first degree assault. Id. at *1. At the time of the hearing, the state law criminal charges were pending. Id. at *5. The evidence at the hearing consisted of (1) a newspaper article, (2) a copy of the charge information printed from the Missouri court website, and (3) the plaintiff's testimony and admission that she had stabbed her brother. The court rejected the argument that the PHA had to present witnesses at the hearing, explaining that the regulation - 24 C.F.R. § 982.555(e)(5) -- did not obligate the PHA to present witnesses. Id. at *5. The court noted that the plaintiff had testified that she had acted in self-

defense, but it was the province of the hearing officer to determine whether the plaintiff had violated the regulations. Id. The court also rejected the argument that the assertion of self-defense is an absolute defense to termination. Id. at *5, n.3. A hearing officer could certainly determine that the participant is not credible on the issue of self-defense and that would be sufficient evidence to meet the PHA's burden of proof. It seems that is what happened here.

Because hearsay evidence is admissible at voucher termination hearings, the right to question witnesses essentially means that the participant has the right to question witnesses who appear at the hearing. PHAs are not precluded from using witness statements and not producing the witness. But the probative value of any such witness statements must be examined in light of the standard articulated in Basco v. Machin, 514 F.3d 1177, 1182 (11th Cir. 2008).

2. Rules of Evidence. Rules of evidence applicable to judicial proceedings do not apply. 24 C.F.R. § 982.555(e)(5) (2015). But, HUD recognized that participants can challenge the probative value of evidence. See 55 Fed. Reg. 28538, _____ (under comments on "Adequacy of Hearing and Review Requirements")(July 11, 1990) ("As with other informal hearings, formal rules of evidence normally do not apply, but participants can raise issues challenging the probative value of any evidence offered by the PHA."). If the PHA introduces anonymous letters or telephone calls, it must be pointed out to the hearing officer that such statements should be given no weight at all.

3. Hearsay. PHAs often rely on hearsay at the termination hearings. Hearsay is admissible. See Basco v. Machin, 514 F.3d 1177, 1182-83 (11th Cir. 2008); Williams v. Hous. Auth. of Raleigh, 595 F.Supp.2d 627, 631-33 (E. D. N.C. 2008), aff'd, 2009 U.S. App. LEXIS 2570 (4th Cir. Feb. 10, 2009); Gammons v. Mass. Dep't. of Housing and Community Development, 502 F.Supp. 2d 161, at *10-11 (D. Mass. 2007); Robinson v. District of Columbia Housing Authority, 660 F.Supp. 2d 6, 11-14 (D.D.C. 2009);

Costa v. Fall River Housing Authority, 903 N.E.2d 1098, 1111 (Mass. 2009) ("[H]earsay evidence may form the basis of a PHA's decision to terminate Section 8 assistance so long as that evidence contains substantial indicia of reliability").

a. See Margaretta E. Homsey, Note, *Procedural Due Process and Hearsay Evidence in Section 8 Housing Voucher Termination Hearings,* 51 Boston College L. Rev. 517 (March 2010).

b. Test for Determining Probative Value of Hearsay. The best articulation of the weight, if any that should be given to particular hearsay testimony was set forth by the 11th Circuit in Basco. The Eleventh Circuit in Basco explained the standard courts should apply in weighing hearsay as follows: "As was held in U.S. Pipe and Foundry Company v. Webb, 'hearsay may constitute substantial evidence in administrative proceedings as long as factors that assure the 'underlying reliability and probative value' of the evidence are present.' 595 F.2d 264, 270 (5th Cir. 1979). The reliability and probative force of such evidence depend on 'whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable.'" 514 F.3d at 1182.

The Basco decision is the best articulation of the analytical standard courts should apply in determining the probative value of hearsay evidence. Basco's subsequent impact on other courts is examined in an article in the Housing Law Bulletin. See National Housing Law Project, *The Impact of Basco v. Machin on Section 8 Voucher Termination Cases*, 41 Housing Law Bulletin 180 (August 2011) (discussing two cases in which the courts relied on Basco to overrule voucher terminations and five cases in which courts applied Basco standard and found evidence

sufficient to uphold termination).

In light of its decision in Basco, the Eleventh Circuit subsequently vacated and remanded a district court decision upholding a voucher termination based wholly upon hearsay. See Ervin v. Hous. Auth. of Birmingham District, 281 Fed. Appx. 938 (11th Cir. 2008).
In Badri v. Mobile Housing Board, No. 11-0328-WS-M, 2011 U.S. Dist. LEXIS 93767 (S.D. Ala. Aug. 22, 2011) the court granted a preliminary injunction and ordered the defendant to restore any missed housing assistance payments. It held that the hearsay evidence on which the hearing officer's decision was entirely based did not constitute sufficient probative evidence under the Basco standard.

In Sanders v. Sellers-Earnest, 768 F.Supp.2d 1180 (M.D. Fl. 2010), the court granted a preliminary injunction on ground that police reports that stated the ex-boyfriend claimed he lived with plaintiff did not constitute sufficient evidence that ex-boyfriend had lived with plaintiff in violation of her obligations). In contrast, in Pickett v. Forest, No. 4:11-cv-02445, 2013 U.S. Dist. LEXIS 9768, (D. S.C. Jan. 24, 2013), the court held that (1) the police reports listing the friend's address as the plaintiff's address, (2) plaintiff's statement in two of the reports that the friend lived with her, and (3) plaintiff's own testimony at the hearing was sufficient evidence to terminate assistance. And, in Nalubega v. Cambridge Housing Authority, No. 12-10124-JGD, 2013 U.S. Dist. Lexis 141685, at *63-64 (D. Mass. Sept. 30, 2013), the court held that the hearing panel properly relied on a police report's description of documents found in the participant's department, noting that the hearsay here contains a substantial indicia of reliability. The facts in Nalubega were very bad for the plaintiff and no doubt influenced the court's decision.

Courts in reviewing decisions by a hearing office

upholding a voucher termination are more likely to uphold a decision based on hearsay statements in government records and police reports than a decision based on a handwritten complaint by someone who does not appear at the hearing and who may have ulterior motives. See Badri, 2011 U.S. Dist. LEXIS 93767 at *10-14; Basco v. Machin, 514 F.3d 1177, 1182-83 (11th Cir. 2008). Thus, it is vital to present contradictory evidence at the hearing to counter the hearsay evidence and to set up a possible court challenge.

c. Decision Based Purely on Hearsay. See National Housing Law Project, 43 Housing Law Bulletin 192, *Questions Corner: My client was terminated from the Section 8 Housing Choice Voucher Program based solely on hearsay evidence presented at her informal hearings. Is this permissible?* (Sept. 2013).

Some courts have held that a termination decision based purely on hearsay contradicted by the participant is arbitrary and capricious and violates due process. See Woods v. Willis, 515 Fed. Appx. 471, 483-84 (6th Cir. 2013)("[A]ssuming, *arguendo*, that hearsay evidence can constitute substantial evidence to support a § 8 Housing termination, the evidence must be at the very least reliable and of proven probative value."; ruling that an unnotarized, handwritten letter asserting claims of fraud unsupported by any facts was unreliable and its probative value was nonexistent); Sanders v. Sellers-Earnest, 768 F.Supp.2d 1180, 1185-88 (M.D. Fl. 2010) (rejecting termination based on hearsay statement of ex-boyfriend in police report); Edgecomb v. Housing Authority of the Town of Vernon, 824 F.Supp. 312 (D. Conn. 1993) (ordering reinstatement of Section 8 voucher participant because hearing officer's decision based solely on hearsay police report and newspaper articles); Woods v. Willis, No. 3:09CV2412, 2010 U.S. Dist. LEXIS 108197, at *12-13 (N.D. Ohio Sept. 27, 2010)(refusing to dismiss case where termination based solely on hearsay evidence); Miles v. Housing Authority of Cook County, No. 1-14-1292, 2015 WL 4873200 (Ill. Ct.

App. Aug. 13, 2015) (upholding trial court opinion reversing termination for violent criminal activity of household member because decision based on unreliable hearsay evidence); (Kurdi v. Du Page County Housing Authority, 514 N.E.2d 802 (Ill. App. Ct. 1987) (reversing Section 8 voucher termination based on hearsay testimony); see also Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 230 (1938) ("Mere uncorroborated hearsay or rumor does not constitute substantial evidence."); but see Costa v. Fall River Housing Authority, 903 N.E.2d 1098, 1106-07 (Mass. 2009) ("[H]earsay evidence may form the basis of a PHA's decision to terminate Section 8 assistance so long as that evidence contains substantial indicia of reliability"; declining to follow Edgecomb v. Housing Authority of Vernon, but holding that PHA's reliance on newspaper article was improper).

In evaluating whether to challenge a termination decision based solely on hearsay, the hearsay should be analyzed under the Basco standards. If the hearsay is lacking in probative value under the Basco standard, the courts are more likely to overturn the voucher termination.

d. Double Hearsay in Police Reports. See Young v. Maryville Housing Authority, No. 3:09-CV-37, 2009 U.S. Dist. LEXIS 56539, at *20-23 (E.D. Tenn. July 2, 2009) (noting that the police report on which the hearing officer relied consisted entirely of an officer's summary of statements made by the parties and was double hearsay; holding that plaintiff should have been given the opportunity to cross-examine the officer and the complaining party with respect to the statements attributed to them in the police report and relied on by the hearing officer.)

e. Letters from Landlord. See Younger v. Jersey City Housing Authority, No. HUD-L-4139-12, 2013 N.J. Super. Unpub. LEXIS 24, at *15-18 (N.J. Super. Ct. Law Div. Jan. 7, 2013) (not for publication)(remanding voucher termination based solely on landlord's letters to PHA).

f. Un-Notarized, Handwritten Letter. See Woods v. Willis, 515 Fed. Appx. 471, 483-84 (6th Cir. 2013), aff'g, 825 F.Supp.2d 893 (N.D. Ohio 2011) (voucher termination decision based solely on un-notarized, handwritten letter sent to PHA from the father of one of plaintiff's children, alleging fraud but unsupported by facts reversed; hearsay evidence must be at the very least reliable and of proven probative value).

g. Sex Offender Registry. See Henley v. Housing Authority of New Orleans, No. 12-2687, 2013 WL 1856061, at *4-6 (E. D. La. May 1, 2013) (upholding voucher termination for unauthorized resident based solely on information contained in the sex offender registry; noting strict requirements of Louisiana law with respect to the registry ensure great degree of reliability).

h. Newspaper Article. Taylor v. City of Decatur, Alabama, Housing Authority, No. CV-09-S-1279-NE, 2010 U.S. Dist. LEXIS 144770, at *16, *26-28 (N.D. Ala. Dec. 2, 2010) (finding due process violation in part because decision based decision primarily on newspaper article);

i. Emails from Police Officer. See Miles v. Housing Authority of Cook County, No. 1-14-1292, 2015 WL 4873200, at *8 (Ill. Ct. App. Aug. 13, 2015) emails from police officer unreliable, because they were double hearsay; he was relaying information from unidentified officers and witnesses).

j. Background Check by Private Company reporting Criminal History. See Miles v. Housing Authority of Cook County, No. 1-14-1292, 2015 WL 4873200, at *8 (Ill. Ct. App. Aug. 13, 2015) (unreliable hearsay; simply showed arrest and that case pending).

k. Police Report Showing Only that Person had been arrested and charged with Aggravated Discharge of Firearm and Aggravated Battery. See Miles v.

Housing Authority of Cook County, No. 1-14-1292, 2015 WL 4873200, at *8 (Ill. Ct. App. Aug. 13, 2015) (unreliable hearsay; without the narrative portion giving information about the underlying offense impossible to judge the reliability of the assertions in the report).

l. Arrest Records. Although conviction records may be used in termination cases, HUD has issued guidance (Notice H 2015-10) to PHAs clarifying that a PHA may not base a termination of assistance on a record of arrest. See U.S. Department of Housing and Urban Development, Notice H 2015-10 *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions* (Nov. 2, 2015). Moreover, with the issuance of Notice H 2015-10, HUD listed as an example of best practices the policies of some PHAs that list the circumstances that will be considered in determining whether to terminate assistance on the basis of criminal activity. See id. at ¶ 7.

m. Failure to Object to Hearsay at the Hearing. See Dowling v. Bangor Housing Authority, 910 A.2d 376, 380-81 (Me. 2006)(upholding termination based in part on notes by housing counselor of conversation with landlord indicating the tenant initiated illegal side agreement, because the tenant did not object at the hearing to the PHA's consideration of the note without producing the landlord for cross-examination). Two judges dissented, arguing that "whether hearsay evidence is, standing alone, substantial evidence that can support administrative findings must be resolved on a case-by-case basis" and in a manner consistent with "fundamental fairness." Id. at 387. Accord Gammons v. Mass. Dep't. of Housing and Community Development, 502 F.Supp. 2d 161, at *10 (D. Mass. 2007)(participant waived right to complain about hearsay by not objecting at hearing). Whether failure to object is fatal to the case may very well depend on state law on the issue.

n. Decisions Based Upon Hearsay. See National Housing Law Project, *The Impact of Basco v. Machin on*

Section 8 Voucher Termination Cases, 41 Housing Law Bulletin 180 (August 2011) (discussing five cases with hearsay evidence in which courts applied Basco standard to uphold the voucher termination); Tomlinson v. Machin, No. 8:05-cv-1880-T-30MSS, 2007 U.S. Dist. LEXIS 3032, at *18-20 (M.D. Fla. Jan. 16, 2007) (holding that hearsay statements and copies of documents may be considered by the hearing officer without regard to rules of evidence and without presence of the witnesses); Steward v. Mulligan, 849 N.Y.S.2d 175, 175 (N.Y. App. Div. 2008) ("While the bulk of the respondents' proof constituted hearsay, it was sufficient to serve as the basis for the determination.")

4. Consideration of Circumstances.

a. The hearing officer may consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member and the effects of termination of the voucher on other family members who were not involved. 24 C.F.R. § 982.552(c)(2)(i)(2015); see also U.S. Department of Housing and Urban Development, Notice H 2015-10, *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions* (Nov. 2, 2015) (clarifying that PHAs do not have to adopt "one-strike" policies and listing as an example of "best practices" PHA policies that list the circumstances that will be considered prior to termination of assistance for criminal activity); National Housing Law Project, *Courts Revisit Procedural Protections for Voucher Terminations*, 36 Housing Law Bulletin 103, 107-08(May 2006) (discussing recent developments with respect to hearing officers and consideration of circumstances).

b. Hearing Officer Must Affirmatively Indicate Whether Exercising Discretion Under § 982.552(c)(2)(i) (2015). See Carter v. Lynn

Housing Authority, 880 N.E.2d 778, 785-86 (Mass. 2008), reversing, 851 N.E.2d 437 (Mass. App. Ct. 2006)(Decision of hearing officer must "reflect factual determinations relating to the individual circumstances of the family (based on a preponderance of the evidence at the hearing), demonstrate that he is aware of his discretionary authority under 24 C.F.R. § 982.552(c)(2)(i), to take all relevant circumstances (including mitigated circumstances) into account, and indicate whether he either did or did not choose to exercise that discretion in favor of mitigating the penalty..."); Daniels v. City of Des Moines Municipal Housing Agency, No. 0-582/10-0196, 2010 Iowa App. LEXIS 947, at *16-21 (Iowa Ct. App. Sept. 9, 2010) (unpublished) (reversing termination decision because the record did not show the hearing officer was aware he had any discretion to consider individual circumstances); see also Wojcik v. Lynn Housing Authority, 845 N.E.2d 1160, 1169 (Mass. App. Ct. 2006 (holding that hearing officer does have the authority to exercise discretion and to decline to terminate benefits so long as that decision is on the facts found by the hearing officer).

c. With respect to consideration of mitigating circumstances, one court has distinguished between grounds that are mandatory and permissive under the regulations. When the basis for termination is one of the discretionary grounds listed in § 982.552(c) rather than one of the mandatory grounds listed in § 982.552(b), "the agency must consider some circumstances particular to the individual case, otherwise section 982.552's distinction between mandatory and discretionary terminations becomes meaningless. Gaston v. CHAC, Inc., 872 N.E.2d 38, at *15 (Ill. App. Ct. 2007) (upholding trial court reversal of voucher termination on basis of failure to report family income).

d. Cases Holding that Failure to Consider Circumstances Arbitrary. Some courts have held that failure to consider all the circumstances is arbitrary. See e.g., State ex rel. Smith v. Housing Authority of St. Louis, 21 S.W.3d 854, 857 (Mo. Ct.

App. 2000) (affirming trial court judgment overturning termination by PHA hearing officer and acknowledging that circumstances should be considered; here the participant claimed that her adult son, who had engaged in drug activity, although listed on her section 8 recertification documents as a household member did not in fact live with her).

