UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REBECCA TAYLOR, et al	:	DOCKET NO. 3:08-cv-557(JBA)
Plaintiffs	:	
V.	:	
THE HOUSING AUTHORITY OF THE	:	
CITY OF NEW HAVEN, et al	:	
Defendants	:	APRIL 22, 2008

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF AND EMERGENCY MOTION FOR PARTIAL SUMMARY JUDGMENT

Since 2006, the defendants have been aware of, and engaged in litigation upon, the claims made on behalf of the plaintiff class in this lawsuit. See Ex. 1, 2, and 3. No genuine issue of material fact or possible defense remains unexplored. Rather, a question of legal accountability is the sole issue to be resolved: Can the defendants be liable for failing to follow HUD's directives to assist disabled Section 8 voucher holders who are unable to effectively search for accessible housing themselves? The attached documentary evidence in the form of public documents, signed correspondence and sworn statements made by the defendants' own staff provides ample evidence that the defendants currently refuse to assist disabled families who request help locating apartments to lease under the section 8 program. In doing so, the defendants choose to operate in a manner that is at odds with HUD's interpretation of the Fair Housing Act Amendments, the Rehabilitation Act, and 24 C.F.R. §8.28(a)(3). The plaintiffs suffering from this legal stand off desperately need to have it resolved as rapidly as possible.

I. FACTUAL BACKGROUND

The plaintiffs set forth all relevant facts in the attached Local Rule 56(a)(1) Statement of Facts.

II. LEGAL STANDARDS

A. Summary Judgment

Summary judgment is available to fair housing plaintiffs where the defendants fail to raise a genuine issue of material fact concerning the existence of a "pattern and practice" discrimination claim. United States v. Incorporate Village of Island Park, 888 F.Supp. 419, 449 (E.D.N.Y. 1995). Summary judgment or partial summary judgment is permitted "if, when '[v]iewing the evidence produced in the light most favorable to the nonmovant ... a rational trier could not find for the nonmovant.' Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir.1991)." Clarkson v. Coughlin, 898 F.Supp. 1019, (S.D.N.Y. 1995); Algie v. RCA Global Communications, Inc., 891 F.Supp. 875 (S.D.N.Y. 1994). All evidence must be viewed in the light most favorable to the nonmoving party, yet the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587(1986).

B. Preliminary Injunction

Preliminary injunctive relief is available to a plaintiff if she is "likely to suffer irreparable harm if the injunction is not granted and 'either (1) likelihood of success on the merits of its case, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in favor' of the party requesting preliminary relief." K.P. v. Juzwic, 891 F. Supp. 703, 710 (D. Conn. 1995). Likelihood of success does not mean certainty of success; a greater than fifty percent probability of success is sufficient. Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985). Housing discrimination "almost always results in irreparable injury." Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1424 (11th Cir.); Ruiz v. New Garden Township, 232 F. Supp. 2d 418, 428-29 (E.D. Pa. 1984). "[W]here a plaintiff demonstrates a likelihood of success on the merits of a fair housing claim, irreparable injury may be presumed." Forest City Daly Housing, Inc. v. Town of Hempstead, 175 F.3d 144, 153)2d Cir. 1999). Violation of a federal statute or regulation is irreparable harm as a matter of law. See Concerned Residents of Taylor Wythe v. New York City Housing Authority, 1996 WL 452432 at *3 (S.D.N.Y. August 9, 1996) (citing Hueblin, Inc. v. Federal Trade Comm'n, 539 F.Supp. 123, 128 (D. Conn. 1982)).

III. ANALYSIS

A. The Defendants Offer Less Housing Search Assistance to the Disabled Than to the Non-Disabled, in Violation of 42 U.S.C. §3604(f).

1. Mobility Counseling Services.

The defendants take the position that "The housing authority does not do housing searches." See Exhibit B to Complaint. They have claimed repeatedly in legal pleadings that providing housing search assistance to Section 8 tenants is so contrary to the vision and purpose of the Section 8 program as to constitute a "fundamental alteration" of it:

> The plaintiffs are asking the Housing Authority to take an action which is outside the requirements of the Section 8 Program. As can be seen from the information contained in the administrative plan for the program, referred to in the Affidavit of Mr. Heinrichs and attached as an exhibit to the Affidavit, there is no requirement under the law that the Housing Authority find a place for any member of the Section 8 program and then move the family to that location." Docket # 55, Gaither v. HANH, 3:07-cv-667 (WWE).

