UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REBECCA TAYLOR, On behalf of herself and all others similarly situated, Plaintiffs V. THE HOUSING AUTHORITY OF THE CITY OF NEW HAVEN, JIMMY MILLER, individually, DAVID ALVARADO, IIONA LEFFINGWELL, LOUISE PERSALL, ROBERT SOLOMON, and JASON TURNER, individually and in their official capacities as members of the Housing Authority Commission for the City of New Haven, and KAREN DUBOIS-WALTON, in her official capacity as Executive Director of the Housing Authority of the City of New Haven, Defendants	:	DOCKET NO. 3:08-cv-00557(JBA) August 7, 2008

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, plaintiff Rebecca Taylor and proposed plaintiff-intervenor Karl Hunter move this Court to certify the above-captioned lawsuit as a class action.

I. LEGAL STANDARD

Plaintiffs seeking certification of a class action under the Federal Rules of Civil Procedure, " must demonstrate that the . . . case (1) conforms to the four requirements of Rule 23(a), and (2) fits into one of the three categories under Rule 23(b)." Amone v.

Aveiro, 226 F.R.D. 677, 682 (D. Haw. 2005). Courts should consider the allegations made by a proposed class in the class complaint as true for purposes of deciding the motion to certify. See Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661 n. 15 (2d Cir.1978) ("it is proper to accept the complaint allegations as true in a class certification motion"). "When deciding a motion for class certification, the only issue is whether the requirements of Rule 23 have been met, and not whether the plaintiffs have stated a cause of action or will prevail on the merits. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974)." Matyasovszky, v. Housing Authority of the City of Bridgeport, 226 F.R.D. 35, 40-42 (D. Conn. 2005).

"The four requirements of Rule 23(a) are as follows: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir.1999), cert. denied, 529 U.S. 1107, 120 S. Ct. 1959, 146 L.Ed.2d 791 (2000)." Id.

Plaintiffs seeking certification must also demonstrate that they qualify under one of the subdivisions of subpart (b) of Rule 23. Subpart (b)(2) permits certification if the action is one that is "appropriate" for final injunctive relief or declaratory relief.[1] In the

[1] Subpart (b)(2) of Rule 23 reads in its entirety:

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Second Circuit, injunctive relief must predominate in order for a class to be certified under Rule 23(b)(2). The District of Connecticut has specifically recognized that "the fact that monetary damages are an element of the relief sought does not preclude certification under Rule 23(b)(2). See, e.g., Duprey v. State of Connecticut Dept. of Motor Vehicles, 191 F.R.D. 329 (D. Conn. 2000)." Id.

II. ARGUMENT

A. PROPOSED CLASS DEFINITION

Plaintiffs propose the following class definition:

> 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.

1. Disabled Section 8 Participant Families

All households that include a disabled person who currently participate in the Section 8 program should be considered members of the class for purposes whether or not they currently need to move, because many Section 8 households move multiple times during participation in the program. Even if a family does not need search assistance now, it is likely to need it in the future. They may move by choice, or because the unit they are occupying is in foreclosure, or has failed a Section 8 inspection due to lack of repairs to the building. The named plaintiffs offer some typical examples of this phenomenon. Karl Hunter currently hopes to move out of an inner city rooming house to an accessible one-bedroom apartment that has a stove. See Hunter Adffidavit, attached

hereto as Exhibit E. Rebecca Taylor has just been forced to move due to a foreclosure, and is now in a suitable two-bedroom apartment. However, the Section 8 program will require Taylor to move to smaller unit in the future when her children move out of the house.

2. Disabled Applicant Families

The plaintiff class also includes all disabled Section 8 applicants, because all of these households must move at least once—that is, when they first join the program. Thus, for purposes of certification under Count I, applicants and other individuals who have a future right to a Section 8 voucher administered by HANH should be considered members of the class. Disabled applicants are expressly included in the language of 24 C.F.R. § 8.28. Count III therefore alleges that HANH violated the National Housing Act by failing to comply with 24 C.F.R. § 8.28 by affirmatively offering the list and search assistance to all disabled Section 8 applicants and participants alike, and all of these applicants should be considered putative class members.