Although several unpublished Minnesota court decisions had held that a PHA must consider mitigating circumstances, the Minnesota Court of Appeals disapproved those cases in Peterson v. Washington County Housing and Redevelopment Authority, 805 N.W.2d 558, 563-64 (Minn. Ct. App. 2011) (holding that a hearing officer is **not** required to take account of mitigating factors; noting that in three prior unpublished opinions the court had held that the PHA must consider mitigating circumstances and thus effectively overruling them).

e. Cases Holding that Consideration of Circumstances is Discretionary. Other courts have held that it is discretionary on the part of the PHA and hearing officer whether to consider mitigating circumstances. See Lawrence v. Town of Brookhaven Department of Housing, 393 Fed. Appx. 791, at *7-8 (2d Cir. 2010) (affirming district court's conclusion that consideration of circumstances is discretionary); Robinson v. District of Columbia Housing Authority, 660 F.Supp. 2d 6, 16-17 (D.D.C. 18, 2009) (distinguishing Carter v. Lynn Housing Authority, 880 N.E.2d 778, 785-86 (Mass. 2008); Bowman v. City of Des Moines Municipal Housing Agency, 805 N.W.2d 790, 799-801 (Iowa 2011) (holding that regulations do not require the hearing officer to state whether the officer considered mitigating facts, "at least where circumstances indicate the hearing officer was aware of his or her discretion to consider those factors); Peterson v. Washington County Housing and Redevelopment Authority, 805 N.W.2d 558, 563-64 (Minn. Ct. App. 2011) (holding that a hearing officer is **not** required to take account of mitigating factors; noting that in three prior

unpublished opinions the court had held that the PHA must consider mitigating circumstances and thus effectively overruling them).

f. Unintentional Errors in Providing Information. See Smith v. Hamilton County, Ohio, No. C-060315, 2007 Ohio App. LEXIS 1603, at *13-15 (Ohio Ct. App. April 13, 2007)(PHA may not terminate participants who make "trivial or minor errors in filling out required forms"). See discussion of case at VI-B-2.

g. Offense Does Not Justify Termination. New York appears to be the sole state in which state law allows the court to reverse a termination that is "disproportionate to the offense."

i. See Gist v. Mulligan, 886 N.Y.S.2d 172 (N.Y. App. Div. 2009) (acknowledging that the participant violated the rules by failing to appear for a recertification appointment and two subsequent appointments, but finding that termination was "so disproportionate to the offenses committed as to be shocking to one's sense of fairness," because the participant was incarcerated at the time of the appointments and was unable to attend).

ii. Riggins v. Lannert, 796 N.Y.S.2d 93 (N.Y. App. Div. 2005) (acknowledging that hearing officer's decision finding that voucher holder had violated her obligations by defaulting on payments under a repayment agreement supported by substantial evidence **but** holding that termination "so disproportionate to offenses as to be shocking to one's sense of fairness" and remanding for imposition of lesser penalty.

iii. Sicardo v. Smith, 853 N.Y.S.2d 639(N.Y. App. Div. 2008) (upholding finding that voucher holder had failed to notify PHA that her former husband was living with her, but holding that termination was "so disproportionate to the offense as to be shocking to one's sense of fairness and

remanding for imposition of lesser penalty). These cases can be relied on in support of clients who have committed minor or unintentional violations of their obligations.

iv. Bush v. Mulligan, 869 N.Y.S.2d 569 (N.Y. App. Div. 2008). In this case the voucher holder began receiving Social Security benefits in July 2004, but she did not report the income to the PHA until her recertification in February 2005. The hearing officer terminated her from the program for failing to report the income change. The court reverses on the basis that the evidence showed the participant suffers from vascular dementia, a progressive disease that affected her memory and ability to handle her affairs. In light of this evidence, the court says that the decision to terminate the participant based upon fraud was not supported by substantial evidence and termination would shock one's sense of fairness.

v. Oliver v. Cestero, 975 N.Y.S.2d 367 (N.Y. Sup. Ct. April 19, 2013) (unpublished) (table) (reversing termination decision for failure to report income because plaintiff suffered with major depressive disorder and had two minor children with severe disabilities; remanding for imposition of lesser penalty).

h. The hearing officer may impose a requirement that family members who participated in or were culpable for the violation not reside in the unit. 24 C.F.R. § 982.552(c)(ii) (2015).

i. When the basis for termination is illegal use of drugs or alcohol abuse, the PHA may consider whether the household member is participating in or has completed a supervised drug or alcohol rehabilitation program. Id. at § 982.552(c)(iii).

j. It is important to determine prior to the hearing whether the basis for the defense of the termination action will be an admission of the conduct and a request for exercise of discretion by

the hearing officer. When the PHA clearly has grounds to terminate, it is vital to provide the hearing officer with evidence in support of an argument that the hearing officer consider all the circumstances and not terminate the assistance. That could, for example, consist of letters of support from persons in positions of responsibility or certificates of completion of anger management or counseling classes. It might consist of the testimony at the hearing of a mental health caseworker or even the landlord. It might be testimony relating to the hardship that termination would impose or testimony showing the participant has taken steps to prevent such conduct in the future. Creative advocacy is demanded. It is crucial to prevail at the hearing level in cases that turn on the exercise of discretion because a court is much less likely to hold that a termination decision is arbitrary and capricious when it turns on the exercise of discretion by the hearing officer. See, e.g., Eddings v. Dewey, No. 3:06CV506-HEH, 2006 U.S. Dist. LEXIS 74373 (E.D. Va. October 2, 2006), aff'd., 261 Fed. Appx. 638 (4th Cir. 2008) (per curiam)(affirming decision of the hearing officer terminating voucher for failing to report change in family composition within thirty days; stating that nothing precluded the PHA from terminating assistance for an unintentional violation and granting deference to PHA decision). The participant in Eddings first reported that her husband was incarcerated at her annual review six months after he had been incarcerated. The hearing officer declined to exercise discretion and terminated the subsidy.

5. Reasonable Accommodations.

a. If the family includes a person with disabilities, the hearing officer must consider request for reasonable accommodations. Id. at § 982.552(c)(iv); 24 C.F.R. § 8.33 (2015); Gaston v. CHAC, Inc., 872 N.E.2d 38, at *15-16 (Ill. App. Ct. 2007) (upholding trial court reversal of voucher termination on basis of failure to report family income in part because of hearing officer's failure to consider whether reasonable accommodation

required). Any requests for a reasonable accommodation should be in writing and submitted to the hearing officer at or prior to the hearing. By reducing the request to writing, the advocate will avoid proof problems if the termination decision is challenged in court.

b. In Garcia v. Washington County Department of Housing Services, No. CV 05-1780-MO, 2006 U.S. Dist. LEXIS 100044 (D. Or. March 31, 2006), the court refused to dismiss a lawsuit by a former Section 8 voucher holder who was terminated because he was using the voucher at a home owned by his brother. Mr. Garcia claimed that the PHA violated the reasonable accommodation provision of the Fair Housing Act and Section 504 when it refused to allow him to use his voucher at his brother's home on the ground that it would violate the regulations prohibiting renting from a person related by blood when the owner also resides in the unit. He argued that without the voucher assistance his brother could not afford to allow him to reside in his home and serve as his care giver and he did not have the resources to obtain another care giver. The court held that Mr. Garcia had stated claims against the PHA for its failure to grant the requested accommodation.

c. Participants with Disabilities – PHA Duty to Include in the Notice of Termination Notice of Right to Request Reasonable Accommodation. See Price v. Rochester Housing Authority, No. 04-CV-6301P, 2006 U.S. Dist. LEXIS 71092, at *27 (W. D. N.Y. Sept. 29, 2006)([D]ue process requires RHA to include language in termination letters issued to participants in the Shelter Plus Care Program notifying them of the right to request a reasonable accommodation of any disability in connection with the termination decision."). That same reasoning would also apply to PHAs seeking to terminate the housing voucher of a tenant with disabilities.

d. Reasonable Accommodation & Violent Criminal Activity. See Super v. D'Amelia & Associates, No. 3:09cv831 (SRU), 2010 U.S. Dist. LEXIS 103544 (D. Conn. Sept. 30, 2010). In Super a former Section

voucher participant filed suit after her voucher was terminated when she pleaded guilty to first degree assault. At the termination hearing she requested that the PHA grant her a reasonable accommodation to permit her to maintain her rent subsidy while she underwent court-ordered mental health treatment. The hearing officer ruled that Super's assault conviction "eliminated her Section 8 eligibility and that no accommodation could be made for her." Id. at *7. Ms. Super filed suit. The court refused to dismiss the case, reasoning that "[a]n extension of Section 8 benefits can serve as an accommodation when there is evidence to support the plaintiff's contention that continued rental subsidies will effectively allow her to use and enjoy her dwelling without posing a threat to her neighbors and public." Id. at *27-28.

e. See generally Taylor v. Housing Authority of City of New Haven, 645 F.3d 152 (2d Cir. 2011) (affirming district court holding that 24 C.F.R. §§ 8.28 and 100.204 on reasonable accommodation provision may not be enforced through 42 U.S.C. § 1983).

6. Violence Against Women Act Amendments. With the enactment of the amendments to the Violence Against Women Act in January 2006, the PHA cannot terminate assistance when the basis for the proposed termination is criminal activity directly related to domestic violence, stalking, or dating violence if the tenant or immediate member of the tenant's family is a victim. See 42 U.S.C.A. 1437f(o)(7)(C),(D) (West 2012 & Supp. 2015).

a. Congress extended the VAWA protections when President Obama signed VAWA 2013 on March 7, 2013. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (March 7, 2013).

On April 1, 2015, HUD published proposed rules that would amend its regulations to fully implement the statutory changes. See 80 Fed. Reg. 17548-17584 (April 1, 2015).

HUD has published notice providing an overview of the VAWA Reauthorization Act of 2013 and its applicability to HUD programs. See 78 Fed. Reg. 47717 (August 6, 2013). HUD states in the Notice: "The provisions of VAWA 2013 that are applicable to HUD programs are found in title VI of VAWA 2013, which is entitled 'Safe Homes for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking.' Section 601 of VAWA 2013 amends subtitle N of VAWA (42 U.S.C. 14043e et seq.) to add a new chapter entitled 'Housing Rights.'" Id. at 47718.

HUD has published proposed rules that would amend its regulations to fully implement the 2013 statutory changes. See 80 Fed. Reg. 17548-17584 (April 1, 2015).

See also National Housing Law Project, "*VAWA 2013 Continues Vital Housing Protections for Survivors and Provides New Safeguards,*" 43 Housing Law Bulletin 79 (April-May 2013) (highlighting key differences between prior statute and new statute).

b. Final Rule Implementing 2006 Act. See 75 Fed. Reg. 66246 (Oct. 27, 2010) (effective Nov. 26, 2010) (conforming HUD's regulations to the self-implementing statutory protections for victims of domestic violence) (codified generally at 24 C.F.R. § 5.2001 - § 5.2009 (2015); see also 24 C.F.R. § 982.551(e), (l); § 982.552 (c)(2)(v) (2015). The final rule replaced an earlier interim rule. See 73 Fed. Reg. 72336 (Nov. 28, 2008) (interim rule effective December 29, 2008).

c. The regulations clarify that an incident of actual or threatened domestic violence, dating violence, or stalking may not be construed as a serious or repeated lease violation by the victim for which the voucher assistance of the victim may be terminated. See 24 C.F.R. § 982.551(e) (2015).

d. The regulations also provide that criminal activity directly related to domestic violence, dating violence, or stalking, engaged in by a member of

the tenant's household or any guest or other person under the tenant's control, shall not be cause for termination of the voucher assistance of the victim if the tenant or immediate family member is the victim. See § 982.551(*l*).

e. Self-Certification. Under the statute and HUD's interpretation, see 24 C.F.R. § 5.2007 (2015), victims of domestic violence may self-certify that they are victims and must then be afforded the VAWA statutory protections from eviction and termination of their voucher. Form HUD-50066 is currently available on HUD's website at: http://www.hud.gov/offices/adm/hudclips/forms/files/50066.doc Self-certification is a powerful tool. It seems to mean that even if an individual is arrested and charged with domestic violence, the person can self-certify status as a victim and obtain the protections of the Act. That would preclude termination of the voucher by the PHA, unless the PHA can show the self-certification is false.

f. Compare Herman v. NYC Department of Housing Preservation and Development, 964 N.Y.S.2d 59 (N.Y. S. Ct. 2012) (unpublished) (table)(noting that when members of a household both claim victim status, the PHA must determine the true victim with respect to VAWA protections), and Metro North Owners, LLC v. Thorpe, 870 N.Y.S.2d 768 (N.Y. Civ. Ct. Dec. 25, 2008) (holding that section 8 voucher tenant was a victim of domestic violence and thus landlord could not terminate her tenancy for the incident of violence that had occurred) with Hammond v. Akron Metropolitan Housing Authority, C.A. No. 25425, 2011 Ohio App. LEXIS 2241, at *9-11 (Ohio Ct. App. June 1, 2011) (holding that although Hammond testified she had been a victim of violence, the PHA did not terminate her subsidy for any reason related to any incident of domestic violence and thus had not violated the VAWA regulations) and Jennings v. Housing Authority of Baltimore City, No. WDQ-13-2164, 2015 WL 1085574, at *5 (D. Md. March 10, 2015) (upholding termination although one of the listed grounds was a domestic violence assault on plaintiff; court notes that had this been only ground for

termination of assistance, termination would have been improper, but PHA had two other valid grounds – assault by plaintiff's son and possession of marijuana by the son).

g. See Meister v. Kansas City, Kansas Housing Authority, No. 09-2544-EFM, 2011 U.S. Dist. LEXIS 19166 (D. Kan. Feb. 25, 2011). Here, the plaintiff challenged the termination of her voucher for excess damages to unit. She claimed the damages had resulted from domestic violence by the father of one of her sons. The court declined to rule whether she had a right of action under VAWA enforceable under § 1983. Id. at *11-16. But the court holds that fact issues existed on whether the termination constituted illegal sex discrimination in violation of the Fair Housing Act. Id. at *17-21.

7. Failure of PHA to Contact the Contact Person. With the issuance of HUD Notice H-2009-13 and PIH-2009-36(HA) on September 15, 2009, HUD implemented 42 U.S.C. § 13604 and directed PHAs to give applicants the opportunity to designate an individual or organization to facilitate contact and to assist in resolving issues arising during the tenancy. HUD issued another notice on May 9, 2012, reinstating and extending the 2009 joint notice. See Notice H 2012-9; PIH 2012-22(HA) (effective until superseded by successor notice or regulation). With respect to existing tenants, HUD said PHAs "should provide" them the opportunity to provide contact information at the time of their net annual recertification.

   If a participant has designated a contact person or organization and the PHA fails to contact that person when a problem arises, the participant can contend that the PHA's failure to comply estops the PHA from terminating assistance. This could apply, for instance, in cases of missed inspections or missed appointments. If the PHA attempts to terminate on one of these grounds and failed to communicate with the contact person, the PHA should not be able to terminate the participant's voucher assistance.

8. Limited English Proficiency Issues. See 72 Fed. Reg.

2732 (Jan. 22, 2007) (final guidance to recipients of federal financial assistance on Title VI prohibition against national origin discrimination affecting limited English proficient persons). When a voucher termination may have resulted in part because of communication problems with an individual with limited English speaking ability, HUD's guidance should be relied on in defending a voucher termination action.

9. Effect of Guilty Plea in Criminal Proceeding. See Costa v. Fall River Housing Authority, 903 N.E.2d 1098, 1114 (Mass. 2009) (holding that guilty pleas are not conclusive of the underlying facts, but evidence of them).

J. No Hearing Transcript or Recording Required. The regulations do not impose a requirement that the hearing be transcribed. And, due process does not require a transcript. See Montgomery v. Housing Authority of Baltimore City, 731 F.Supp.2d 439 (D. Md. 2010) (denying motion for temporary restraining order requesting that PHA be required to permit the participant to record hearing by court reporter or tape recorder); Mortle v. Milwaukee County and Milwaukee County Housing Choice Voucher Program, No. 2007AP166, 2007 Wisc. App. LEXIS 1062, at *15-16 (Wis. Ct. App. Dec. 4, 2007). State law may impose such a requirement if the decision is subject to review under the state administrative review act. See id. at *16-17 (although due process does not require a transcript, state law here requires a record that permits meaningful review).

K. Decision.

1. Decision Must State Reasons for Decision. The hearing officer must issue a written decision stating briefly the reason for the decision. See 24 C.F.R. §982.555(e)(6)(2015). "Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing." Id. at § 982.555(e)(6). "The hearing officer is expected under the regulations to render a 'decision' that deals with individual circumstances." Wojcik v. Lynn Housing Authority, 845 N.E.2d 1160, 1169 (Mass. App.

Ct. 2006).