In fact, housing authorities have been assisting Section 8 tenants in with specialized housing searches or in finding hard-to-find types of housing for over two decades, with excellent success. See, e.g., Wallace v. Chicago Housing Authority, 298 F.Supp. 2d 710 (N.D. Ill. 2003) Walker v. HUD, 734 F.Supp. 1231 (N.D. Texas 1989). Search assistance is an important tool in helping the Section 8 program meet its goals of allowing families exercise the freedom to move to unfamiliar neighborhoods, become more fully integrated into mainstream society, and receive numerous benefits like decent quality housing and safer streets. HANH itself has commented on publicly on why Section 8 participants

need search assistance. A 2003 study of local housing needs co-authored by HANH stated: "HANH needs additional housing search assistance resources to serve all section 8 participants who would benefit. HANH considers housing search assistance to be a critical tool for helping participant families to lease-up." Ex. 8 at 44.

So many housing authorities now provide search assistance to certain participants in their Section 8 programs that private companies now exist that offer search assistance to housing authorities nation-wide. See Ex. 23. Yet HANH persists in claiming that providing search assistance to disabled households like Ms. Taylor's would fundamentally alter the Section 8 program. Incredibly, not only do the defendants know very well that such organizations exist, but one mobility counseling company actually lists HANH as a star client on its web site. See Ex 23. The decision by Housing Opportunities Unlimited to feature HANH on its web site as a client reflects HANH's history as a repeat client that has spent hundreds of thousands of dollars on such services between 2004 and 2007. Id. at p. 2; Ex. 9. Unfortunately, those services were rarely offered to disabled families Section 8 who needed to find accessible housing, and then only in response to litigation.

HANH's position is not based on lack of funding. In addition to the $15,000,000 budget surplus currently enjoyed by HANH, see Ex. 10, it had entered into a contract with a mobility counseling firm, Housing Opportunities Unlimited. The contract provided for $100,000 per year to be spent on mobility counseling services for Section 8 participants, from June 2004 through October 2007. See Ex. 7. The existence of this

search assistance contract shows that HANH was always in a position to assist the plaintiffs, and had long been receiving special funding from HUD for this purpose. Thus, the Housing Opportunities Unlimited contract was effective and the mobility counseling services available when the Gaither, Hampton, and Stokes-Hall households first sought a reasonable accommodation in 2006. See Ex. 1, 2, and 3.

Yet the defendants chose not to use the service to serve disabled household until nine months later, after a specific request to do so by a federal judge. On August 28, 2007, when the defendant Commissioners voted to extend mobility counseling services to the Gaither and Stokes-Hall families, each had filed actions against HANH at the Connecticut Commission on Human Rights and Opportunities ("CHRO"), HUD's identified local clearinghouse for discrimination complaints. See Ex. 1 and 3. Ms. Gaither's case had been the subject of three status conference calls with federal Magistrate Judge Holly Fitzsimmons during August of 2007 alone. Accordingly, the August 28, 2007 minutes for the Commission actually specify that this vote occurred because "*HUD has directed HANH to provide immediate relocation services to a specifically named family*."[1] Id. at p.1

[1] Though referred to only indirectly in the August 28, 2007 minutes, at the time of this vote, the Gaither family had informed HANH of their intent to file a motion for preliminary injunction against HANH for failing to offer such services to a disabled household within the next week. They did so on September 4, 2007. The court ruled in the defendants' favor on the issue of mobility counseling on September 19, 2007. Having received word that the Court had ruled in their favor, the defendants stopped providing mobility counseling services to the Gaither family. See Ex.6.

This vote represented a calculated effort by the commissioners to offer the minimum of mobility counseling necessary to appear to have altered the defendants' illegal practices. The minutes make clear that the commissioners did not merely ratify the course recommended by Executive Director Miller. Rather, the minutes include an exchange between Commissioner Solomon and the Reasonable Accommodations Coordinator William Heinrichs in which Heinrichs tries to convince the Commission to assist additional families that he has identified as needing the same mobility counseling services. Id. Even though these families have not taken any legal action against HANH, Heinrichs avers that he has obtained the approval of "management" to use the mobility counseling services to benefit them, and that the language of the resolution is open-ended enough to encompass such an approach. Id. Commissioner Solomon reacts by proposing to revise the resolution, saying "why don't we assist the families specifically named by HUD." Id. The Commissioners then vote in accord with Commissioner Solomon's proposal to provide mobility counseling services *only* those who have commenced legal action against HANH. Id.