B. THE PROPOSED CLASS MEETS ALL RULE 23(a) REQUIREMENTS

1. Numerosity

Of the 1,640 new Section 8 vouchers that HANH issued between 2003 and 2006, the defendants indicate that 386,[2] or 24%, went to households that included a disabled

[2] The number of disabled families provided by the defendants errs on the low side, because it fails to include some households with disabled family members. For example, HANH's computer records do not identify as disabled Destiny A., a severely asthmatic child, even though HANH admits that she has disabilities sufficient to justify a

person. See Ex. 15 to Plaintiff's Memorandum in Support of Preliminary Injunctive Relief. Assuming for purposes of this motion that the percentage of HANH Section 8 households that include a person with disabilities remains constant from their receipt of a voucher onward,[3] then HANH's current total of 2,879 Section 8 households is likely to include 691 households that include a person with disabilities. This number of potential plaintiffs is so large that joinder of all claimants would impose a burden on both the court system and the plaintiffs, further delaying resolution of their needs for assistance. For this reason alone, joinder is impracticable. See, e.g., Diaz v. Hillsborough County Hospital Authority, 165 F.R.D. 689, 693 (M.D. Fla. 1996) (finding joinder of 383 patients impracticable based on the number of putative class members).

Yet the putative class is far larger than the number of current participants. Current and future applicants are also entitled to be given a list of available, accessible apartments known to HANH, and advised that HANH will provide search assistance if necessary. As

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reasonable accommodation and it ultimately granted her family such an accommodation. See Redacted File A at p. A-1 and A-8, attached hereto as Exhibit A.

[3] This assumption is likely to be overly optimistic, given that 26% of HANH vouchers went unused last year—up from 13% in 2006. See HANH Annual Plans for FY 2006 and 2008, attached hereto as Exhibit B. Declining voucher utilization during a period when the rental market in New Haven was very tight suggests that some of the voucher underultilization could be attributable to HANH's failure to assist disabled applicants in finding and leasing an apartment. In addition, some applicants may have been purged from HANH's waiting list because they failed to respond during the years of waiting for a voucher, but who would have persevered had they known that they had the right to receive search assistance upon being issued a voucher. Likewise, if HANH had affirmatively offered search assistance, such assistance may have provided some now-terminated disabled Section 8 households the support needed to keep participating in the program. These factors indicate that the starting number of disabled households who were eligible for or were actually issued a Section 8 vouchers may have been significantly higher than the number of disabled participant households suggests.

HANH has never offered either the list or the assistance to any new voucher holder, the number of class members affected by the civil rights violations alleged in Count III is simply equal to the total number of disabled applicants and potential applicants to whom HANH has, or will in the future, issue vouchers. The fact that it is impossible to tell how many of these disabled families newly admitted to the Section 8 program will need search assistance at the moment when they are issued the voucher mitigates in favor of certification. See Amone, 226 F.R.D. at 684-85 (finding numerosity requirement met where identifiable members of putative class were estimated at as few as 60 to 100, but joinder was rendered impracticable because defendant housing authority had failed to implement any "notice and procedure whereby tenants would be informed of their rights").

Other courts have specifically noted that applicants for subsidized housing programs are likely to have characteristics, such as lack of financial resources and being at risk of becoming homeless, that make joinder especially impracticable. See, e.g., Matyasovszky at 40-41 (certifying class, based in part on finding that a class composed of disabled applicants for low-income housing is "necessarily fluid"). Robidoux v. Celani, 987 F.2d 931 (2d Cir.1993) (finding numerosity requirement met where plaintiffs showed evidence that at least 22 cases in which benefits were delayed occurred each month). Putative class members in government benefits cases, whether applicants or participants, are also poor candidates for joinder because they are in an especially vulnerable position.