2. Adequate Explanation and Analysis.

a. HUD's Interpretation. HUD in its final rule on the requirements for termination hearings explained the requirement as follows: "The statement of decision required by the regulation must be truly informative as to the reasons for the decision. This would include a short statement of the elements of fact or law on which the decision is actually based. A bare and conclusory statement of the hearing decision, that does not let the participant know the basic reasons for the decision, will not satisfy the regulatory requirement." 49 Fed. Reg. 12215, 12230 (March 29, 1984) (comment on final rule) (emphasis added).

i. See Boykins v. Community Development Corp. of Long Island, No. 10-CV-3788 (JS) (ARL), 2011 U.S. Dist. LEXIS 28650, at *9-14 (E.D. N.Y. March 21, 2011) (ruling that hearing officer's decision violated due process because it did not explain factual basis for decision).

ii. Compare McCall v. Montgomery Housing Authority, 809 F.Supp.2d 1314, 1325 (M.D. Ala. 2011) (ruling that a jury could find that a written decision by the hearing officer violated the law because it did not set forth any reasons for the decision), and Brantley v. West Valley City Housing Authority, No. 2:08CV573DAK, 2009 U.S. Dist. LEXIS 10824 (D. Utah Feb. 4, 2009) (ruling that written decision violated due process because it was conclusory with no stated reasons to support it; it failed to apply facts or mention the participant's arguments) with Baldwin v. Housing Authority of City of Camden, No. 09-6583, 2011 U.S. Dist. LEXIS 4537 (D. N.J. Jan. 18, 2011), aff'd., 442 Fed. Appx. 719 (3rd Cir.)(finding sufficient a decision by the hearing officer merely stating that termination upheld because Ms. Baldwin had failed to supply required information on

household composition).

iii. See also Costa v. Fall River Housing Authority, 903 N.E.2d 1098, 1112-14 (Mass. 2009) (hearing decision did not adequately explain factual determinations of the hearing panel).

iv. Pittman v. Dakota County Community Development Agency, No. A07-2063, 2009 Minn. App. Unpub. LEXIS 92, at *9 (Minn. Ct. App. Jan. 20, 2009) (hearing decision inadequate because it failed to explain why certain evidence offered by participant was disregarded; hearing officer did not address mail received by alleged unauthorized guest at another address or court order placing unauthorized visitor at another address or social worker's testimony that she had been to participant's unit on number of occasions and had not seen any indication that the alleged unauthorized person lived with her).

b. Explanation of Whether Hearing Officer Chose to Exercise Discretion with respect to Mitigating Circumstances. See Carter v. Lynn Housing Authority, 880 N.E.2d 778, 785-86 (Mass. 2008), reversing, 851 N.E.2d 437 (Mass. App. Ct. 2006)(Decision of hearing officer must "reflect factual determinations relating to the individual circumstances of the family (based on a preponderance of the evidence at the hearing), demonstrate that he is aware of his discretionary authority under 24 C.F.R. § 982.552(c)(2)(i), to take all relevant circumstances (including mitigated circumstances) into account, and indicate whether he either did or did not choose to exercise that discretion in favor of mitigating the penalty..."); Bowman v. City of Des Moines Municipal Housing Agency, 805 N.W.2d 790, 799-801 (Iowa 2011) (holding that regulations do not require the hearing officer to state whether the officer considered mitigating facts, "at least where circumstances indicate the hearing officer was aware of his or her discretion to consider those factors).

c. Judicial Interpretations of Adequacy of Decision. See Edgecomb v. Housing Authority of the Town of Vernon, 824 F.Supp. 312, 316 (D. Conn. 1993). In Edgecomb the court also ruled that the hearing officer failed to issue a sufficient written decision. The hearing officer's conclusory statement stated "there was a preponderance of evidence that indicated that a family member did engage in such drug related activity while on the Section 8 Program." The decision did not state the elements of fact or law on which the decision to uphold the termination was based. Nor did the hearing officer specify the reasons for her determination or indicate the evidence on which it rested. The court concludes this decision was contrary to HUD regulations. See id. at 316. See also, Pratt v. Housing Authority of City of Camden, No. 05-0544(NLH), 2006 U.S. Dist. LEXIS 70575, at *31-37 (D. N.J. Sept. 27, 2006)(failure of the hearing officer to state how participant's conduct qualified as criminal activity violated due process and HUD regulations); see generally, Baldwin v. Housing Authority of City of Camden, 278 F.Supp.2d 365, 386 (D.N.J.2003) (denial of voucher applicant on basis of creditworthiness; hearing decision is arbitrary and constitutes an abuse of discretion if the hearing officer fails to exercise "reasonable and legal decision-making skills"); Driver v. Housing Authority of Racine County, 713 N.W.2d 670, 677-78 (Wis. Ct. App. 2006) ("Both decision letters from HARC fall appallingly short of the mark. They contain no facts related to the incidents.... Moreover, they do not state the elements of law motivating the court's conclusion.... They cite no policy, regulation, or other authority indicating what a "family obligation" is or how the plaintiffs' acts or omissions fail to meet the pertinent legal requirements."); Jipson v. South Portland Hous. Auth., No. AP-07-60, 2008 Me. Super. LEXIS 101 (Me. Super. Ct. May 2, 2008) (review under state law review process finding decision inadequate to permit meaningful judicial review; remanding for issuance of decision by hearing officer that describes the rule the participant violated;

states how it was violated; and explains how and why the hearing officer reached her decision); compare Nalubega v. Cambridge Housing Authority, No. 12-10124-JGD, 2013 U.S. Dist. Lexis 141685, at *63-64 (D. Mass. Sept. 30, 2013)(upholding termination and ruling that the law does not require the decision maker to include in the decision the "exact provisions" of the regulations violated or to state whether it considered mitigating circumstances). The facts in this case were very bad for the plaintiff and no doubt influenced the court's decision.

3. Preponderance of the Evidence. Fact determinations shall be based on a preponderance of the evidence presented at the hearing. 24 C.F.R. §982.555(e)(6) (2015);

   a. See Young v. Maryville Housing Authority, No. 3:09-CV-37, 2009 U.S. Dist. LEXIS 56539, at *23-26 (E.D. Tenn. July 2, 2009) (holding that decision lacked substantive evidence to support hearing officer's decision when it was based on hearsay in police report and gave no weight to plaintiff's statements disputing the account by the complaining party set forth by the police officer in his report); Pena v. Mulligan, 820 N.Y.S.2d 809 (N.Y. App. Div., Sept. 19, 2006) (anonymous letter not sufficient to establish that §8 participant's estranged husband living with her); Rinzin v. Olmsted County Hous. & Redevelopment Auth., No. A07-2344, 2008 Minn. App. Unpub. LEXIS 1371 (Minn. Ct. App. Nov. 25, 2008) (review of termination under state law appeal procedure for administrative decisions; reversing voucher termination for unauthorized persons living in the unit; reasoning that the termination decision was not supported by substantial evidence because it was based only on failure to provide copy of lease or a written statement from alleged household member's landlord and not on a determination that the testimony of the participant and alleged household member was not credible); but see, Robinson v. District of Columbia Housing Authority, 660 F.Supp. 2d 6, 17-19 (D.D.C.

2009)(finding that the PHA complied with preponderance of evidence standard).

b. The hearing officer cannot engage in independent fact-finding after the hearing and base the decision on such fact determinations; the decision must be based on facts presented at the hearing. See Taylor v. City of Decatur, Alabama, Housing Authority, No. CV-09-S-1279-NE, 2010 U.S. Dist. LEXIS 144770, at* 26-27 (N.D. Ala. Dec. 2, 2010) (finding due process violation because the hearing officer spoke to witness after hearing and considered the conversation in her decision with no opportunity by plaintiff to respond); Lyons v. Tuscarawas Metropolitan Hous. Auth., No. 2007AP080051, 2008 Ohio App. LEXIS 2697 (Ohio Ct. App. 2008) (reversing voucher termination because the hearing officer independently gathered evidence after the hearing); cf. Singleton v. Drew, 485 F.Supp. 1020, 1024 (E.D. Wis. 1980 (public housing denials).

c. Burden of Proof. See Basco v. Machin, 514 F.3d 1177, 1181-82 (11th Cir. 2008)(holding that the PHA has burden of persuasion to establish a prima facie case of a violation); Taylor v. City of Decatur, Alabama, Housing Authority, No. CV-09-S-1279-NE, 2009 U.S. Dist. LEXIS 132109, at *10-12 (N.D. Ala. Sept. 10, 2009) (noting that the PHA did not offer any evidence during the hearing but erroneously placed the burden on plaintiff to refute the charges); see also Carter v. Olmsted County Hous. & Redevelopment Auth., 574 N.W.2d 725, 731 (Minn. Ct. App. 1998)("Federal section 8 regulations do not address burdens of proof, but U.S. Supreme Court precedent indicates that, where deprivations of benefits necessary for survival are concerned, the initial burden of proof must fall on the government.").

d. To the extent the court's ruling in Tomlinson v. Machin, No. 8:05-cv-1880-T-30MSS, 2007 U.S. Dist. LEXIS 3032, at *20-25 (M.D. Fla. Jan. 16, 2007), holds that the burden of persuasion may be placed on the voucher holder, it has been effectively overruled by Basco. In Tomlinson the court upheld

a provision in the Section 8 Administrative Plan placing burden of proof that the individual is a visitor on the family. But, the court noted that the PHA presented substantial evidence to show that the tenant did permit an unauthorized person to live with her, and the tenant offered no evidence of any other address for the visitor and no explanation of why he gave the tenant's address as his address.

e. Decision Based on Factual Finding that is the Opposite of Uncontradicted Testimony of an Incredible Witness. See NLRB v. Walton Mfg. Co., 369 U.S. 404, 408 (1962), quoting Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952) ("[T]he demeanor of a witness '... may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story...'").

i. The issue in such a case would be whether such a finding by the hearing officer would be based on a preponderance of the evidence. See 24 C.F.R. § 982.555(e)(6) (2015).

ii. See Williams v. Hous. Auth. of Raleigh, 595 F. Supp. 2d 627, 631-32 (E. D. N.C. 2008), aff'd, 2009 U.S. App. LEXIS 2570 (4th Cir. Feb. 10, 2009) (PHA hearing officer permitted to assess credibility and infer opposite of the testimony of the witness).

4. Decision Must Be Based on Grounds Stated in the Notice of Termination. The hearing officer must base the decision on grounds stated in the termination notice. Ellis v. Ritchie, 803 F.Supp. 1097, 1106, n. 14 (E.D. Va. 1992) (court cannot uphold termination on grounds not stated by the PHA in its notice because of due process requirements); State ex rel. Smith v. Housing Authority of St. Louis, 21 S.W.3d 854, 858 (Mo. Ct. App. 2000) (PHA could not terminate voucher for failure to notify of change in family composition when only ground for termination stated in the notice was son's drug activity).

5. Effective Date of the Termination Decision. The

hearing officer must promptly give the participant a copy of the hearing decision. 24 C.F.R. § 982.555(e)(6) (2015). The regulations do not specifically address when the decision is to be made effective. At least one court has held that a termination effective the day after the hearing was proper. See Caswell v. City of Detroit Housing Comm., 418 F.3d 615, 620-21 (6th Cir. 2005). This too should be a point of advocacy. When it is clear that the hearing officer will terminate the voucher subsidy, the advocate should ask the hearing officer to make the decision effective thirty, sixty, or ninety days in the future to allow the family time to transition to other housing to the extent that is possible for the family.

6. Participant's Liability for Full Rent Following Termination. At least in New York, a Section 8 tenant who has signed the Section 8 lease agreeing only to pay the tenant's share of the rent is not liable for the Housing Authority's share of the rent following termination, but can be held responsible for paying the fair use and occupancy of the premises. See Douglas v. Nole, No. SP001635, 2008 N.Y. Misc. LEXIS 4159 (N.Y. Dist. Ct. July 15, 2008) (unpublished). But, when a tenant has signed a lease other than the form Section 8 lease and agreed in the lease to pay the full rent, the tenant could be held liable for the full rent following the termination of the housing assistance payments contract.

7. PHA's Right to Disregard Decision. See 24 C.F.R. §982.555(f) (2015).

   a. The PHA is not bound by a hearing decision:

      a. Concerning a matter of which the PHA is not required to provide an opportunity for an informal hearing under the regulations or that otherwise exceeds the authority of the hearing officer; or
      b. If the decision is contrary to HUD regulations or requirements, or otherwise contrary to federal, state, or local law.
      c. If the PHA determines that it is not bound by a hearing decision, the PHA must promptly notify the family of the reasons for the determination.

Id.

b. See Nichols v. Seattle Housing Authority, 288 P.3d 403 (Wash. App. 2012). In this case, the PHA chose to disregard the hearing officer's decision on basis that he had exceeded his authority in interpreting the PHA's policies. The appellate court held the hearing officer had acted within his authority in ruling that the PHA was required under its policies to offer plaintiff a repayment plan on unreported income.

c. See Tinnin v. Section 8 Program of the City of White Plains, 706 F.Supp. 2d 401 (S.D. N.Y. 2010). Here the PHA terminated plaintiff's voucher for selling cocaine from her apartment. The hearing officer reinstated plaintiff, but found that no mitigating factors were present. Id. at 403. The PHA disregarded the hearing officer's decision. Ms. Tinnin sued. The court held that the PHA properly disregarded the decision because the hearing officer had found termination was justified and no mitigating factors existed. It refused to remand the case.

d. See Landry v. Maine State Hous. Auth., No. 07-AP-076, 2008 Me. Super. LEXIS 136 (Me. Super. Ct June 26, 2008) (affirming a decision by the PHA to disregard a hearing officer's decision that set aside a voucher termination by the PHA for eviction for nonpayment of rent; concluding that nonpayment of rent is serious lease violation and PHA must terminate voucher and therefore properly disregarded hearing officer's decision). This case illustrates the problem with the mandatory language of the regulation that a PHA "must terminate program assistance for a family evicted... for serious violation of the lease." See 24 C.F.R. § 982.552(b)(2) (2015). Even though the language is mandatory, it can be argued that the mandatory termination requirement is modified by the regulation allowing the PHA to consider all the circumstances. See id. at § 982.552(c)(2) (2015). When the hearing officer has done that, the court should not overturn the hearing officer's decision.

e. Preclusive Effect of Hearing Decision Depends on State Law. See Lawrence v. Town of Brookhaven Department of Housing, 393 Fed. Appx. 791 (2d Cir. 2010). The court held that New York law did not require the PHA to give claim-preclusive effect to an earlier informal hearing decision refusing to terminate the participant's voucher. The court also noted that the failure of a PHA to give preclusive effect to a state administrative hearing in which there is no clear-cut right under state law does not violate due process. Id. at *4.

L. Judicial Review.

1. No Federal Statute Provides for Judicial Review. Because the voucher statute does not provide for an express or implied private right of action for judicial review of voucher terminations, participants must challenge termination decisions either through a state administrative procedure act that provides for judicial review of PHA decision or state a claim under 42 U.S.C. § 1983. When the state administrative procedure act does not apply to PHA voucher termination decisions, a participant family's claim must be premised on § 1983.

2. Review Under Either State Administrative Procedures Act or 42 U.S.C. § 1983. In some states, PHA decisions on voucher terminations are subject to review under the state's administrative procedure act. See, e.g., Bouie v. New Jersey Department of Community Affairs, 972 A.2d 401, at *24-32 (N.J. Super. Ct. App. Div. 2009) (holding that a Section 8 termination hearing is a contested case subject to the New Jersey Administrative Procedure and its protections). If the state administrative procedure act does not apply, the participant must challenge the decision by filing suit in state or federal court under 42 U.S.C. §1983.

3. State Law Remedy May Preclude Suit Under § 1983. If state law provides an adequate remedy to challenge a termination, the participant does not have a claim for relief under § 1983. See Collins v. City of Kenosha Housing Authority, 789 N.W. 2d 342 (Wis. Ct. App. 2010) (applying U.S. Supreme Court decision in Parratt

v. Taylor, 451 U.S. 527 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986)). Thus, in those states where state law provides for judicial review, advocates should use that process unless the state law remedy is inadequate.