The vote to revise the resolution to exclude the additional families in need of assistance was unanimous, despite the fact that the discussion had already made clear that the mobility counseling contract had over $57,000 of unused capacity—funding already budgeted by HANH for such services . Ex. 9 at p. 1. According to the minutes, none of the Commissioners commented in supported of Henrichs' effort to extend mobility counseling to disabled families who had not filed suit. Id. at p. 2. Instead, the

commissioners chose to continue HANH's decades-long practice of blatantly hoarding resources for the benefit of the politically vocal elderly at the expense of the disabled. See HUD 504 Investigative Report, attached as Ex. A to Complaint; Ex. 19.

2. Current Listing of Available, Accessible Apartments

For over two years, the defendants have been told by HUD and numerous other advocates and agencies that they have an obligation to provide disabled Section 8 households with an apartment listing that is at least as complete and up-to-date as the list they routinely provide to non-disabled Section 8 households. Their answer each time has been the same: we will. Each time, HANH claims that they are in the midst of doing a survey of landlords that will finally provide them with an accessible apartment listing. Yet each time another judge or agency prods HANH to produce the results of said survey, they simply promise once again that they are about to complete it. In 2003, a study co-authored by HANH included the following bullet point in a list of actions that it intended to take to improve fair housing in New Haven: "development of an accurate listing of accessible and adaptable housing units available in the City . . . This listing should build upon the existing Housing Authority inventory listing." See Ex. 8 at p. 7. Accordingly, on August 14, 2006, defendant Jimmy Miller represented to the City of New Haven Commission on Disabilities that HANH "will be conducting a survey" on the issue of accessible housing stock for Section 8 participants. See Ex. 19 at p. 2, fourth paragraph. On October 9, 2007, HANH reported to HUD as part of its obligations under the 2007 Voluntary Compliance Agreement that "HANH shall compile a list of units that are

accessible to persons with disabilities. . . . The list will identify what features of such unit are accessible (i.e. wheelchair accessible). The HANH listing form for landlords to list available units has questions addressing this objective. . . We are reviewing this form to make improvements and will conduct a mailing to landlords." See Ex. 13 at p. 2, last two paragraphs. Three months later, on January 30, 2008, William Heinrichs of HANH offered as an update that "I've also drafted and haven't had time to put out yet a questionnaire to all Section 8 landlords asking as to what accessible units they own." See Ex. 6 at p. 14, lines 14-17. And finally, five years after it was first mentioned, on March 27, 2008, the defendants issued Supplemental Compliance to Discovery Requests in which they note that "A copy of a survey sent to 1,444 owners and property managers in the New Haven in regard to rental units. The survey was sent out in February 2008 and as of this time, over 700 responses have been received." See Ex.14 at p. 2, #6(3). Remarkably, after repeatedly claiming that the survey was necessary to create the listing, the defendants still do not offer any apartment listings based on the survey responses. See Ex. 5 and 16 at p. 5.

Ultimately, HANH's empty promises to produce a listing in the future are irrelevant. As other courts have observed, there is a point at which delay in providing housing-related services turns into a denial of those services. Langlois v. Abington Housing Authority, 207 F.3d 43, 48 (1st Cir. 2000); Groome Resources, Ltd., L.L.C. v. Parish of Jefferson, 234 F.3d 192, 199 (5th Cir. 2000); Matyasovszky v. Housing Authority of the City of Bridgeport, 226 F.R.D. 35, 45-46 (D.Conn. 2005). On two

separate occasions in the past four months, HANH staff who were asked by members of the public for the accessible apartment listing responded that there is no such listing. See, e.g., Ex. 5. After two years, the defendants' continual promises to provide a listing in the future have become no more than a technique for distracting from the reality that HANH does not and has never provided the required listing.

3. Repeated Discrimination Shows Sufficient Intent for Liability.

Intent to discriminate can be inferred from a pattern of conduct alone, for purposes of the Fair Housing Act Amendments of 1988. "Factors to be considered in evaluating a claim of intentional discrimination include: "(1) the discriminatory impact of the governmental decision; (2) the decision's historical background; (3) the specific sequence of events leading up to the challenged decision; (4) departures from the normal procedural sequences; and (5) departures from normal substantive criteria." Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 579-80 (2d Cir. 2003). In the present case, the defendants continue to violate the law until sued, and to repeatedly alter their policy only on a case-by-case basis. The defendants' knowledge of the illegality of their policy, combined with a pattern of responses expressly aimed at neutralizing or settling lawsuits rather than adjusting the illegal policy, creates a strong basis for inferring intent to discriminate. Such knowledge is sufficient to show intent under §3604(f)(2)[2] of the Fair

[2] 42 U.S.C. §3604(f)(2) provides that ". . . [I]t shall be unlawful—
(f)(2) To discriminate against any person . . . in the provision of services or facilities in connection with [a] dwelling, because of a handicap of—
(A) that person; or

Housing Amendments Act, and a showing of intent is unnecessary to create liability under §3604(f)(3)[3]. See Id.; accord, Wisconsin Community Services, Inc. v. City of Milwaukee, 465 F.3d 737, 747-50, 753 (7th Cir. 2006).