In this case, most applicants and participants are aware that the Section 8 staff has a great deal of discretion over certain aspects of their cases, including whether they will

be admitted to the program. They are therefore less likely to create work for the staff by asking for search assistance, even if they need it. Many disabled applicants are further impeded in their ability to make known their needs by the very disabilities that cause them to need search assistance, or by limited literacy skills. Some disabled applicants who suffer from severe depression or other disabilities with behavioral symptoms may have given up on the Section 8 application process altogether, abandoning their spot on the waiting list, because they doubted their ability to use the voucher to lease an accessible unit. Others may have persevered, waiting years to reach the top of the waiting list, receive their vouchers, and yet still fail to lease a unit without ever understanding that they were entitled to search assistance under 24 C.F.R. § 8.28.

2. Commonality

Defendants have acted uniformly with respect to the proposed class, by refusing to provide either mobility counseling or a listing of accessible, available units. "[I]n a civil rights suit, . . .commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir.2001).

a. Refusal to provide search assistance

Prior to the start of this litigation, each disabled Section 8 participant who requested search assistance from HANH in writing received a similar letter from HANH's Reasonable Accommodations Coordinator. The response letter neither denied nor granted the request, instead advising that:

> You do not need to request an accommodation in order to move to a different apartment that is better suited to your needs. As a Section 8

> participant, you may select to live in any eligible apartment in the private market. If you would like to move from your current apartment, you should contact your caseworker[4] in the Service Center in order for HANH to issue you a new voucher for your apartment search. See Redacted File G, attached hereto as Exhibit G.

As of August 2007, HANH had apparently started stating in its response letter that the request for a reasonable accommodation was "granted." See Redacted File H, attached hereto as Exhibit H. Yet the primary instruction contained in the response letter remains the same, directing the household to contact its Section 8 specialist. Id. HANH's Reasonable Accommodations Coordinator at that time, William Heinrichs, also confirmed under deposition what he stated in the letter: even where HANH had empowered him to communicate to a Section 8 participant that their request for search assistance had been granted, it was not his responsibility to personally provide this search assistance.

However, when disabled households contact their Section 8 specialists, they find—as Rebecca Taylor did—that these specialists also believe that it is not their responsibility to provide search assistance. The recent testimony of a Section 8 specialist, Lashanda Jones, is extraordinarily clear on this point:

Q: Have you ever personally used that available accessible units list to help find somebody housing?

A: No.

Q: That is because you don't do that activity at all? You don't find units for people?

A: Yes. That's correct.

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[4] The staff persons who currently serve the functions formerly provided by persons with the job title of "caseworker" now bear the job title "Section 8 specialist."

Q: Never have, even once?

A: Never have.

See Jones Depo. at p. 68, line 20 to page 69, line 2, attached hereto as Exhibit C. The testimony above is from a deposition taken July 25, 2008, in which Jones was asked to describe HANH's present manner of providing search assistance to disabled Section 8 households. Jones went on to confirm that she was describing the practices of all HANH Section 8 specialists, not just her own practices:

Q: Have you been told you should be doing that?

A: No.

Q: Do you know of any other Section 8 specialist who does that?

A: No, no.

Id., page 69, lines 8-13. Jones also stated these practices have remained unchanged throughout her five years of service as a HANH Section 8 specialist.

In sum, if HANH's policy changed after being sued in 2007, it was only a superficial alteration. The evidence shows that *all* members of HANH staff have always disavowed any responsibility for actually providing search assistance. Whether or not the defendants claim to have adopted a new policy of providing search assistance to disabled households, it is clear that no one at HANH is actually providing it.

b. Refusal to provide a list of available, accessible units

On May 6, 2008, the defendants promised this Court to provide an apartment listing in satisfaction of their obligations under 24 C.F.R. § 8.28(a)(3) within ninety days. On August 4, 2008, HANH provided counsel to the plaintiffs with a listing of building

complexes that contain accessible units. See August 4, 2008 Accessible Apartment Listing, attached hereto as Exhibit D. It offers no clues whatsoever about the availability of the accessible units. In this manner, HANH continues its practice of refusing to comply with the regulation.