4. Suit under 42 U.S.C. §1983. Because § 1437f(o) does not create an express or implied right of action to sue for wrongful termination, plaintiffs must seek relief under § 1983 when state law does not provide for judicial review. See e.g., Swift v. McKeesport Housing Authority, 726 F.Supp. 2d 559, 570-72 (W.D. Pa. 2009); Robinson v. District of Columbia Housing Authority, 660 F.Supp. 2d 6, 11 (D.D.C. 2009)("It is undisputed that an improper termination of a housing subsidy can give rise to a claim under § 1983.").

   a. Termination Decision and PHA Policy or Final Decision-maker. Some courts have ruled against plaintiffs on the ground that the voucher termination decision was not attributable to a final decision-maker. In order to hold the PHA liable under § 1983, the alleged violation of due process or federal law must be attributable to the enforcement of a municipal policy, practice, or decision of a final policymaker. See James v. Dallas Housing Authority, 526 Fed. Appx. 388, 394-95 (5th Cir. 2013) (per curiam) (unpublished; not precedent) (pro se plaintiff) (termination decision by the hearing officer is not decision by official policymaker); Swift v. McKeesport Housing Authority, 726 F.Supp. 2d 559, 571-78 (W.D. Pa. 2009) (dismissing challenge to voucher termination decision on ground that plaintiff had failed to allege sufficient facts to establish municipal liability); Larue v. Houston Housing Authority, No. H-12-00523, 2013 U.S. Dist. LEXIS 48106, at *8-12 (S.D. Tex. April 3, 2013) (granting summary judgment to PHA on § 1983 claim for wrongful voucher termination on basis that Board of PHA was official policy-maker and plaintiff had not presented evidence that Board participated in the decision; plaintiff had stated in interrogatory answers that the Board of Commissioners was relevant policymaker); Eslin v. Housing Authority of the Town of Mansfield,

No. 3:11-cv-134, 2012 U.S. Dist. LEXIS 4314, at *7-10 (D. Conn. Jan. 13, 2012) (dismissing § 1983 suit because plaintiff did not allege that her federal rights were violated as a result of either the PHA's official policy or custom or the actions of employees with final policymaking authority; plaintiff given opportunity to re-plead); Hill v. Ypsilanti Housing Commission, No. 09-13562, 2010 U.S. Dist. LEXIS 82556, at *8-11 (E.D. Mi. Aug. 10, 2010)(dismissing claim against PHA because no evidence suggesting that employee who denied hearing had final authority to establish PHA policies); Ross v. Houston Housing Authority, No. H-09-2361, 2010 U.S. Dist. LEXIS 41927, at *10-12 (S.D. Tex. April 29, 2010) (granting summary judgment to PHA on § 1983 claim for wrongful voucher termination on basis that Board of PHA was official policy-maker and plaintiff had not presented evidence of any official policy promulgated by the Board that caused the violation of due process rights). To avoid dismissal on this ground, plaintiffs should always ask the Executive Director or the Board of the PHA to reverse any decision of the hearing officer prior to filing suit challenging the termination decision. When the claim has been presented to the Executive Director, the PHA will not have grounds to dismiss on this basis.

The court in in the Eslin case cited above gave the plaintiff an opportunity to re-plead. After amendment, the court refused to dismiss, finding the plaintiff had sufficiently alleged facts supporting claim that Executive Director was the final decision maker. See Eslin v. Housing Authority of the Town of Mansfield, No. 3:11-cv-134, 2012 U.S. Dist. LEXIS 106064, at *7-12 (D. Conn. July 13, 2012). The court rejected the argument that the Board was the final policymaker. Id. at *12. This is clearly the better reasoned view, since PHA boards generally are not in any way involved in voucher termination decisions.

See Cooley v. Housing Authority of City of Slidell, No. 12-2376, 2013 WL 3776488, at *4

(E.D. La. July 16, 2013) (plaintiff's allegation that PHA's policy of sending participants only one notice of the annual recertification appointment and terminating the voucher if the participant failed to appear was promulgated by PHA Board, thus the deprivation met the § 1983 requirement that the deprivation of property occur pursuant to official policy).

See Guerrero v. City of Kenosha Housing Authority, No. 10-CV-1090, 2012 U.S. Dist. LEXIS 5813, at *10-18 (E.D. Wis. Jan. 18, 2012) (finding that plaintiff had raised fact question on whether it was PHA's policy to send termination notices in violation of federal law, thus precluding summary judgment for PHA).

b. Section 1983 Claim must Allege Constitutional or Federal Statutory Violation; violation of Regulation Insufficient. When a termination decision is challenged solely on the basis that the decision is not in accord with the regulations (as contrasted with a due process challenge), plaintiffs should be prepared to address whether they have an enforceable statutory right for which a claim may be maintained under 42 U.S.C. §1983. See e.g., Colvin v. Housing Authority of Sarasota, 71 F.3d 864, n.1 (11th Cir. 1996) (per curiam) (noting that defendants did not raise issue whether plaintiffs had private right of action and thus waived it); Ritter v. Cecil County Office of Housing and Community Development,33 F.3d 323, 327 n.3 (4th Cir. 1994) (noting that parties had not raised issue of whether plaintiff had right created by statute protecting her from termination of her voucher except for cause); Daniels v. Housing Authority of Prince George's County, No. 11-cv-02938, 2013 U.S. Dist. LEXIS 54848 (D. Md. April 17, 2013) (finding that plaintiff could maintain suit under 42 U.S.C. § 1437f(y)(2), the Section 8 Homeownership Program, to challenge calculation of rental subsidy); Lane v. Fort Walton Beach Housing Authority, 518 Fed. Appx. 904, 914-15 (11th Cir. 2013) (upholding district court dismissal of § 1983 claims for

alleged violation of 42 U.S.C. §§ 1437-1437z-8 proper because the statute did not create a private right or action and none could be implied); see generally, Langlois v. Abington Housing Authority, 234 F.Supp. 2d 33, 46-55 (D. Mass. 2002) (discussion of right to maintain § 1983 action to challenge PHAs' Section 8 preferences).

See also Gammons v. Mass. Dep't. of Housing and Community Development, 523 F.Supp. 2d 76, at *13-25 (D. Mass. 2007); Stevenson v. Willis, 579 F.Supp. 2d 913, at *16-24 (N.D. Ohio 2008).

Gammons is an interesting decision, because the court (erroneously in my opinion) applies the statute that created the public housing tenant grievance procedure, 42 U.S.C. § 1437d(k), to voucher termination cases. See 523 F.Supp. 2d at *11-12. It concludes that a tenant who claims her voucher has been arbitrarily terminated because a hearing officer's decision is not based on a preponderance of the evidence brought forth at the hearing states a claim under § 1983. Id. at *23. But, it further concludes that a claim that a hearing officer failed to consider all relevant circumstances does not state a claim under § 1983 because the provision is couched in precatory terms ("may consider"). Id. at *23-24.

Stevenson also rules that Congress intended that 42 U.S.C. § 1437d(k) benefit § 8 Voucher Program participants and thus concludes that the plaintiff may maintain her § 1983 claims for violations of the regulations at 24 C.F.R. § 982.555 (2015). Stevenson, 2008 U.S. Dist. LEXIS 76213, at *16-24.

Challenges to termination decisions based on rights created solely by the regulations with no statutory underpinning will not support a § 1983 claim. See e.g., Caswell v. City of Detroit Housing Comm., 418 F.3d 615, 618-21 (6th Cir. 2005); Brooker v. Altoona Housing Authority, No. 3:11-CV-95, 2013 U.S. Dist. LEXIS 82228, at *60-76 (W.D. Pa. June 12, 2013) (holding that

plaintiff cannot invoke § 1983 to enforce right created by regulations permitting a PHA to deny § 8 benefits to those who have been evicted from federally assisted housing).

In Caswell, the plaintiff attempted to state a claim under § 1983 for the PHA's violation of § 982.311(b) by terminating his voucher before his eviction was finalized in state court. The Sixth Circuit held that because the plaintiff could point to no specific statutory provision that confers a right relevant to the PHA's alleged violation of §982.311(b), the plaintiff could not maintain a §1983 claim for this alleged violation. The plaintiff did not attempt to state a supremacy clause claim.

See also Gammons v. Mass. Dep't. of Housing and Community Development, 502 F.Supp. 2d 161, at *9, n.2 (D. Mass. 2007), *quoting* Johnson v. City of Detroit, 446 F.3d 614, 627 (6th Cir. 2006) ("Section 8 does not provide 'an individual entitlement enforceable under § 1983.'"); but see Hill v. Ypsilanti Housing Commission, No. 09-13562, 2010 U.S. Dist. LEXIS 82556, at *11-18 (E.D. Mi. Aug. 10, 2010) (holding that because plaintiff alleged a violation of her **constitutional** right to due process rather than a federal statutory right to Section 8 benefits, plaintiff stated a claim enforceable under § 1983).

5. Due Process and Supremacy Clause Claims. Given the possibility a court will hold that a plaintiff cannot challenge a voucher termination premised solely on violation of the regulations under § 1983, plaintiffs should try to state constitutional due process claims. When the plaintiff alleges that the PHA violated a regulation, the plaintiff should always assert a due process claim under § 1983 as well as a claim under § 1983 for violation of the regulation. Cf. U.S. v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.")

If a plaintiff can identify a conflict between state and federal law with regard to the voucher program, the plaintiff should also plead a cause of action based on the supremacy clause to the extent possible. See generally, LAUREN K. SAUNDERS, Clearinghouse REVIEW Journal of Poverty Law and Policy, "Preemption as an Alternative to Section 1983," (March-April 2005); Planned Parenthood v. Sanchez, 403 F.3d 324, 329-35(5th Cir. 2005) (holding that plaintiffs had implied right of action under supremacy clause to seek injunctive relief from state statute preempted by federal spending clause legislation regardless of whether they had enforceable statutory rights under § 1983).

6. Scope of Judicial Review. The Federal Administrative Procedure Act does not apply because PHAs are not federal agencies. Ritter v. Cecil County Office of Housing and Community Development, 33 F.3d 323, 327 (4th Cir. 1994); Baldwin v. Housing Authority of City of Camden, New Jersey, 278 F.Supp. 2d 365, 374 (D. N.J. 2003).

   The court should review the decision to determine whether it is contrary to the regulations or the law. Ritter, 33 F.3d at 328.

7. Review Standard Under § 1983. See Clark v. Alexander, 85 F.3d 146, 151-52 (4th Cir. 1996) (deference must be given to hearing officer's finding, but they must be supported by substantial evidence). The best most accurate test of the review standard for the courts is set forth in Baldwin v. Housing Authority of City of Camden, New Jersey, 278 F.Supp. 2d 365, 374 (D. N.J. 2003).

   a. Reasonable Deference. If the PHA's actions are consistent with constitutional requirements and federal housing regulations, then the court should grant the decision reasonable deference, meaning that the action should be upheld unless it is found to be arbitrary or capricious. Id. at 374 (quoting Clark v. Alexander, 85 F.3d 146, 152 (4th Cir. 1996)). The court must accord deference to the factual findings of the PHA. Gammons v.

Mass. Dep't. of Housing and Community Development, 502 F.Supp. 2d 161, at *12, (D. Mass. 2007); Gammons v. Mass. Dep't. of Housing and Community Development, No. 07-10110-PBS, 2007 U.S. Dist. LEXIS 87289,*24-25 (D. Mass. Nov. 28, 2007).

b. De Novo Review. To the extent the PHA's actions are inconsistent with constitutional requirements or federal regulations, de novo review applies. Baldwin, 278 F.Supp.2d at 374; Pratt v. Housing Authority of City of Camden, No. 05-0544(NLH), 2006 U.S. Dist. LEXIS 70575 (D. N.J. Sept. 27, 2006).

8. Review Standard Under State Administrative Procedure Act. This will vary by state, depending on the standard set by state law for administrative review of agency decisions. The standard is likely a substantial evidence standard. A termination decision violates due process if the PHA fails to follow its own rules and procedures for termination. See Goldfarb v. New York City Housing Authority, No. 4000353/11, 2011 N.Y. Misc. LEXIS 3684, at *2-3 (N.Y. Sup. Ct. July 11, 2011).

9. Record for Judicial Review. Whether a court will consider evidence not presented to the hearing officer may turn on whether the action is a § 1983 lawsuit or a state court action under the state's administrative review act. Because there is no transcript of the hearing, a reviewing court in a § 1983 action may also consider testimony or documents not presented at the hearing in considering a challenge to a termination decision. But, where state law provides for administrative review on the record at the hearing, this will not be the case.

Moreover, even in a § 1983 action the court may be inclined to judge the propriety of the hearing officer's decision on the testimony and documents presented at the hearing. See Williams v. Hous. Auth. of Raleigh, 595 F.Supp.2d 627, 631 (E. D. N.C. 2008), aff'd, 2009 U.S. App. LEXIS 2570 (4th Cir. Feb. 10, 2009)(noting that the court conducted a bench trial to determine "what happened at and following the

hearing"). Thus, it is important to introduce all testimony at the hearing before the hearing officer. See Gaston v. CHAC, Inc., 872 N.E.2d 38, at *17 (Ill. App. Ct. June 18, 2007) (review of voucher termination under state law administrative appeal; refusing to consider PHA documents that were not part of the record before the hearing officer). When a participant first seeks representation after the hearing has occurred and failed to present relevant testimony or documents to the hearing officer, I recommend sending a letter asking the hearing officer to reconsider and presenting the evidence in the request for reconsideration. If suit is necessary, one can then argue the court must also consider that information in determining whether the decision to terminate is arbitrary.

10. Remedies.

a. Injunctive Relief. Participants may either seek to enjoin the termination or seek retroactive reinstatement. The loss of benefits and the resulting loss of housing constitute irreparable harm. Johnson v. Fort Walton Beach Housing Authority, No. 3:11CV506, 2012 WL 10688344, at *7 (N.D. Fla. Jan. 5, 2012) (granting preliminary injunction ordering reinstatement of § 8 benefits, although the termination had been effective for over one year)

b. Preliminary Injunctive Relief. See, e.g., Sanders v. Sellers-Earnest, 768 F.Supp.2d 1180 (M.D. Fl. 2010) (granting preliminary injunction on ground that police reports did not constitute sufficient evidence that ex-boyfriend had lived with plaintiff); Jackson v. Jacobs, 971 F.Supp. 560 (N.D. Ga. 1997) (granting preliminary injunction to restore plaintiff's voucher); Pickett v. Housing Authority of Cook County, No. 15-CV-749, 2015 WL 4185943, at *9 (N.D. Ill. 2015) (granting preliminary injunction and ordering the PHA to grant plaintiff due process hearing on termination of voucher); Jones v. Harrison, No. 12-CV-11192, 2012 U.S. Dist. LEXIS 48477 (E.D. Mich. April 5, 2012) (issuing temporary restraining order reinstating voucher pending informal hearing by

PHA); Johnson v. Fort Walton Beach Housing Authority, No. 3:11CV506, 2012 WL 10688344, at *4 (N.D. Fla. Jan. 5, 2012) (granting preliminary injunction ordering reinstatement of § 8 benefits, although the termination had been effective for over one year); Badri v. Mobile Housing Board, No. 11-0328-WS-M, 2011 U.S. Dist. LEXIS 93767 (S.D. Ala. Aug. 22, 2011) (granting preliminary injunction and ordering defendant to restore any missed housing assistance payments); Miles v. Phenix City Housing Authority, No. 3:11-CV-216-WKW[WO], 2011 U.S. Dist. LEXIS 69814, (M.D. Ala. June 29, 2011)(granting preliminary injunction ordering PHA to reinstate plaintiff's subsidy retroactive to date of termination nine months prior to court's order); Perkins-Bey v. Housing Authority of St. Louis County, No. 4:11CV310 JCH, 2011 U.S. Dist. LEXIS 25438 (E.D. Mo. March 14, 2011) (granting preliminary injunction prohibiting PHA from terminating plaintiff's voucher assistance); Carter v. Montgomery Housing Authority, No. 2:09-cv-971-MEF-CSC (WO), 2009 U.S. Dist. LEXIS 102352 (M.D. Ala. Nov. 3, 2009) (granting preliminary injunction because PHA failed to provide plaintiffs with their criminal records prior to termination hearing); Young v. Maryville Housing Authority, No. 3:09-CV-37, 2009 U.S. Dist. LEXIS 56539, at *26-32 (E.D. Tenn. July 2, 2009) (granting preliminary injunction reinstating plaintiff's voucher assistance that had been terminated almost one year prior to the issuance of the preliminary injunction); Hendrix v. Seattle Housing Authority, No. C07-657MJP, 2007 U.S. Dist. LEXIS 70773 (W.D. Wash. Sept. 25, 2007) (granting preliminary injunction enjoining the housing authority from proceeding with an informal termination hearing pending determination by court whether the HUD regulations and housing authority procedures are constitutionally adequate); Williams v. Hous. Auth. of Raleigh, No. 5:05-CV-219-BO(1), 2005 U.S. Dist. LEXIS 46791 (E. D. N.C. April 14, 2005) (granting preliminary injunction enjoining section 8 termination); see also Perkins v. Metropolitan Council, Metro HRA, 21 F.Supp.3d 1006 (D. Minn. 2014) (denying preliminary injunction on claim that PHA failed to grant

plaintiff a reasonable accommodation by excusing her eviction for holding over; court concludes that holding over and physical removal by the sheriff constituted serious lease violation requiring the PHA to terminate assistance); Gammons v. Mass. Dep't. of Housing and Community Development, 502 F.Supp. 2d 161 (D. Mass. 2007) (denying preliminary injunction seeking reinstatement of section 8 voucher subsidy).

c. Injunctive Relief and Timing of Filing Suit. See Lawrence v. Town of Brookhaven Dep't of Housing, Community Development & Intergovernmental Affairs, No. 07-CV-2243, 2007 U.S. Dist. LEXIS 94947, at *15-19 (E.D. N.Y. Dec. 26, 2007)(ruling that because plaintiff filed suit more than two months after her benefits had been terminated, plaintiff's request for preliminary injunction reinstating the voucher was mandatory rather than prohibitory and thus plaintiff had to meet an elevated standard of "a clear or substantial likelihood of success.") Id. at *16-17. A party can avoid this problem by filing prior to the effective date of the termination of the benefits as announced by the hearing officer. See also Barfield v. Plano Housing Authority, No. 4-11-cv-00206, 2012 U.S. Dist. LEXIS 93531, at *9-12 (E.D. Tex. July 6, 2012)(denying preliminary injunction to reinstate voucher assistance because voucher had been terminated for eighteen months and plaintiff remained in home with his daughters).