B. The Defendants Refuse Comply with 24 C.F.R. §8.28(a)(3).

HUD has asked HUD on three separate occasions by HUD to stop violating 24 C.F.R. §8.28(a)(3) by refusing to assist disabled Section 8 participants who need help locating an apartment to lease under the program. See, e.g., Ex. A to Complaint; Ex. 19 and 20. The defendants also openly admit their policy of refusing to provide accessible apartment listings to disabled families or perform housing searches, see Ex. B to Complaint. In light of the amount of energy that HUD and other agencies have put into informing HANH of the specific actions required by 24 C.F.R. §8.28(a)(3), these positions can only be described as willful noncompliance.

1. The Commissioners understand how to comply with 24 C.F.R. § 8.28(a)(3), but have chosen not to do so.

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available. . .”

[3] 42 U.S.C. §3604(f)(2) provides that“(f) (3) For purposes of this subsection, discrimination includes. . . .
(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. . . ”

The Second Circuit has consistently held that deference is due to the interpretation that a federal agency, such as HUD, gives its regulations. See, e.g., Shapiro v. Cadman Towers, 844 F. Supp. 116, aff'd, 51 F.3d 328, (2d Cir. 1995); see generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, (1984). For example, in Liddy v. Cisneros, the court rejected a plaintiff who urged the court to interpret a regulatory interpretation in way that contradicted HUD guidance, stating:

> A federal agency's interpretation of its own regulations is ' "of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' Udall v. Tallman, 380 U.S. 1, 16-17 (1965) ; . . . Soler v. G. & U., Inc., 833 F.2d 1104, 1108 (2d Cir.1987) ("Even if a court concludes that its alternative construction of the agency's regulation is 'more equitable' or 'more reasonable,' the agency's interpretation of its regulation is not thereby rendered invalid") (citations omitted), cert. denied, 488 U.S. 832 (1988). 823 F.Supp. 164, 174 (S.D.N.Y. 1993).

The defendants regularly receive messages from HUD and other agencies attempting to correct HANH's failure to comply with 24 C.F.R. §8.28(a)(3). See Ex. 6,9, 12, 13, 19, 20 and 21. Nevertheless, the defendant commissioners have shown no concern that HANH refuses to acknowledge HUD's interpretation of 24 C.F.R. §8.28(a)(3), even going out of their way to keep HANH management from adopting a new policy of compliance on August 28, 2007. As discussed *infra* in section A.1 of this brief, the commissioners were presented with a resolution proposed by HANH's management that would have authorized extending the services of a mobility counseling firm to all the Section 8 households with disabled members who needed it. See Ex.9. Without any case-by-case analysis or apparent concern for why the particular disabled

families involved needed mobility counseling services, the commissioners rejected the plan. Id. Because HANH chooses not to devote any of its own manpower to providing search assistance, their vote was tantamount to a decision not to provide the disabled families with *any* search assistance at all. See Ex. 6 at p. 2. The August 28, 2007 vote demonstrates yet again that the defendants' standard practice is to refuse all search assistance to disabled families, unless and until the family obtains legal assistance and notifies HUD. The named plaintiff is just the latest in a line of families that have experienced the human cost of this strategy.

2. Noncompliance with 24 C.F.R. § 8.28(a)(3) is politically expedient.

In the absence of background information, HANH's decision not to help the disabled Section 8 population to determine whether an accessible unit is available might seem so irrational that it could only be the product of some legitimate disagreement or ambiguity in the regulation. Why would HANH, whose mission is to help vulnerable populations such as the disabled choose to provide *less* assistance to persons with mobility disabilities than to the general population? The answer is because such a listing would show that there are only a handful of accessible units available to disabled people in New Haven. In turn, this lack of available units exposes the Housing Authority to an additional form of liability. A 2007 Investigative 504 Report by HUD explains the issue, having concluded that HANH is in violation of its responsibilities to the disabled, as follows:

> HUD is also concerned that a substantial amount of HANH's accessible housing stock is grouped in developments that are subject to an elderly-only Designated Housing Plan. While the plan calls for housing the non-elderly disabled with Section 8 vouchers, there is no evidence that the non-elderly disabled have been provided with such certificates. There were further questions raised regarding HANH's provision of assistance to non-elderly disabled to assist in locating accessible properties eligible for Section 8 assistance that meet the needs of non-elderly persons with disabilities. . . . The Section 504 Regulations at 24 C.F.R. 8.28 govern the recipient's obligations in administering Section 8 certificates or vouchers. The reviewer did not find evidence that HANH is fulfilling these obligations. See Ex. A to Complaint.

In other words, HANH itself helped create to the shortage of privately owned accessible units available for rental by Section 8 households. HANH regularly asks HUD for permission to reserve even more public housing units exclusively for the elderly, see Ex. 8 at p. 33 and 52. These requests are made in spite of the fact that HANH itself acknowledges that "public units. . .are now experiencing vacancies and declining applications from elderly families," and observes the opposite trend for its disabled client population. Id. Defendant Miller observed in 2006 that applications from persons with disabilities had been increasing, which suggests they now exceed the 35% mark reached in 2003. See Ex. 12 at p.2 ; Ex. 8 at p. 14. In order to obtain from HUD politically popular "elderly-only" designations for its public housing complexes, HANH repeatedly promises to make up the loss of the accessible public housing units to disabled persons by offering them Section 8 vouchers. See Ex. 8 at p. 9; Ex. 13; Ex. A attached to Complaint. Not only has HANH failed to follow through on providing these extra Section 8 vouchers, as HUD points out in the quoted paragraph above, but the existing Section 8

vouchers have turned out to be meaningless to households that include mobility-impaired individuals who cannot find any available accessible units on the private market. In 2003, HANH participated in a HUD-required "Analysis of Fair Housing Impediments" which concluded that Section 8 vouchers are not effective in housing the disabled unless coupled with search assistance:

> . . .A significant proportion of HANH's Section 8 participants have mental health problems and other disabilities that limit their ability to effectively use their Section 8 assistance. HANH has sought HUD grant funding for housing search assistance , but, most recently in 2001, HANH's grant application was denied because of a technical threshold requirement. Id. at 44.

As HANH itself recognizes, absent search assistance services, Section 8 vouchers will not relieve the artificial drain on New Haven's supply of accessible apartments that is imposed by HANH's insistence on designating the majority of its accessible units as "elderly-only."

In sum, if HANH were to distribute a list of accessible units that included a column showing the date of availability, that list would show that there is no principled basis for HANH's claims that it can justify reserving the vast majority of the accessible public housing in the City for the elderly by claiming that the needs of younger disabled persons are being met through the Section 8 vouchers. The listing would expose the defendants as having acted based on political pressure rather than in furtherance of their mission. Therefore, the defendants continue to refuse to provide a listing of accessible

apartments that includes current availability information, even though their duty to do so could hardly be clearer under 24 C.F.R. § 8.28(a)(3).

3. The database is ready, but HANH refuses to create the listing.

Since 1994, HANH has been promising to create a database to produce the current listings of available accessible units required by HUD. See Ex. 21. After fourteen years, HANH's reasons for not yet having completed this task are neither technical nor funding-related. See Ex. 10. On January 30, 2008, HANH staff member William Heinrichs admitted under deposition that HANH already has such a database, and that the database already contains the necessary field for entering accessibility features. See Ex.6 at p. 3. Thus, the database could easily print out a listing of accessible apartments. In fact, HANH did so in response to a court order on September 21, 2007. See Ex. 18. However, in its most recently published Administrative Plan, HANH stated that it is still not ready to share the data on accessibility with the public or even internally with its own staff. See Ex. 16 at p.5; Ex. 24.

4. The Listing would help the plaintiff class.

The named plaintiff's circumstances illustrate why the absence of even the most basic form of assistance HANH could give in locating an apartment—a list of the type that the defendants readily provide to *non-disabled* Section 8 families—makes it harder for disabled families to use their Section 8 vouchers. See Ex. 4 at ¶ 9, 10 and 13-16. For Rebecca Taylor—a person who for whom even telephone service is not always affordable, much less access to the internet to perform online searches—an accurate,

current listing of accessible apartments could make all the difference. But even disabled persons who have the ability to perform online searches need HANH's listing in order to have an equal opportunity to lease an apartment through the Section 8 program. The reason that HANH, like every other urban housing authority in the nation, supplies its current apartment listings to non-disabled families is precisely because such lists are so effective in connecting tenants to landlords who are ready and willing to rent to Section 8 tenants. See Ex. 7, 8, 11 and 23. Simply put, the listings greatly cut down on the literal "leg work" it takes to find an apartment.