But in Johnson v. Fort Walton Beach Housing Authority, No. 3:11CV506, 2012 WL 10688344, at *4 (N.D. Fla. Jan. 5, 2012), the court granted a preliminary injunction ordering reinstatement of § 8 benefits, although the termination had been effective for over one year).

d. Damages Against PHA. Participants may recover actual damages resulting from a wrongful termination. See Orullian v. Housing Authority of Salt Lake City, No. 2:10-cv-276, 2011 U.S. Dist. LEXIS 149800, at *14-15 (D. Utah Dec. 30, 2011)(awarding plaintiff $2,500 in economic damages and $5,000 in emotional distress damages

for PHA's action in refusing to issue her a voucher and moving packet after she received eviction notice from landlord); Rayburn v. City of Phoenix Housing Department, No. CV06-1590-PHX-SRB, 2008 U.S. Dist. LEXIS 123699, at *9-11 (D. AZ. May 23, 2008) (awarding plaintiff $2,440 for loss of Section 8 housing assistance for eight months and $8,000 in emotional distress damages for wrongful termination). If the court finds that valid grounds for termination existed but the PHA violated procedural due process, the participant may recover nominal damages. See Edgecomb v. Housing Authority of the Town of Vernon, 824 F.Supp. 312 (D. Conn. 1993) (awarding nominal damages of $1.00); Taylor v. City of Decatur, Alabama, Housing Authority, No. CV-09-S-1279-NE, 2010 U.S. Dist. LEXIS 144770, at *27-28 (N.D. Ala. Dec. 2, 2010) (finding that plaintiff not entitled to any more than nominal damages for due process violations because plaintiff subsequently pled guilty to drug-related criminal activity warranting new voucher termination proceeding).

e. Damages Against PHA Employees. In addition, if a PHA employee violated well established law, then suit against that employee in his individual capacity is appropriate. See Davis v. Mansfield Metropolitan Housing Authority, 751 F.2d 180, 186 (6th Cir. 1984) (denial of application; upholding $900 award against the PHA executive director who actively participated in unconstitutional denial of application); Baldwin v. Housing Authority of City of Camden, 278 F.Supp.2d 365, 387-89 (finding fact questions precluded summary judgment for executive director on his claim of qualified good faith immunity); Hill v. Ypsilanti Housing Commission, No. 09-13562, 2010 U.S. Dist. LEXIS 82556, at *21-24 (E.D. Mi. Aug. 10, 2010)(denying defendants' motion for summary judgment on basis of qualified immunity; plaintiff adequately alleged violation of clearly established constitutional right); Woods v. Willis, No. 3:09CV2412, 2010 U.S. Dist. LEXIS 108197, at *22-25 (N.D. Ohio Sept. 27, 2010)(refusing to dismiss claims against employees sued in individual capacities); but see, Boykins v. Community Development Corp. of Long Island, No. 10-CV-3788 (JS) (ARL), 2011 U.S. Dist. LEXIS 28650, at

*21-23 (E.D. N.Y. March 21, 2011) (dismissing claims against employee who sent insufficient termination notice and employee who provided an affidavit of results of investigation); Pratt v. Housing Authority of City of Camden, No. 05-0544(NLH), 2006 U.S. Dist. LEXIS 70575, at 37-39 (D. N.J. Sept. 27, 2006) (holding that four named PHA employees entitled to qualified immunity from liability for violating plaintiff's due process rights); Lawrence v. Town of Brookhaven Dep't of Housing, Community Development & Intergovernmental Affairs, No. 07-CV-2243, 2007 U.S. Dist. LEXIS 94947, at 55-58 (E.D. N.Y. Dec. 26, 2007) (reserving decision on whether the Section 8 coordinator was entitled to qualified immunity).

f. Hearing Officer Immunity. See Lopez v. Johnson, No. 1:09-cv-02174-LJO-JLT, 2010 U.S. Dist. LEXIS 72410, at *7-8 (E.D. Calif. July 19, 2010); Woods v. Willis, No. 3:09CV2412, 2010 U.S. Dist. LEXIS 108197, at *25-30 (N.D. Ohio Sept. 27, 2010)(hearing officer entitled to quasi-judicial immunity).

When the participant has been wrongfully terminated and has paid the landlord the full monthly rent to remain in possession after the termination, the participant may recover from the PHA under § 1983 the monthly housing assistance payments the PHA failed to pay. See DeProfio v. Waltham Housing Authority, No. 07-1498, 2007 Mass. Super. LEXIS 306, at *16 (Mass. Super. Ct. July 17, 2007); but see Evans v. Hous. Auth. of City of Raleigh, N.C., No. 5:04-CV-291-FL, 2008 U.S. Dist. LEXIS 48950 (E.D. N.C. June 25, 2008) (finding no actual damages and awarding nominal damages of $1.00, court costs, and attorney's fees; declining to award plaintiff the unpaid voucher subsidy for period that voucher was illegally terminated, reasoning that the lease did not remain in effect after the termination of the voucher and the landlord permitted the plaintiff to stay so long as she paid her monthly share of the rent under the terminated contract).

g. Attorney's Fees. See Woods v. Willis, 986

F.Supp.2d 900 (N.D. Ohio 2013) (awarding fees of $38,704 to plaintiff's counsel in wrongful § 8 voucher termination case; plaintiff had asked for $82,986 in fees).

h. No Claim Against HUD. Actions challenging a § 8 voucher termination must be brought against the PHA. A participant has no claim against HUD, because HUD's oversight is committed to agency discretion and the participant has an adequate remedy against the PHA. Copeland v. United States, No. 08-60588-CIV-Cohn/Seltzer, 2008 U.S. Dist. LEXIS 103072, at *15-18 (S.D. FL. Dec. 22, 2008) (dismissing lawsuit against HUD in case in which HUD had investigated termination and notified the plaintiff that the termination was in accordance with the law.)

M. Delay by PHA in Terminating Assistance. See Morrow v. Chicago Housing Authority, No. 1-13-2706, 2014 WL 5242603 (Ill. App. Oct. 14, 2014) (unpublished). Here the court addressed whether the PHA was equitably estopped from terminating plaintiff's assistance on the basis of an eviction because more than two years had passed since the eviction and she had moved into another subsidized apartment. Id. at *18-19. The court concludes that the PHA was not estopped and the delay was to the benefit of the plaintiff since she continued to receive subsidized rent. Id. at *19.

VI. Examples of Voucher Termination Decisions.

A. Termination for Eviction by the Landlord. A participant may be terminated if the participant is evicted by the landlord. See 24 C.F.R. § 982.552(c)(1)(ii) (2015). But, the family is entitled to a pre-termination hearing; the PHA may not simply terminate upon the basis that a court has evicted the participant.

1. Eviction means "physically evicted, not legal process permitting an eviction." DeProfio v. Waltham Housing Authority, No. 07-1498, 2007 Mass. Super. LEXIS 306, at *13-14, n. 10 (Mass. Super. Ct. July 17, 2007) (refusing to accept PHA's argument that tenant is considered evicted by virtue of having signed an agreed judgment giving landlord possession, with

tenant right to remain for two additional months contingent upon making rent payments; reversing voucher termination by PHA); see also Martinez v. Ball, 721 S.W.2d 580, 581 (Tex. App. – Corpus Christi 1986, no writ) ("To constitute an eviction, or constructive eviction, the tenant must be permanently deprived of the premises."); Banks v. Housing Authority of City of Omaha, 795 N.W.2d 632 (Neb. 2011) (sidestepping issue whether plaintiff could be terminated for having been evicted when he moved prior to court hearing on the eviction; affirming termination because of violent criminal activity); Morford-Garcia v. Metropolitan Council Housing and Redevelopment Authority, No. A08-2203, 2009 Minn. App. Unpub. LEXIS 1334, at *3-6 (Minn. App. Dec. 22, 2009) (holding that substantial evidence supported hearing officer's decision that the participant had been evicted because writ was issued and posted after the participant failed to vacate in accordance with an agreement announced in court in an eviction action; court rejected argument that no eviction occurred because the writ was subsequently canceled).

2. See Colvin v. Housing Authority of City of Sarasota, 71 F.3d 864 (11th Cir. 1996) (per curiam). In this case the PHA terminated plaintiff's Section 8 subsidy after she was evicted from her unit without giving her an opportunity for an administrative hearing on the termination. Plaintiff claimed that the PHA's actions violated due process and the federal regulations for the Section 8 Existing Housing Program. The court rejects the due process claim, finding that the state court eviction proceeding provided the plaintiff with all the process to which she was due. Id. at 866. But the court holds that the plaintiff had a right to a hearing on the termination, and the state court proceeding did not satisfy that right. This is clearly correct. Moreover, the issue in the eviction suit (whether a lease violation has occurred) is different from the issue presented by termination of the Section 8 subsidy.

3. Gray v. Allegheny County Hous. Auth., 8 A.3d 925 (Pa. Commw. Ct. 2010). Here the Section 8 participant challenged a hearing officer's decision terminating his voucher assistance after a judgment of eviction

was entered against him for unpaid rent and court costs. Mr. Gray subsequently paid the judgment but after he had been evicted. The trial court reversed the termination, and the PHA appealed. The appellate court held that the hearing officer wrongly concluded that an eviction established a per se serious lease violation for which termination was mandated. Id. at 930. Because Mr. Gray would not have been evicted had he paid the judgment by the date given by the eviction court, the appellate court held that whether the landlord had influenced him not to pay was relevant to whether his failure to pay rent was a serious lease violation. It remanded the case for a determination of whether Mr. Gray did not pay the judgment by the date given by the eviction court, because the landlord had told him he would still be evicted. Id. at 929-30.

4. Cole v. Metropolitan Council HRA, 686 N.W. 2d 334 (Minn. Ct. App. 2004) (upholding § 8 termination when tenant evicted by default judgment for excessive damages and drug activity; rejecting argument that hearing officer should have considered hardship on grounds that regulations mandate termination in event of an eviction).

5. The court's holding in Cole that it was proper for the hearing officer not to consider mitigating circumstances or hardship because the regulations mandate termination in the event of an eviction is erroneous. The regulations do say that "[t]he PHA **must** terminate program assistance for a family evicted from housing assisted under the program for serious violation of the lease." 24 C.F.R. §982.552(b)(2) (2015) (emphasis added). But, a fair reading of that section in conjunction with the section allowing the consideration of circumstances, see §982.552(c)(2), is that the PHA must initiate termination proceedings, but nothing precludes the hearing officer from considering all circumstances.

6. See Landry v. Maine State Hous. Auth., No. 07-AP-076, 2008 Me. Super. LEXIS 136 (Me. Super. Ct June 26, 2008) (affirming a decision by the PHA to disregard a hearing officer's decision that set aside a voucher termination by the PHA for eviction for nonpayment of

rent; concluding that nonpayment of rent is serious lease violation and PHA must terminate voucher and therefore properly disregarded hearing officer's decision).

7. Eviction For Holding Over After Expiration of Lease Term. See Wilhite v. Scott County Housing and Redevelopment Auth., No. A07-2103, 2008 Minn. App. LEXIS 397, at *4-10 (Minn. Ct. App. July 13, 2008) (holding that failure to vacate the premises at end of lease term constituted serious lease violation for which voucher assistance may be terminated). The court acknowledges the harsh consequences but explains that the tenant had been warned she would terminated if she did not vacate; there was no evidence she attempted to communicate to the PHA or the landlord about her difficulty in vacating the premises; there was no indication that the tenant was actively seeking alternative living arrangements; and there was no evidence that an emergency or unforeseen events prevented her from vacating. Id. at *10. Thus, in a termination on this basis, such evidence is crucial.

8. Eviction When Tenant Not Under HAP Contract. Sometimes a family is evicted after the HAP contract has expired and the PHA has stopped making payments. If the PHA tries to terminate the voucher in such a case, the advocate should argue that no basis exists to terminate assistance because at the time of the eviction, the participant was not under an existing HAP contract and thus was not evicted from "federally assisted housing" as is required under the regulation. See 24 C.F.R. § 982.552(c)(1)(ii) (2015).

B. Termination of Participation for Fraud, Failure to Report Income, and Side Payments.

1. Fraud. See 24 C.F.R. Part 792 (2015) (defining fraud and abuse under the Section 8 Program). HUD has recognized that there is a difference between fraud and tenant error or omission and tenants should not be terminated for tenant error or omission. See United States Department of Housing and Urban Development, *Housing Choice Voucher Program Guidebook 7420.10G*," at chp. 22 (April 2001).

a. See Basham v. Freda, 805 F.Supp. 930 (M.D. Fla. 1992), aff'd. without opinion, 985 F.2d 579 (11th Cir. 1993) (unpublished table decision)(upholding termination for fraudulently concealing changes in income).

b. See Zajac v. Altoona Housing Authority, 626 A.2d 1271 (Pa. Commw. Ct. 1993), appeal denied, 641 A.2d 591 (Pa. 1994). In this case the court upholds a termination from the Section 8 Program for fraud. It finds that the evidence supported the Housing Authority's finding that the Section 8 participant knowingly failed to report the income of an individual who was staying with her.

2. Criminal Fraud. See United States v. Petruk, 484 F.3d 1035 (8th Cir. 2007) (upholding a trial court determination that former Section 8 participant liable for restitution to HUD for $45,441 in section 8 voucher subsidies wrongfully paid because of fraud; the defendant had pleaded guilty to conspiring to fraudulently obtain federal housing subsidies); United States v. Ware, 404 Fed. Appx. 133 (9th Cir. 2010) (affirming conviction for understating income to obtain Section 8 housing voucher benefits); Ohio v. Rhodes, No. 90620, 2008 Ohio App. LEXIS 4606 (Ohio Ct. App. Oct. 23, 2008) (affirming conviction of section 8 participant on tampering with records charge for providing false information about family income and composition).

3. Termination for Failing to Report Income. See Peterson v. Washington County Housing and Redevelopment Authority, 805 N.W.2d 558, 561-62 (Minn. Ct. App. 2011) (upholding termination for failing to report income within five-day deadline); Matter of Cappiello v. Mechanicville Housing Authority, 915 N.Y.S.2d 753 (N.Y. App. Div. 2011) (upholding termination for reporting only about 60% of income over two-year period); Frey v. New York City Department of Housing Preservation and Development, No. 402490/10, 2011 N.Y. Misc. LEXIS 2253 (N.Y. Sup. Ct. May 10, 2011) (upholding termination for failing to report daughter's income on recertification forms; noting that hearing officer was not required to consider effects of subsidy termination on participant and her children);Colliers

v. Dakota County Development Agency, A06-1993, 2007 Minn. App. Unpub. LEXIS 1110 (Minn. Ct. App. Nov. 20, 2007) (upholding termination for failing to report employment for four years; rejecting claim that memory problems impaired participant's ability to report income and employment); Rawlings v. Washington County Housing Redevelopment Authority, A06-1257, 2007 Minn. App. Unpub. LEXIS 710 (Minn. Ct. App. July 17, 2007) (upholding termination for failing to report household member's employment for two years; holding that PHA did not have to establish that the voucher holder knew of the household member's unreported income).

4. Unintentional Errors in Providing Information.

a. See McClarty v. Greene Metropolitan Housing Authority, 963 N.E.2d 182 (Ohio Ct. App. 2011)(reversing termination for failure to report income; holding that voucher termination requires a finding of an intent to deceive or a pattern of deception); Smith v. Hamilton County, Ohio, No. C-060315, 2007 Ohio App. LEXIS 1603, at *13-15 (Ohio Ct. App. April 13, 2007)(PHA may not terminate participants who make "trivial or minor errors in filling out required forms"); contra Eddings v. Dewey, No. 3:06CV506-HEH, 2006 U.S. Dist. LEXIS 74373 (E.D. Va. October 2, 2006), aff'd., 261 Fed. Appx. 638 (4th Cir. 2008) (per curiam) (no federal regulation, policy, or local policy prohibits termination of voucher for unintentional violation).

b. In Smith v. Hamilton County, *supra,* the appellate court reverses a trial court decision upholding Smith's termination for failing to state on recertification forms that she did not have custody of her two children; the children stayed with her only on weekends, holidays, and during the summer. The court concludes that the correct legal standard is whether the participant acted fraudulently, disagreeing with the trial court that had held the PHA needed only to show that the participant had made inaccurate statements on her application and that fraud was not relevant. See id., 2007 Ohio App. LEXIS 1603, at *7, *15. Applying the legal standard, the court holds that the participant had

not acted fraudulently in listing the children as household members because they spent weekends, holidays, and summers with her. Id. at *17. This is a very good decision, with the court refusing to allow termination for a participant's failure to supply complete information.

c. See Bush v. Mulligan, 869 N.Y.S.2d 569 (N.Y. App. Div. 2008). In this case the voucher holder began receiving Social Security benefits in July 2004, but she did not report the income to the PHA until her recertification in February 2005. The hearing officer terminated her from the program for failing to report the income change. The court reverses on the basis that the evidence showed the participant suffers from vascular dementia, a progressive disease that affected her memory and ability to handle her affairs. In light of this evidence, the court says that the decision to terminate the participant based upon fraud was not supported by substantial evidence and termination would shock one's sense of fairness.

d. See Fyksen v. Dakota County Community Development Agency, No. A08-0372, 2009 Minn. App. Unpub. LEXIS 252, at *5-7 (Minn. Ct. App. March 10, 2009)(reversing termination of voucher assistance on ground that participant's negative response to recertification question asking whether she had ever been arrested or convicted for violent activity did not constitute grounds for termination when criminal conviction was fifth-degree assault that requires mere infliction of bodily harm; court reasoned that such assault did not fall within definition of "violent criminal activity" under the regulations).