The timesaving component of the listings produced by housing authorities becomes even more crucial where the Section 8 voucher is in the hands of a disabled householder. Unable to leave her home, Rebecca Taylor cannot simply visit advertised apartments to determine whether they are accessible. Ex. 4, at ¶ 6, 8 and 9. Because accessibility features are rarely included in the limited space of a newspaper classified ad, her search for apartments becomes very much like the proverbial search for a needle in a haystack. Id. By the time she finally locates a viable apartment, it has invariably already been rented. See Ex. 4 at ¶ 10 and 11. A current listing of such apartments from HANH could by itself have eliminated much of this problem.

The best that can be said of HANH's fourteen years of refusing to comply with 24 C.F.R. § 8.28(a)(3) is that HANH and its governing Commission evidence a deeply ingrained culture of deliberate indifference to the disabled. Injunctive relief in favor of the proposed class is necessary to overcome such a culture.

C. The Defendants Denied Rebecca Taylor a Reasonable Accommodation.

The Second Circuit enumerates the elements of a claim of denying a reasonable accommodation under Section 504 of the Rehabilitation Act as follows: "(1) the plaintiffs are 'handicapped persons' under the Act; (2) they are 'otherwise qualified' to participate in the offered activity or program or to enjoy the services or benefits offered; (3) they are being excluded from participation or enjoyment solely by reason of their disability; and (4) the entity denying plaintiffs participation or enjoyment receives federal financial assistance." Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995) (granting plaintiffs' motion for summary judgment where civil rights violation was clear from the record). The standard for judging a denial of a reasonable accommodation under the Fair Housing Amendments Act is the same. Wisconsin Comm. Services, Inc. v. City of Milwaukee, 465 F.3d 737 (7th Cir. 2006) (en banc); Hovsons, Inc. v. Township of Brick, 89 F.3d 1096 (3rd Cir. 1996).

The Second Circuit has been followed by many others in using the burden-shifting analysis articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) when a plaintiff claims that intentional discrimination occurred, but cannot provide direct evidence of such intent. 2922 Sherman Avenue Tenants' Assoc. v. District of Columbia, 444 F.3d 673, 682 (D.C. Cir. 2006). "Plaintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of

their choice." Smith & Lee Assocs., Inc. v. City of Taylor,102 F.3d 781, 795 (6th Cir. 1996). The burden then shifts, such that "[t]he ultimate burden at trial of proving that a proposed accommodation is not reasonable or that plaintiffs cannot be accommodated rests with defendants." Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Township, 996 F. Supp. 409, 435 (D. NJ 1998).

As a victim of spina bifida, Rebecca Taylor is unquestionably handicapped and disabled within the meanings of Section 504 of the Rehabilitation Act and the Fair Housing Amendments Act. See Ex. 4. at ¶ 2. The second element is also established; as a current Section 8 program participant, it is clear that the named plaintiff is "otherwise qualified" for the program. See Ex. 4 at ¶ 3. Similarly, the fourth element—receipt of federal funding by HANH—has been admitted by HANH in numerous documents. See Ex. 16 at p. 1.

Proof of the remaining element comes from a series of events. The Taylor family asked for a reasonable accommodation twice. First, Ms. Taylor made her request orally, explaining in detail why she needs the assistance and her reasons for believing that foreclosure would force her to move very soon. This request was denied on the spot by a HANH staff person. See Ex. 4 at ¶ 13-14.

Ms. Taylor's second attempt to request a reasonable accommodation has been constructively denied, through delay. "[D]elay for practical purposes may be denial." Langlois v. Abington Housing Authority, 207 F.3d 43, 48 (1st Cir. 2000); Groome Resources, Ltd., L.L.C. v. Parish of Jefferson, 234 F.3d 192, 199 (5th Cir. 2000). On

March 14, Ms. Taylor tried again to explain her situation to HANH, this time in writing. Her request was successfully submitted to HANH that same day, as verified by the fax transmission report. See Ex. 17. More than thirty days later, HANH has made no response whatsoever to her plea. HANH's own procedural manual, the Administrative Plan, states that it will respond to reasonable accommodation requests within thirty days. See Ex. 16, p. 2. In addition, it is obvious on the face of Ms. Taylor's written request that waiting longer than thirty days could cause her family great harm. Together, these events establish the third and final element of her claim under Count II.

If a requested accommodation is necessary before a disabled individual can derive benefit from the program, then denying such request is a form of disability discrimination. Here, the Section 8 voucher cannot serve its purpose of saving Ms. Taylor from homelessness and integrating her into the community until someone helps her take the threshold step of leasing an accessible apartment. Failure to timely grant her reasonable accommodation request for assistance in finding an accessible Section 8 apartment has forced her to live in physical danger, and will very likely deprive her of a home altogether within the next month, absent this Court's order.