5. Enterprise Income Verification (EIV) System).

Effective January 31, 2010, HUD began requiring PHAs to use its EIV System. *See* 24 C.F.R. § 5.233 (2015). This is the program under which HUD reports to PHAs all income from all sources reported on all members of a subsidized household. See id. § 5.234.

HUD has operated the EIV system under a series of notices. The first notice – PIH 2010-19(HA) was

issued on May 17, 2010. HUD extended this Notice again on January 9, 2015, with the issuance of Notice PIH 2010-19(HA) which is effective "until amended, superseded, or rescinded." See Notice PIH 2015-02 (HA) (Jan. 9, 2015). Prior to issuance of this Notice, HUD had previously issued the following notices applicable to the voucher program – PIH 2013-13(HA) -- on June 1, 2013, extending Notice PIH 2010-19(HA) until August 31, 2013, and another notice -- PIH 2013-23(HA) -- on August 30, 2013, extending Notice PIH-2010-19(HA) until September 1, 2014.

See also 76 Fed. Reg. 56781 (Sept. 14, 2011) (Notice of computer matching program between HUD and Social Security Administration); HUD Notice PIH 2012-10(HA), *Verification of Social Security Numbers, Social Security and Supplemental Security Income Benefits; and Effective Use of the Enterprise Income Verification (EIV) System's Identity Verification Report*, (issued Feb. 14, 2012) (effective until amended, superseded, or rescinded). This is the program under which HUD reports to subsidized owners all income from all sources reported on all members of a subsidized household. See id. § 5.234.

HUD has included procedural safeguards in the EIV System prohibiting PHAs from terminating assistance or taking any adverse action against an individual based solely on the data in the EIV system. See 24 C.F.R. § 5.236(b) (2015). The PHA must notify the participant of the results of any third party verification. Id. § 5.236(c). The participant may contest the findings. Id. Any termination of the voucher or reduction in assistance must be implemented in accordance with the procedures set forth in HUD notices and the regulations governing the voucher program. Id.

Notice PIH 2010-19 (HA), as extended, requires that participants reimburse the PHA when they were charged less rent than required under HUD's regulations because they failed to correctly report income. Id. at ¶ 16 (on p. 14). The Notice provides that a tenant may repay by entering into a repayment agreement. Id. It also provides that the monthly payment plus the amount of rent the tenant pays

"should be affordable and not exceed 40 percent of the family's monthly adjusted income." Id. (on p. 15). But the Notice further states that "PHAs have the discretion to establish thresholds and policies for repayment agreements in addition to HUD required procedures." Id.

In terminations based on information obtained by the PHA through the EIV system, advocates will have defenses when the PHA fails to adhere to the Notice requirements.

6. Additional Rent Payments.

a. Landlord Fraud. HUD identifies the collection of extra or "side" rent payments as landlord fraud but not as tenant fraud. See Housing Choice Voucher Program Guidebook, at § 22.2 (chart).

b. Tenant Culpability. See Dowling v. Bangor Housing Authority, 910 A.2d 376 (Me. 2006) (upholding voucher termination for participation in side agreement to pay landlord additional rent in exchange for which tenant moved into better mobile home than the one she initially contracted to rent; finding that tenant violated her obligation to supply true and complete information and also committed fraud); U.S. ex rel. Stearns v. Lane, No. 2:08-cv-175, 2010 U.S. Dist. LEXIS 96981 (D. Vt. Sept. 15, 2010) (denying Section 8 participant any recovery under False Claims Act because she participated in the illegal side payments scheme).

c. Qui Tam Action Under False Claims Act.

i. When a landlord charges extra rent through illegal side payments, a tenant may file a qui tam action under 31 U.S.C. § 3729 asserting claims against the landlord under the False Claims Act. See e.g. U.S. ex rel. Richards v. R & T Investments LLC, 29 F.Supp.3d 553 (W.D. Pa. 2014) (denying motion to dismiss; Section 8 voucher plaintiff stated False Claims Act claim with her contention that landlord charged her side payment of $118 per month for eleven month and required her to pay for water and sewage services in violation of the HAP

contract); U.S. ex rel. Sutton v. Reynolds, 564 F.Supp.2d 1183(D. Or. 2007) (denying landlord's motion for summary judgment; finding material fact issue with respect to whether additional $30 monthly fee collected by landlord was illegal "side rent;" holding that plaintiffs stated claim for violation of False Claims Act); Coleman v. Hernandez, 490 F.Supp.2d 278 (D. Conn. 2007) (charging an additional $60 per month for water usage was an illegal side payment because it was not included in the HAP contract; granting default judgment for tenant in False Claims Act suit against landlord and awarding tenant damages of $10,224 on *qui tam* False Claims Act for rent overcharges of $360); U.S. ex rel. Smith v. Gilbert Realty Co., Inc., 840 F.Supp. 71 (E.D. Mich. 1993) (illegal side payments; determining the amount owed under False Claims Act); U.S. ex rel. Mathis v. Mr. Property, Inc., No. 2:14-cv-00245 (D. Nev. March 10, 2015) (charging of additional $150 pool maintenance fee not included in the HAP contract is illegal side payment); U.S. ex rel. Wade v. DBS Investments, LLC, No. 11-cv-20155, 2012 U.S. Dist. LEXIS 122734 (S.D. Fl. Aug. 29, 2012) (finding violation of False Claims Act in landlord's action in charging § 8 tenant additional rent of $200 per month); see also, National Housing Law Project, *Challenging Voucher Side Payments Under the False Claims Act*, 37 Housing Law Bulletin 156 (Sept. 2007).

ii. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 10104(j)(2) (amending 31 U.S.C.A. § 3730(e)(4)(A) (West Supp. 2015) (providing for mandatory dismissal of False Claim Act lawsuit, unless opposed by the Government, if substantially the same allegations as alleged in the action were publicly disclosed); Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1621-25 (May 20, 2009)(amending 31 U.S.C. § 3729 and effectively overruling the United States Supreme Court decision in Allison Engine Co.,

Inc. v. U.S., 553 U.S. 662 (2008), which had held that a plaintiff asserting a claim under 31 U.S.C. §3729(a)(2)must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim and that a plaintiff asserting a claim under §3729(a)(3) must show that the conspirators agreed to make use of the false record or statement to achieve this end).

iii. See also U.S. v. Westchester County, 668 F.Supp.2d 548 (S.D. N.Y. 2009) (holding that a governmental entity that falsely certifies to HUD that it will affirmatively further fair housing as a condition of receipt of federal funds may be liable under the False Claims Act); but see U.S. ex rel. Newell v. City of St. Paul, 728 F.3d 791 (8th Cir. 2013) (upholding dismissal of False Claims Act claims on basis of public disclosure bar in lawsuit asserting that city falsely certified compliance with section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. § 1701u, in applying for and obtaining HUD grants); U.S. ex rel. Lockey v. City of Dallas, Texas, 576 Fed. Appx. 431 (5th Cir. 2014) (per curiam) (rejecting False Claims Act lawsuit alleging that city falsely certified it affirmatively furthered fair housing; finding that lawsuit allegations had been publicly disclosed and that plaintiff was not original source of the information); U.S. ex rel. Washington v. City of New Orleans, No. 09-7244, 2012 WL 956497 , at *3-5 (E.D. La. March 19, 2012) (rejecting False Claims Act lawsuit premised upon allegation that city had falsely certified that it was affirmatively furthering fair housing; finding city had not falsely certified about its efforts to affirmatively further fair housing).

C. Termination for Drug-Related Criminal Activity or Violent Criminal Activity or Other Criminal Activity that Threatens the Health, Safety or Right to Peaceful Enjoyment of Other Residents and Persons Residing in the Immediate Vicinity.

1. Regulations. See 24 C.F.R. § 982.551(l), § 982.553(b)(2015); 24 C.F.R. § 5.100 (2015) (definitions of "guest", "other person under the tenant's control","premises","drug-related criminal activity", and "violent criminal activity"; 24 C.F.R. § 982.310(b), (c)(2015) (grounds for eviction by owner for drug-related conduct and criminal conduct).

2. Use of Criminal Record. See 42 U.S.C.A. § 1437d(q)(2) (West 2012); 24 C.F.R. § 982.553(d)(2) (2015). When the PHA proposes to terminate assistance for criminal activity as shown by a criminal record, it must provide the subject of the record and the tenant with a copy and provide an opportunity to dispute the criminal record. Id. In Bey v. Richmond Redevelopment and Housing Authority, No. 3:13CV464-HEH, 2013 U.S. Dist. LEXIS 112835, at *19-23 (E.D. Va. Aug. 9, 2013), the court, ruling on a motion to dismiss, refused to dismiss a claim based on the allegation that the PHA did not give the plaintiff a copy of the criminal record used to terminate plaintiff's voucher.

3. "Violent Criminal Activity". This is defined by HUD as meaning "any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage." Id. at § 5.100 (definitions).

   a. See Young v. Maryville Housing Authority, No. 3:09-CV-37, 2009 U.S. Dist. LEXIS 56539, at *18-20 (E.D. Tenn. July 2, 2009) (holding that an assault charge, as distinguished from aggravated assault, under Tennessee law does not include serious bodily injury and thus, the PHA could not terminate plaintiff's voucher on ground that the assault constituted "violent criminal activity" as defined in the regulations).

   b. The Supreme Court held in an immigration case with the identical statutory language that crimes involving driving while intoxicated that cause bodily injuries do not constitute violent criminal activity. See Leocal v. Ashcroft, 543 U.S. 1, 125 S. Ct. 377, 160 L. Ed.2d 271 (2004). The Court

reasoned that the ordinary meaning of "violent criminal activity" suggests a higher degree of intent than negligence or accidental conduct. See also Rodriguez v. Holder, 705 F.3d 207 (5th Cir. 2013) (holding that under immigration law a conviction for attempted sexual assault was not a crime of violence). These cases may be of help in appropriate Section 8 voucher termination cases.

c. Reasonable Accommodation & Violent Criminal Activity. See Super v. D'Amelia & Associates, No. 3:09cv831 (SRU), 2010 U.S. Dist. LEXIS 103544 (D. Conn. Sept. 30, 2010). In Super a former Section voucher participant filed suit after her voucher was terminated when she pleaded guilty to first degree assault. At the termination hearing she requested that the PHA grant her a reasonable accommodation to permit her to maintain her rent subsidy while she underwent court-ordered mental health treatment. The hearing officer ruled that Super's assault conviction "eliminated her Section 8 eligibility and that no accommodation could be made for her." Id. at *7. Super filed suit. The court refused to dismiss the case, reasoning that "[a]n extension of Section 8 benefits can serve as an accommodation when there is evidence to support the plaintiff's contention that continued rental subsidies will effectively allow her to use and enjoy her dwelling without posing a threat to her neighbors and the public." Id. at *27-28.

d. Powell v. Housing Authority of City of Pittsburgh, 812 A.2d 1201 (Pa. 2002) (upholding section 8 voucher termination for violent criminal activity by members of the household although it did not occur near the premises). Note, however, that in evictions of voucher tenants, the regulations require that the criminal activity have occurred near the premises. Compare 24 C.F.R. §982.551(l) (2015) (permitting termination for "violent criminal activity") with § 982.310(c)(2)(i)(C) (2015) (allowing for eviction for any "violent criminal activity on or near the premises").

e. Threats – Violent Criminal Activity? See Meyer v. Dakota County Community Development Agency, 2007 Minn. App. Unpub. LEXIS 968 (Minn. Ct. App. Sept.

18, 2007) (reversing Section 8 termination for violent criminal activity consisting of written threat to attack local police department; court finds that the evidence before the hearing officer did not show that the participant was reasonably likely to carry out the threat and thus the "threat" did not constitute violent criminal activity).

f. Criminal Trespass and Violation of Probation – Violent Criminal Activity? See Matter of Hallman v. Rosenblum, No. 15471/10, 2010 N.Y. Misc. LEXIS 5238 (N.Y. Sup. Ct. Oct. 20, 2010) (reversing termination on ground that such activity does not constitute violent criminal activity and did not threaten health or safety of other residents).

g. See Bailey v. Haley, 459 Fed. Appx. 152 (3d Cir. 2012) (affirming denial of preliminary injunction in termination for spraying an individual with mace and attempting to hit her with an automobile).

4. Drug-Related Criminal Conduct. The regulations allow for termination of assistance for illegal use of a drug by any household member. 24 C.F.R. 982.553(b) (2015); Kelly v. Topeka Housing Authority, No. 04-4069-JAR, 2004 U.S. Dist. LEXIS 21200, at *10-11 (D. Kan. Oct. 13, 2004) (upholding termination of participant for son's drug-related activity; son arrested and placed on diversion for drug charges; no conviction required). This **does not extend to guests** or other persons under the tenant's control. See 24 C.F.R. 982.553(b) (2015). Thus, if a guest has engaged in illegal use on the premises, it is not a permissible ground to terminate the family's subsidy under this section of the regulations.

a. But, participants may also be terminated for "serious or repeated violation of the lease." Id. at § 982.551(e). The section 8 tenancy addendum that is required by §982.308(f) prohibits "drug-related criminal activity engaged in, on or near the premises by any tenant, household member, or guest, or such activity engaged in on the premises by any other person under the tenant's control." Id. at 982.310(c). In such cases, it is important to draw to the PHA's attention the difference and

to argue that the distinction evidences HUD's intent that families not lose their voucher subsidy for actions of guests. HUD intended to give owners the power to evict but in such cases, but obviously viewed termination of the subsidy in a different light.

b. Decriminalization and Effect on Termination. In Figgs v. Boston Housing Authority, 14 N.E.3d 229 (Mass. 2014), the court upheld the termination of assistance on the basis that Ms. Figgs had committed a serious lease violation because of evidence of criminal activity in her apartment. Id. at 232. The police had executed a search warrant at Figgs's apartment in connection with a criminal investigation of her brother and had found two plastic bags of marijuana, a pistol, and ammunition. Id. at 231. The court concludes this was sufficient to justify the termination of assistance. Id. at 241. The court reached this conclusion notwithstanding the enactment of a state law which had decriminalized the possession of one ounce of less of marijuana. Id. at 232. Importantly, the court notes in a footnote that it is not deciding whether evidence of only the simple possession of one ounce or less of marijuana would constitute a serious lease violation. Id. at 241, n. 21. It further notes "[a]lthough we question whether such a termination could withstand an abuse of discretion analysis," it is not addressing the question. Id.

c. HUD has given some indication of what it means by "near." See 60 Fed. Reg. 34660, 34673 (July 3, 1995) (comments to final rule) ("In general, this standard would cover drug crime in a street or other right of way that adjoins the project or building where a Section 8 unit is located.").

d. See Rivera v. Town of Huntington Housing Authority, No. 12-CV-901, 2012 U.S. Dist. LEXIS 74267, at *17-19 (E.D. N.Y. May 29, 2012)(granting preliminary injunction reinstating voucher assistance; noting that "the fact that plaintiff was arrested and that the charges remained pending as of the hearing date does not evidence that she

possessed cocaine," and that plaintiff never admitted to possessing cocaine).

e. See State ex rel. Smith v. Housing Authority of St. Louis, 21 S.W.3d 854 (Mo. Ct. App. 2000) (affirming trial court judgment overturning termination by PHA hearing officer; here the participant claimed that her adult son, who had engaged in drug activity, although listed on her section 8 recertification documents as a household member, did not in fact live with her)

f. See Lawrence v. Town of Brookhaven Dep't of Housing, Community Development & Intergovernmental Affairs, No. 07-CV-2243, 2007 U.S. Dist. LEXIS 94947 (E.D. N.Y. Dec. 26, 2007) (denying preliminary injunction in termination for sale of controlled substance). This case has really unusual facts in that the PHA conducted two hearings. At the first hearing, only the Section 8 participant testified. The hearing officer ruled that because the plaintiff was not given the opportunity to cross examine the arresting officer or the assistant district attorney, she was denied the right to a fair hearing. The hearing officer held the PHA did not establish that the participant had engaged in the sale of an illegal substance. Approximately six months later, the PHA issued another termination letter terminating for the same conduct on the ground that the participant had since pleaded guilty to the sale of a controlled substance. Again, only the participant testified. But, the same hearing officer now upheld the termination on the basis of the guilty plea. Although counsel for the participant argued that the doctrine of res judicata barred the second decision, the court rejected that argument. See id. at *37-39.