D. CLASS CERTIFICATION FOR PURPOSES OF INJUNCTIVE RELIEF

The proposed plaintiff class would include "All current and future participants in the Section 8 Housing Choice Voucher program who, because of the disabilities and/or handicaps of themselves or someone in their household, need assistance in searching for suitable dwellings to lease under the program."

The burden is on the plaintiff to properly allege the prerequisites for class certification, but a plaintiff has a right to class certification if the allegations contained in her complaint and associated filings meet the prerequisites. United States Parole Commission v. Geraghty, 445 U.S. 388, 403 (1980); Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571 (2d Cir. 1982). "Federal Rule of Civil Procedure 23(a)(1)-(4) sets forth four prerequisites to a class action that are commonly referred to as: (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir.1998) (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997))." Amone v. Aveiro, 226 F.R.D. 677, 68 (D. Haw. 2005). This action is appropriate for certification under Rule 23 (b)(2) of the Federal Rules of Civil Procedure, because the plaintiffs' pleadings meet the four prerequisites, the defendants have refused to act "on grounds generally applicable to the class," and the plaintiffs seek primarily injunctive and declaratory relief. In the Second Circuit, a Rule 23(b)(2) class may be certified even where certain plaintiff class members request compensatory or punitive damages, provided that injunctive relief predominates. Matyasovszky v. Housing Authority of the City of Bridgeport, 226 F.R.D. 35, 45-46 (D.Conn. 2005). Where "the interests of the class members in the liability phase of [a] case would be identical," class certification may be provisionally granted during that phase of the action. Id.

1. Numerosity

The proposed class is "so numerous that joinder of all members is impracticable" within the meaning of Rule 23 (a)(1) of the Federal Rules of Civil Procedure. Of the

1,640 new Section vouchers that HANH issued from 2003 to 2006, 386 went to households that included a disabled person. See Supplemental Compliance dated April 4, 2008 at p. 2. These figures suggest that at least 24% of HANH's total 4,500 population of Section 8 participants include a disabled person, yielding a class size of 1,080. HANH reported in 2003 that 35% of its applicants for public housing were disabled, a number that suggests that the true number of Section 8 participant families that include a disabled person might be closer to 1,575. In addition, the defendant's records confirm that at least 75 new vouchers were issued to households that include a disabled member during each year from 2003 to 2006. Id. at p. 1. It is therefore likely that at least 75 new class members will be added to the class over the course of 2008. Thus the class, while fluid, nevertheless comprises between 1,466 and 1,961 voucher-holders and participants at any given moment. Moreover, the plaintiff class members are by definition persons who not only struggle to meet basic needs because of their low income levels, but also suffer from extreme isolation by virtue of living in non-accessible apartments or from other disability-related impediments. The impracticability and inefficiency of joinder as a method of adjudicating the claims of such persons is also a relevant consideration. Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993).

2. Commonality

The proposed class has been subjected to identical or similar treatment by the defendants, such that "there are questions of law or fact common to the class" within the meaning of Rule 23 (a)(2) of the Federal Rules of Civil Procedure. The plaintiff class

alleges that they have been treated identically with respect to the two services mandated by 24 C.F.R. § 8.28(a)(3): apartment listings and mobility counseling. Each complainant to HUD and the CHRO called or wrote to her Section 8 worker requesting help finding an accessible apartment—a request, in lay person's terms, for apartment listings and mobility counseling. See Ex. 1, 2 and 3. Each was ignored for months or years until they filed a CHRO complaint. Id. The glaring similarity between how the plaintiffs have been treated was highlighted on August 28, 2007, when the defendant commissioners met to discuss HUD's order to provide mobility counseling to the Gaither household. Of the group of disabled families that HANH staff member William Heinrichs identified as needing mobility counseling, the commissioners would only agree to offer the service to the two who had pending CHRO suits. Rather than discussing the five based on their individual needs and characteristics, the defendant commissioners treated the group identically based on its well-established practice of only assisting disabled persons when necessary to evade legal scrutiny. See Ex. 9.

3. Typicality

The claims of named plaintiff Rebecca Taylor are "typical of the claims or defenses of the class" within the meaning of Rule 23 (a)(3) of the Federal Rules of Civil Procedure. As described above and in detail in her affidavit, see Ex. 4, plaintiff Rebecca Taylor's housing needs and experience with HANH is typical of the class. Cf. Ex. 1, 2 and 3.

4. Adequacy

The named plaintiff Rebecca Taylor will "fairly and adequately protect the interests of the class" within the meaning of Rule 23 (a)(4) of the Federal Rules of Civil Procedure. The named plaintiff has diligently sought legal advice from appropriate sources, see Ex. 22 at ¶ 3-4, and Ex. 4 at ¶ 12, and has shown herself to be ready to vigorously protect the interests of the class. Id.