5. Termination for Drug-Related Conduct of Individual Not on Lease. See Clark v. Alexander, 894 F.Supp. 261 (E.D. Va. 1995). Here the court upholds the termination of plaintiff's Section 8 subsidy for the drug-related activity of an individual not listed as a member of the household on the lease, but who the hearing officer found was in fact living at the unit. Plaintiff argued that her subsidy could not be

terminated for drug-related activity of a guest but only for such activity of a family member. Although the individual was not listed as a member of plaintiff's Section 8 household or on the lease, the court held that the termination was proper because the hearing officer had found that the person who had engaged in the illegal activity was in fact living at the unit.

Plaintiff also contended that her due process rights had been violated because the hearing officer allowed into evidence hearsay testimony of a confidential informant. The court rejects this argument, noting that Section 887.405(b)(6)(iv) specifically states that the rules of evidence do not apply. Id. at 264-65. The court also notes that the decision was premised on substantial non-hearsay evidence rather than merely on hearsay testimony. Id.

This was a tough case for plaintiff because the facts were not compelling for plaintiff. The court thus showed no inclination to overrule the hearing officer's finding that the "guest" was a member of the household.

(An ***applicant*** may not be denied a voucher because of illegal drug activity of a guest. Williams v. Integrated Community Services, Inc., 736 N.W.2d 226 (Wis. Ct. App. 2007.)

6. Criminal Activity – Non-Violent. Here too the regulations allow for termination of assistance for violent criminal activity or other criminal activity that threatens the health, safety or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises only if committed by a household member. See 24 C.F.R. § 982.553(b)(2); § 982.551(*l*); § 982.552(c)(1)(i) (2015). It does not extend to guests or other persons under the tenant's control. But, again, the section 8 tenancy addendum required by §982.310(f) provides for eviction for the following types of criminal activity (Id. at §982.310(c)(2)):

   a. Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the

premises by other residents (including property management staff residing on the premises);

b. Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; or

c. Any violent criminal activity on or near the premises by a tenant, household member, or guest, or any such activity on the premises by any other person under the tenant's control.

d. Preponderance of the Evidence Test. The PHA may terminate assistance for criminal activity if it determines by a preponderance of the evidence that the participant engaged in the activity, regardless whether she has been arrested or convicted of such activity. Id. at § 982.553(c).

e. Prostitution. See 24 C.F. R. § 982.551(*l*) (2015); See Costa v. Fall River Housing Authority, 903 N.E.2d 1098, 1113 (Mass. 2009) (noting that PHA may terminate assistance for nonviolent criminal activity that threatens health, safety, or right to peaceful enjoyment of other residents and neighbors and that prostitution may constitute such a threat in some circumstances).

7. Termination Based Solely Upon Accusation of a Crime Improper. See Diaz v. Donovan, No. 404959/07, 2008 N.Y. Misc. LEXIS 4570, at *7-8 (N.Y. Sup. Ct. June 25, 2008)("no rational basis for terminating Plaintiff's Section 8 subsidy solely because Plaintiff was once indicted with a crime that was later dismissed.").

D. Termination for Failure to Provide Information of Change in Family Composition.

1. Eddings v. Dewey, No. 3:06CV506-HEH, 2006 U.S. Dist. LEXIS 74373 (E.D. Va. October 2, 2006), aff'd., 261 Fed. Appx. 638 (4th Cir. 2008) (per curiam) (affirming decision of the hearing officer terminating voucher for failing to report change in family composition within thirty days; stating that nothing precluded the PHA from terminating assistance for an unintentional

violation and granting deference to PHA decision). The participant in Eddings first reported that her husband was incarcerated at her annual review six months after he had been incarcerated. The hearing officer declined to exercise discretion and not terminate the subsidy.

2. Kinnaird v. Secretary, Indiana Family and Social Services Admin., 817 N.E.2d 1274 (In. Ct. App. 2004) (upholding § 8 termination for failing to notify PHA of 130-day incarceration).

3. Carter v. Belmont Shelter Corp., No. 03-CV-625, 2005 U.S. Dist. LEXIS 43697 (W.D. N.Y. March 10, 2005) (upholding termination for failing to report change in family composition despite numerous requests) (client proceeded pro se).

4. Lipscomb v. Housing Authority of County of Cook, No. 1-14-2793, 2015 WL 6410292 (Ill. Ct. App. Oct. 22, 2015)(unpublished) (reversing hearing officer decision terminating plaintiff's assistance for failure to timely report that her son and daughter had moved out of the household; remanding for consideration of mitigating factors and intent of plaintiff in failing to timely report).

5. Rodriguez v. Chicago Housing Authority, 35 N.E.3d 1258 (Ill. Ct. App. 2015) (holding that plaintiff violated her family obligation by not promptly notifying the CHA that her son had moved out of the household, but remanding since the hearing officer had erroneously also based termination decision on alleged violation for failure of the plaintiff to notify the CHA of her son's arrest, although she had no obligation to do so because he had moved out of the household).

E. Termination for Failing to Recertify.

1. Ellis v. Ritchie, 803 F.Supp. 1097 (E. D. Va. 1992). The PHA terminated for failure by the participant to reveal a credit union account. The PHA claimed that this violated the obligation to provide recertification information requested by the PHA. The court reversed the termination, reasoning that the participant had complied with all requests to submit

information and thus had fulfilled her family obligations. HUD subsequently revised the regulations in 1995 to undercut the court's decision that fraud or intent required. See 24 C.F.R. § 982.551(b)(4) (2015) ("Any information supplied by the family must be true and correct.").

2. Huberty v. Washington County Housing & Redevelopment Authority, 374 F.Supp. 2d 768 (D. Minn. 2005) (upholding §8 termination for failing to provide documents necessary to recertify; rejecting accommodation request as unreasonable because the effect would be to delay recertification indefinitely).

3. See Carter v. Olmsted County Housing and Redevelopment Authority, 574 N.W.2d 725, 733 (Minn. Ct. App. 1998)(failure to provide tax returns of alleged unauthorized guest cannot serve as basis for termination without some indication that such returns existed; imposing an impossible burden is arbitrary.)

4. See Hassan v. Dakota County Community Development Agency, No. A08-0184, 2009 Minn. App. Unpub. LEXIS 291 (Minn. Ct. App. March 24, 2009))(reversing voucher termination for failure of participant to provide copies of her three most recent pay stubs, because there was no showing that the participant understood she needed to provide the requested pay stubs).

5. See Hassan v. Dakota County Community Development Agency, No. A08-0373, 2009 Minn. App. Unpub. LEXIS 204 (Minn. Ct. App. Feb. 24, 2009))(reversing voucher termination for failure of participant to provide proper tax documents; evidence showed she had made two attempts to submit what she thought the PHA wanted; hearing officer failed to consider all relevant circumstances).

6. See Younger v. Jersey City Housing Authority, No. HUD-L-4139-12, 2013 N.J. Super. Unpub. LEXIS 24, at *19 (N.J. Super. Ct. Law Div. Jan. 7, 2013) (not for publication)(writing that providing recertification packet six days late and missing appointment is minor infraction and "does not seem to create grounds for termination.").

F. Termination for Missing Recertification Appointment.

1. See Cooley v. Housing Authority of City of Slidell, 747 F.3d 295 (5th Cir 2014) (holding that PHA acted arbitrarily in terminating plaintiff's voucher for failure to attend recertification appointment; plaintiff presented evidence of her mother's death and showed she did not timely receive the appointment notice because she was out of town concluding her mother's affairs and on date she received notice of recertification she called to try to reschedule).

2. See Ali v. Dakota County Community Development Agency, No. A08-0112, 2009 Minn. App. Unpub. LEXIS 235 (Minn. Ct. App. March 3, 2009) (unpublished)(reversing voucher termination for failure to attend recertification appointment on ground that failure to attend annual recertification appointment was not permissible ground to terminate assistance under federal regulations; refusing to hold that missing an appointment is per se failure to cooperate in providing required information).

   By comparison, in Thompson v. Housing and Redevelopment Authority of Duluth, A13-0528, 2013 Minn. App. Unpub. LEXIS 942 (Minn. Ct. App. Oct. 15, 2013) (unpublished), the court upheld a voucher termination for the participant's failure to attend monthly recertification appointments. The PHA required that participants reporting zero income appear every month to recertify the zero income. The participant repeatedly failed to appear at the monthly recertification meetings and at rescheduled meetings. Id. at *2. The court held that the failure to appear each month to provide information about income violated the duty under the section 8 regulations to supply any information that the PHA determines is necessary and the duty to supply any information requested by the PHA for use in a regularly scheduled reexamination of family income. Id. at *7-8.

3. The regulations do not specifically list as a family obligation a duty to attend recertification appointments. They do mandate that families supply required information. requested by the PHA for use in

the annual recertification process. See 24 C.F.R. § 982.551(b)(2) (2015). If the sole basis for the termination is the family's failure to attend the annual recertification appointment, this is not a sufficient basis to terminate assistance. This gets more difficult, however, if the PHA lists the basis for termination as refusing to provide required information. In any missed appointment case, the participant should immediately provide, or offer to provide, all requested information to recertify.

4. See Gist v. Mulligan, 886 N.Y.S.2d 172 (N.Y. App. Div. 2009) (acknowledging that the participant violated the rules by failing to appear for a recertification appointment and two subsequent appointments, but finding that termination was "so disproportionate to the offenses committed as to be shocking to one's sense of fairness," because the participant was incarcerated at the time of the appointments and was unable to attend).

G. Termination for Unauthorized Occupants.

1. See National Housing Law Project, *"Unauthorized Occupant" Voucher Terminations: Common Legal Issues*, 42 Housing Law Bulletin 203 (Oct. 2012).

2. Case Examples in Which Courts Reversed Termination for Unauthorized Persons Living in Unit:

a. Basco v. Machin, 514 F.3d 1177 (11th Cir. 2008). The Eleventh Circuit reversed the trial court decision upholding a termination for permitting unauthorized persons to live in the unit, finding that the police reports – one by the unauthorized resident listing the tenant's address as his address and another by the tenant's husband asserting that the unauthorized resident stayed at the unit – were legally insufficient to establish that the alleged unauthorized occupants had resided at Ms. Basco's residence for longer than the periods allowed under the PHA's policies. Id. at 1183-84. Basco is also significant in that the court makes clear that the burden of persuasion at the hearing is on the PHA. Id. at 1181-82.

b. Lane v. Fort Walton Beach Housing Authority, 518

Fed. Appx. 904, 910-13 (11th Cir. 2013) (reversing and remanding dismissal of case by district court; ruling that termination decision based solely on address from sex offender registry showing estranged son's address as plaintiff's home insufficient to establish stay in violation of 14-day limit).

c. See Carter v. Olmsted County Housing and Redevelopment Authority, 574 N.W.2d 725, 731-32 (Minn. Ct. App. 1998)(finding evidence insufficient to show that participant had unauthorized person living with her; overturning termination by PHA); Pittman v. Dakota County Community Development Agency, No. A07-2063, 2009 Minn. App. Unpub. LEXIS 92, at *9 (Minn. Ct. App. Jan. 20, 2009) (reversing and remanding voucher termination for alleged unauthorized guest; hearing decision inadequate because it failed to explain why certain evidence offered by participant was disregarded; hearing officer did not address mail received by alleged unauthorized guest at another address or court order placing unauthorized visitor at another address or social worker's testimony that she had been to participant's unit on number of occasions and had not seen any indication that the alleged unauthorized person lived with her).

d. See Matthews v. Housing Authority of Baltimore City, 88 A.3d 852, 858 (Md. Ct. Spec. App. 2014) (reversing voucher termination for allegedly permitting husband to live in unit as unauthorized occupant because the hearing officer's decision was based on non-household member's use of the address as mailing address); Driver v. Housing Authority of Racine County, 713 N.W.2d 670, 680 (Wis. Ct. App. 2006) (reversing termination for permitting non-household member to use participant's address for mail); Mortle v. Milwaukee County and Milwaukee County Housing Choice Voucher Program, No. 2007AP166, 2007 Wisc. App. LEXIS 1062, at *18-20 (Wis. Ct. App. Dec. 4, 2007) (unreported; no precedential value)(reversing termination for unauthorized person living in the household and remanding for development of adequate record; noting that the hearing examiner's conclusion that

a mailing address is the equivalent of living at that address is inconsistent with previous decision of the appellate court).

3. Case Examples in Which Courts Upheld Termination for Unauthorized Persons Living in Unit:

   a. See Rivas v. Chelsea Housing Authority, No. 10-P-976, 2011 Mass. App. LEXIS 1150 (Mass. App. Ct. Aug. 31, 2011) (upholding termination for permitting mother to live with participant; evidence included letters addressed to mother at Ms. Rivas's address and affidavit Ms. Rivas signed in support of her mother's application stating her mother was living with her at the time). The decision here should be fairly limited to its facts since the evidence included the participant's prior affidavit stating her mother was living with her.

   b. In Thomas v. Hernando County Housing Authority, No. 8:07-cv-1902-T-33EAJ, 2008 U.S. Dist. LEXIS 92941 (M.D. Fla. Nov. 6, 2008), the court, in applying the standard established by Basco, upholds a voucher termination for unauthorized persons and moving without prior approval. The court notes that unlike the facts in Basco there was direct evidence showing that the participant had permitted unauthorized persons to live in the unit and had moved without prior approval. Id. at *25. (The participant represented himself pro se in the federal court lawsuit and did not submit any affidavits to rebut the PHA's summary judgment motion).

   c. Tomlinson v. Machin, No. 8:05-cv-1880-T-30MSS, 2007 U.S. Dist. LEXIS 3032 (M.D. Fla. Jan. 16, 2007)(upholding termination for unauthorized resident where evidence showed the unauthorized individual (1) had listed that address as his address when arrested; (2) used that address on his driver's license; (3) was served with a subpoena at that address; (4) indicated to the court when sentenced to complete a diversion program that he lived at tenant's address). When the ground of termination is an unauthorized resident allegation, it is imperative for the

Section 8 participant to provide the hearing officer with evidence that the individual resides elsewhere to contradict the evidence presented by the PHA. It is not enough to simply have the participant deny that the individual lives with her. It is best to provide testimony both from the alleged unauthorized resident and the person or persons with whom the alleged unauthorized resident actually lives, e.g., a landlord, relative, or friend. If the unauthorized resident is actually listed on a lease elsewhere, it is crucial to provide a copy of that lease to the hearing officer. Here, the court was obviously influenced by the lack of any evidence by the tenant of the unauthorized individual's actual residence other than the tenant's denials and that of one witness who did not have personal knowledge for much of the period at issue.

d. Gammons v. Mass. Dep't. of Housing and Community Development, 502 F.Supp. 2d 161 (D. Mass. 2007). Here, the court denied a request for a preliminary injunction requesting reinstatement of plaintiff's voucher, finding the evidence at the informal hearing sufficient to support termination on the basis that plaintiff's husband did live with her although not included as a member of her household.)

e. Ritter v. Cecil County Office of Housing and Community Development, 33 F.3d 323 (4th Cir. 1994). This is a lawsuit by a Section 8 tenant whose assistance was terminated because she was housing non-family members for periods longer than two weeks. Plaintiff contended that the two-week visitation rule could not serve as a basis for terminating her participation in the Program. Ritter did not take issue with the finding that she had violated the two-week visitation rule but argued that the two-week visitation rule is not provided in the federal regulations and therefore cannot form the basis for termination of Section 8 assistance.

The Fourth Circuit upholds the termination of Ritter's Section 8 assistance. In doing so, it relies on 24 C.F.R. §882.118 (a)(5) which requires

that a family use the dwelling "solely for residence by the Family". The court concludes that the two-week visitation rule is not inconsistent with the HUD regulations prohibiting residency by non-family members and that the adoption of the rule was within the authority of the PHA. The court's reasoning is strained. The regulation (§882.118(a)(5)) was intended to assure that a family use a dwelling for a residence; reading in a prohibition on guests requires imagination.
Ritter also contended that she did not know that violation of the two-week visitation rule could result in termination of Section 8 assistance. The court holds that Ritter had notice because the regulations require that a family use the dwelling solely for a residence; the lease provided for a two-week limitation on visitors; and the administrative plan included the two-week visitation rule. 33 F.3d at 330. Although it seems that Ritter certainly had notice that she might subject herself to eviction for violation of the two-week visitation rule, the court is stretching when it concludes that Ritter had adequate notice that she could be terminated from the Section 8 Program for violation of the two-week visitation rule.

This case is not well-reasoned. The only possible ground for possible termination here would have been fraud. The trial court, however, did not find any fraud. 33 F.3d at 326, n. 2.

f. Hammond v. Akron Metropolitan Housing Authority, C.A. No. 25425, 2011 Ohio App. LEXIS 2241 (Ohio Ct. App. June 1, 2011)(upholding termination; finding that decision supported by preponderance of evidence where evidence at the hearing showed that the participant admitted that the unauthorized guest had been her boyfriend; that he had stayed over approximately one or two nights per week over several months; that she had permitted him to use her address as his mailing address; and that police officer testified that the mother of the boyfriend had complained that he was living with her).

H. Termination Because of Expiration of Voucher Term.

1. See Munford v. Newark Housing Authority, No. 17764-NC, 200 Del. Ch. LEXIS 63 (Del. Ch. April 26, 2000). In this case, the PHA issued Ms. Munford a new voucher after it terminated payments to the landlord for failure to repair and to sign the HAP contract. Ms. Munford was unable to find replacement housing within the sixty day voucher term. The PHA policy provided that no extensions would be granted. Id. at *10. When the PHA denied her request for an extension on the voucher term, Ms. Munford brought suit seeking a preliminary injunction compelling the PHA to reissue and continue her voucher. The court ordered reinstatement of the voucher primarily on the basis that the PHA's Administrative Plan provided that "the family will be assisted in finding another unit" when the HAP contract is terminated because of the landlord's failure to repair. Id. at *7, n. 8. The court held that the PHA had failed to provide any assistance and ordered it to assist Ms. Munford in finding suitable housing and ordered issuance of another voucher with a sixty day term. Id. at *12. This case can be used when the local PHA has similar provisions in its Plan and fails to comply.

2. See United States Department of Housing and Urban Development, "Housing Choice Voucher Program Guidebook 7420.10G" (April 2001). The Guidebook provides that when a voucher term expires, a PHA must comply with its Administrative Plan and that the Plan may (1) require that the family reapply when the PHA begins accepting applications or (2) place the family on the waiting list with a new application date without requiring it to reapply. Id. at chp. , § 8..5 (on p. 8-13).

3. See Matter of Yow v. Donovan, No. 401568/06, 2007 N.Y. Misc. LEXIS 2867 (N.Y. Sup. Ct. April 9, 2007). Yow, a Section 8 voucher holder, was unable to find a landlord willing to lease to her over a six month period. The New York City Department of Housing Preservation and Development ("DHPD") denied her an additional extension on her voucher and terminated her from the Section 8 Housing Voucher Program.

   Under New York law, the decision was subject to judicial review to determine whether it is arbitrary

or capricious and whether it is a reasonable exercise of the agency's discretion.

Yow sued seeking reinstatement and a new voucher. The trial court judge ordered DHPD to reinstate Yow and issue her a new voucher. The court noted that under the regulations PHAs have discretion on the number of voucher extensions that may be granted to a family. But, here the court found DHPD's action arbitrary, because it had failed to consider the guidelines on granting extensions in its Section 8 Administrative Plan in denying Yow's request for an additional extension. The court noted that Yow had twice submitted requests for tenancy approval only to have the landlord back out and that the New York City housing market is extremely difficult for rental applicants. In light of these facts, the court found that DHPD "did not have a sound basis in fact or reason to deny petitioner an extension of her voucher." Id. at *11.

In this case the plaintiff had the advantage of a state law providing for review of the discretionary decision by DHPD. The decision is still remarkable, however, because of the discretion given to PHAs in deciding whether to grant extensions of the voucher term. See 24 C.F.R. § 982.303(b)(1)(2015) (PHA at its discretion may grant a family one or more extensions of the initial voucher term).

4. See Matter of Miller v. Mulligan, 900 N.Y.S.2d 381 (N.Y. App. Div. 2010) (expiration of voucher term; termination of voucher and refusal to grant extension not arbitrary); Matter of Arocho v. Rhea, No. 403253/09, 2010 N.Y. Misc. LEXIS 3140 (N.Y. Sup. Ct. July 7, 2010) (expiration of voucher term and affirming PHA decision not to extend voucher term past one year; no hearing required).

5. PHAs have considerable discretion in deciding whether to grant extensions of the initial voucher term. See 24 C.F.R. § 982.303(b)(1)(2015) (PHA at its discretion may grant a family one or more extensions of the initial voucher term); see also Ely v. Mobile Housing Board, 13 F.Supp.3d 1216, 1226-28 (S.D. Ala. 2014) (holding that after § 8 voucher expires, the property interest ceases and no due process

required), aff'd, 605 Fed. Appx. 846, 849-50 (11th Cir. 2015) (per curiam) (voucher expired by its own force and was not terminated by PHA; thus, the § 8 participant's property interest had lapsed); Burgess v. Alameda Housing Authority, 98 Fed. Appx. 603, 605 (9th Cir. 2004) (plaintiff "is unable to claim an entitlement to a further extension of her Section 8 voucher, as such extensions were discretionary. .. "); (Augusta v. Community Development Corp. of Long Island, Inc., No. 07-CV-0361 (JG) (ARL), 2008 U.S. Dist. LEXIS 103911, at *17-23 (E.D. N.Y. Dec. 23, 2008), aff'd., 363 Fed. Appx. 79 (2d Cir. 2010) (PHA may terminate assistance when voucher expires; no hearing is required).

6. In Pickett v. Housing Authority of Cook County, No. 15-CV-749, 2015 WL 4185943, at *6 (N.D. Ill. 2015), the court reached a different conclusion than the courts in Ely, Burgess, and Augusta, holding that the plaintiff who alleged that her voucher had expired because of circumstances beyond her control, had a legitimate expectation of continued participation and was entitled to a due process hearing. The court also held that the plaintiff had stated a claim against the PHA for acting arbitrarily and capriciously in denying her request for an extension. Id. This is a strong opinion based on compelling facts. Similarly, in Everett v. Housing Authority of City of Shamokin, No. 4:13-CV-1515, 2014 WL 4411603, at *9 (M.D. Pa. Sept. 5, 2014), the court held that even if the plaintiff had no property interest in her expired Section 8 voucher, she "would have a sufficient property interest in a Section 8 rent subsidy voucher as either a 'participant' or 'applicant'" such that she was entitled to a due process hearing.

I. Sex Offenders with Lifetime Registration Requirement.

1. See HUD Notices PIH 2012-28, H 2012-11 (issued June 11, 2012; remains in effect until amended, superseded, or rescinded); H-2009-11; PIH-2009-35(HA) (issued September 9, 2009; expires Sept. 30, 2010) (recommending that owners and PHAs pursue eviction if recertification screening reveals that the tenant or household member is subject to lifetime registration requirement). The notices do not specifically

mention that a PHA should terminate a participant's voucher assistance; they recommend pursing eviction or termination of tenancy.

2. See also, National Housing Law Project, *HUD Heightens Efforts to Restrict Sex Offenders' Access to Subsidized Housing*, 42 Housing Law Bulletin 191 (Sept. 2012).

3. See Perkins-Bey v. Housing Authority of St. Louis County, No. 4:11CV310 JCH, 2011 U.S. Dist. LEXIS 25438 (E.D. Mo. March 14, 2011) (granting preliminary injunction prohibiting PHA from terminating voucher assistance of participant subject to lifetime registration as sex offender, because regulations provide only for denial of vouchers to such persons, and not for termination of assistance).

4. See Miller v. McCormick, 605 F.Supp. 2d 296 (D. Me. 2009) (holding that PHA acted improperly terminating voucher because participant subject to lifetime registration as sex offender; although regulations preclude admission, they do not require termination); Bonseiro v. New York City Department of Housing Preservation and Development, 2012 WL 517198, 950 N.Y.S.2d 490 (N.Y. Sup. Ct. Kings County Feb. 15, 2012)(table) (unreported) (same).

5. See Housing Authority of the City of Hartford v. Kenyatta, No. HDSP-165671, 2013 Conn. Super. LEXIS 1327 (Conn. Super. Ct. June 21, 2013) (citing voucher termination cases in support of its conclusion that an existing public housing tenant with a life-time registration requirement may not be evicted).

6. See also Boddie v. New York City Housing Authority, 873 N.Y.S.2d 509 (N.Y. Sup. Ct. 2008)(denial of application for section 8 housing; noting that even if his application had been accepted, the applicant was barred from obtaining a section 8 voucher because he had a lifetime sex offender registration requirement).

J. Termination Because of Missed Inspection. See DuPont v. Donovan, 873 N.Y.S.2d 510 (N.Y. Sup. Ct. 2008). In this marvelous opinion the court overrules a hearing officer decision upholding a PHA decision to terminate the participant's voucher because she failed to provide access to her apartment on two occasions to allow a housing quality standards inspection by the PHA. The hearing officer held that the participant had violated the requirement that the family "must allow the PHA to inspect the unit at reasonable time after reasonable notice." See 24 C.F.R. 982.551(d) (2015). The court concludes that under the circumstances the penalty of termination "shocks the conscience" and that the violation was a "minor technical violation." Dupont, 873 N.Y.S.2d at *4. The court noted that "ironically, the agency has favored adherence to rigid, technical, procedures in complete disregard of the reasons and policies behind why the regulations were enacted in the first place..." Id. at *5. The court reversed the termination.

K. Termination for Breach of Housing Quality Standards (HQS) Breach Caused by Family. See 24 C.F.R. § 982.551(c), § 982.404(b) (2015). The family is responsible for a breach of the HQS caused by any member of the household or guest resulting in damages to the dwelling unit or premises beyond ordinary wear and tear. The PHA may terminate assistance if the family has caused a breach of HQS. Id. at § 982.404 (a)(4), (b)(3).

When HUD enacted the conforming rule for the Section 8 Certificate and Voucher program, it commented as follows:

"The proposed rule would also have made the family responsible for vermin and rodent infestation caused by trash accumulation from poor family housekeeping. This provision is not included in the final rule.

"Generally, owner leases provide that a tenant must keep the unit in a clean and safe condition, dispose of waste properly, and avoid damage to the unit. An owner may evict if family housekeeping creates a serious or repeated violation of the lease. Under the new rule, the HA may terminate assistance for such violation of the lease. There is no need for a separate provision on termination of assistance because of family housekeeping."

60 Fed. Reg. 34660, 34685 (July 3, 1995) (comments preceding adoption of final rule).

These comments make clear that the HQS violation must be more than ordinary wear and tear damages. PHAs sometime threaten termination if a family does not correct the HQS violation within twenty-four hours. While the regulations provide that the family must correct a life threatening defect caused by the family within twenty-four hours, see 24 C.F.R. § 982.404(b)(2) (2015), they further provide that the family must correct other defects "within no more than 30 calendar days (or any PHA-approved extension)." Id. Thus, it is impermissible for a PHA to terminate assistance because a family does not correct a non-life-threatening tenant-caused HQS defect within twenty four hours.

L. Termination for Not Residing in the Unit.

1. See Matter of Nichols v. Vanamerongen, 901 N.Y.S.2d 437 (N.Y. App. Div. 2010) (affirming termination based in part on two statements under penalty of perjury that participant had been residing in their residence for several months).

M. Termination for Serious or Repeated Violation of the Lease. See 24 C.F.R. § 982.551(e) (2015) (PHA may terminate assistance for "any serious or repeated violation of the lease").

1. Landlord Assertions of Excessive Damages. One issue that may arise is the right of the PHA to terminate the voucher assistance of a family if the landlord claims damages beyond normal wear and use after the family moves. With the conforming rule issued in July 1995, HUD eliminated the right of the owner to

claim reimbursement from the HA for damages or other amounts owed by the tenant under the lease. See 60 Fed. Reg. 34660, 34676 (July 3, 1995). HUD specifically commented as follows:

"The final rule eliminates the right of the owner to claim reimbursement from the HA for damages or other amounts owed by the tenant under the lease. In this respect, the assisted tenancy will function more like an ordinary tenancy in the private market. The owner must look to the tenant for payment of any damages.

"HUD believes that these changes tend to produce significant benefits.

"–The owner can no longer rely on the HA to pay tenant damages or unpaid rent. This change gives the owner a stronger motivation to screen assisted families the same as for unassisted private market tenants, and to check for unit damage during occupancy.

"Since HAs will not pay owner claims, HAs will not deny or terminate assistance for failure to pay such claims. The change will tend to eliminate over time issues concerning denial or termination of a family's assistance for failure to reimburse amounts paid by the HA in owner claims on behalf of the families, including the need for repayment agreements or for hearings to determine whether an owner's claim was properly paid."

Id. at 34676. This language clearly shows that HUD intended that PHAs may not terminate assistance because a family does not pay a landlord for damages to the dwelling unit. A more complicated issue is whether it is permissible for a PHA to terminate assistance on the ground that by damaging the unit (and, implicitly, failing to pay for damages), the family committed a serious lease violation and whether the PHA may consider the family's willingness to pay the landlord a mitigating circumstance that might prevent termination. See 24 C.F.R. § 982.552(c)(2) (2015). To the extent the tenant-caused damages resulted in a breach of HQS, the PHA may terminate. Id. at § 982.404 (a)(4), (b)(3) (2015). But, if the damages do not cause an

HQS violation, the family should maintain that the PHA cannot essentially "back door" termination for the family's failure to reimburse the landlord by terminating on the basis that the family committed a serious lease violation.

In Carter v. Lynn Housing Authority, 880 N.E.2d 778 (Mass. 2008), the PHA terminated the family's voucher assistance after the prior landlord obtained a judgment for damages beyond normal wear and tear. The court does not specifically address whether the PHA had grounds to terminate. That apparently was not an issue on appeal. The opinion assumes the PHA had grounds to terminate because the family caused an HQS violation. The plaintiff centered her appeal on a different issue – the hearing officer's failure to consider mitigating circumstances. See discussion in this outline at section V-I-4. The court does not address the issue of payment by the tenant.

2. Late Payment of Rent Not Serious Lease Violation. See Serna v. Gutierrez, 297 P.3d 1238 (N.M. Ct. App. 2012). Here, in the context of an eviction, the appellate court held that a voucher tenant had not committed a serious lease violation in paying rent late for two months. Id. at 1245. The facts were compelling. The tenant had mailed her July rent payment on July 17 – four days after she received her federal public assistance check. She mailed her August rent on August 3 -- the same day she received her assistance check. Id. at 1240.

3. Failing to Vacate at End of Lease Term. See Eslin v. Housing Authority of the Town of Mansfield, No. 3:11-cv-134, 2013 U.S. Dist. LEXIS 90108, at *19-23 (D. Conn. June 27, 2013). In this case, the court refuses to hold that as a matter of law the failure to vacate following termination of the lease is not a serious lease violation. The court concludes that "a genuine issue of material facts exists as to whether Eslin's failure to vacate constituted a 'serious violation' of her lease," thus precluding summary judgment for plaintiff. Id. at *22. (PHA not obligated to continue to make HAP payments prior to informal hearing on proposed termination when HAP contract has ended).

In Wilhite v. Scott County Housing and Redevelopment

Authority, 759 N.W.2d 252, 255-57 (Minn. Ct. App. 2008), the court held that the plaintiff's failure to vacate the premises at the end of her lease term constituted a serious lease violation. The lease included a phrase requiring that the tenant "give immediate possession" to the landlord upon termination. Id. at 256.

4. Minor Violations. In Wilhite v. Scott County Housing and Redevelopment Authority, 759 N.W.2d 252, 256 (Minn. Ct. App. 2008), the court viewed late payment of rent, boarding an unauthorized pet, and violating homeowner association rules as minor violations as contrasted with failing to vacate at the end of the lease term.

N. Termination for Failure to Obtain Approval to Move from PHA.

See Cain v. Allegheny County Hous. Auth., 986 A.2d 947 (Pa. Commw. Ct. 2009). Here the PHA terminated the participant because she vacated the unit without obtaining approval from the PHA. Ms. Cain argued that the landlord gave her notice to vacate for failing to pay a plumbing bill and rent and she vacated by the date he gave her to vacate. She also testified at the hearing she had notified the PHA she was moving. The appellate court held that although a participant must give the PHA notice prior to moving, it is not grounds for termination that the participant did not obtain prior approval from the move from the PHA. Id. at 952. Because the hearing officer based the decision on failure to obtain approval for a move, the court upholds the trial court decision reversing the termination of the voucher.

O. Termination for Abuse of Alcohol.

See Carroll v. Chicago Housing Authority, 30 N.E.3d 326 (Ill. App. Ct. 2015)(reversing termination for alleged alcohol abuse). Here, the CHA sent notice of termination to plaintiff three years after she pled guilty to driving under the influence of alcohol. Id. at 328. It claimed she had engaged in the abuse of alcohol that threatened the health, safety or right to peaceful enjoyment of the other residents and persons residing in the immediate vicinity of the premises. Id. The appellate court reversed the termination for

a number of reasons. First, it held that the hearing officer erred in putting "great weight" on the fact that the plaintiff had not informed the CHS of the conviction even though she had no obligation to do so. Id. at 333. Second, the court explained that the plaintiff was stopped fifteen minutes away from where she lived and this was not in the immediate vicinity of the premises. Id. at 335. This is a strong well-reasoned opinion.

End