E. NECESSITY OF EMERGENCY SUMMARY JUDGMENT AND/OR PRELIMINARY INJUNCTIVE RELIEF

1. Irreparable harm to the named plaintiff.

The Housing Authority is well aware of the named plaintiff's immediate need for assistance. See Ex. 4 at ¶ 13-16; Ex. 17. Prior to the events that triggered this lawsuit, HANH had been aware of Rebecca Taylor's extremely dangerous current housing arrangement for years, inasmuch as its staff had inspected the apartment, and seen that it has stairs at all points of egress. The Section 8 worker assigned to Ms. Taylor has met on a yearly basis with Ms. Taylor, who is always confined to a wheelchair. While it is troubling enough that these staff members ignored Ms. Taylor's obvious need for an accessible apartment, it is outrageous that Ms. Taylor's Section 8 worker directly refused to help her find a new apartment before she is ejected due to foreclosure.

That Ms. Taylor's fears of being ejected and put into a homeless shelter are grounded in reality is demonstrated by the existence of an uncontested motion for strict foreclosure pending against her landlord. See Exhibit D to Complaint. As the case detail printout demonstrates, the landlord for Ms. Taylor's building has failed to even file an

appearance in the proceeding. Id. This motion will likely be acted upon today, April 21, 2008. Foreclosure and ejection are virtually certain to follow. Ms. Taylor is suffering emotionally before this even occurs, because she believes that ejection and placement in a homeless shelter will put her at risk of losing custody of her daughter. See Ex. 3 at ¶ 7. These facts justify emergency summary judgment and preliminary injunctive relief.

2. Irreparable harm to the proposed class.

Families who are headed by disabled persons, or preoccupied with the care of a profoundly disabled child, are more vulnerable to homelessness because resources they might otherwise be able to devote to locating appropriate housing are drained by dealing with the disability. Such families generally also lack the time, money, and energy to obtain the advice of counsel concerning their housing problems. The Taylor household exemplifies these issues. See Ex. 3. Requiring the defendants to retrain and monitor the Section 8 staff who interact with disabled families is justified, given the defendants' long history of noncompliance with their obligations to this group. See Ex. 1,2,3,4,5,13,18,19, 20 and 21. Moreover, staff retraining is an efficient and low-cost way to require the defendants to begin preventatively meeting the needs of this group, as opposed to settling individual lawsuits as they are filed.

Since 2003, the defendants are aware of having issued 386 Section 8 vouchers to families that include persons with disabilities. See Ex. 15 at p. 3. At least 75 additional persons with rights to search assistance are added to this number on a weekly basis, when Section 8 families' circumstances change or new applicants obtain Section 8 vouchers.

Id. at p. 1. These families are likely to need search assistance, whether currently or in the future. For most of them, Section 8 workers are their sole source of information about the program rules. It is both inhumane and a waste of judicial resources to force each of these families to confront the defendants to separately via a lawsuit. An injunction requiring the defendants to retrain and independently monitor their Section 8 staff on the issue of appropriately assisting disabled families in searching for apartments is necessary to adequately serve the public interests at stake in this case.

F. WAIVER OF BOND FOR PRELIMINARY INJUNCTIVE RELIEF

The named plaintiff's Motion to Proceed In Forma Pauperis was granted on April 15, 2008. Whether to require a bond from plaintiffs in this circumstance is within the discretion of this Court. See Doctor's Ass'n, Inc. v. Stuart, 85 F.3d 975 (2d Cir. 1996). As a single parent with disabilities that prevent her from working, named plaintiff Rebecca Taylor's income barely covers essentials. Paying a bond would be a hardship upon herself and her daughter. The plaintiffs therefore respectfully request waiver of the bond.

CONCLUSION

The plaintiffs move this Court for summary adjudication of the above described issues, and/or preliminary injunctive relief, in recognition of the gravity of the risks they are exposed to by HANH's continuing noncompliance with the Fair Housing Act Amendments, Section 504 of the Rehabilitation Act, and the National Housing Act as amended and its implementing regulation 24 C.F.R. §8.28(a)(3).

Respectfully submitted,

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CERTIFICATION

I hereby certify that the foregoing Memorandum in Support of Preliminary Injunctive Relief and Emergency Motion for Summary Judgment has been served by hand delivery on this 22nd day of April, 2008 in compliance with Fed. R. Civ. P. Rule 5, on the following persons, who constitute all counsel and pro se parties of record:

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