3. Typicality

Proposed representative plaintiffs need not suffer from the same type of disability as each and every class member to be members of the same class. "The typicality inquiry is intended to assess whether the case can be efficiently maintained as a class action and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." Matyasovszky, 226 F.R.D. at 42. In the context of class actions seeking access to governmental programs, the typicality requirement is "generally satisfied if the proposed named plaintiffs are "subject to the same statute, regulation or policy as class members." Id. (citing 7 Newberg on Class Actions § 23:4 (4th ed.).

The typicality requirement is met for Counts I and III of the Taylor Amended Complaint.[5] With respect to Count I, Karl Hunter and Rebecca Taylor are each persons whose disabilities have caused them to experience extra difficulty making use of Section 8 vouchers. See Hunter Affidavit, attached hereto as Exhibit E; Taylor Affidavit, Ex. 4 to Plaintiff's Memorandum in Support of Preliminary Injunctive Relief. They will continue to need mobility counseling each time they must move. They have each suffered from discrimination, as HANH provided mobility counseling and updated apartment listings to

[5] Plaintiffs have moved for an enlargement of the deadline for moving for class certification with respect to Count II, based on the need to complete additional discovery.

non-disabled households but refused to offer it to them. As to Count III, the defendants' failure to affirmatively offer the apartment listing and search assistance opportunities required by 24 C.F.R. § 8.28(a)(3) affects all Section 8 participants in essentially the same way, including Hunter and Taylor. HANH's noncompliance with the affirmative obligations declared by this regulation not only deprives currently participating disabled households of help, but also keeps potential Section 8 participants, like Karl Hunter, from becoming aware that they may be eligible for help that would give them a real chance of being able to lease an accessible apartment through the program.

Any permanent handicap or disability is likely to make searching for an apartment more difficult. While the specific difficulties created by the type of disability will surely vary, these differences do not divide the class in any relevant way because the defendants do not use disability-specific rules to determine whether to assist disabled families. Instead, HANH uniformly denies mobility counseling to *all* disabled families—unless they retain counsel. Even then, disabled households who have nominally been offered mobility counseling by HANH as a result of legal action are in fact denied it by HANH's failure, for over a year, to hire a mobility counseling firm. See July 9, 2008 Quarterly Report at p. F-3, attached hereto as Exhibit F. Thus, in practice, HANH uniformly denies mobility counseling to all disabled Section 8 households.

Based on the above criteria, Rebecca Taylor and Karl Hunter are both typical of this class. Neither Taylor nor Hunter has been provided with a list of available, accessible units. See Hunter Affidavit, attached hereto as Exhibit E; Taylor Affidavit, Ex. 4 to Plaintiff's Memorandum in Support of Preliminary Injunctive Relief. Both have

experienced HANH's failure to either offer or actually provide mobility counseling to those disabled Section 8 households who need it. Id.

4. Adequacy

The adequacy inquiry focuses on whether the named representatives of the proposed class have interests antagonistic to those of the class. Diaz, 165 F.R.D. at 693. In this case, the plaintiffs interests do not conflict in any way with those of the rest of the putative class members. Moreover, by obtaining counsel, each of the proposed name plaintiffs has already demonstrated the capacity to vigorously pursue the vindication of the rights of the entire class. See Ex. 22 to Plaintiff's Memorandum in Support of Preliminary Injunctive Relief at ¶2 - ¶4.

C. THE PROPOSED CLASS MEETS ALL RULE 23(b)(2) REQUIREMENTS

The proposed plaintiff class falls squarely within the parameters for a traditional (b)(2) class based on allegations that the defendants have acted or refused to act "on grounds generally applicable to the class," by adhering to a discriminatory policy, pattern and/or practice of failing to provide the listing and mobility counseling services to disabled Section 8 households that HANH readily provides to non-disabled households. "Clarification of the meaning of the subpart (b)(2) . . . is provided by the Federal Rules Advisory Committee's Notes to the 1966 Amendments to Rule 23 under which subpart (b)(2) was created. The applicable note states that action or inaction is directed to a class within the meaning of [subpart (b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general

application to the class." Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 453-54 (N.D. Cal. 1994).

Here, many members of the proposed class have been affected, although only a few may realize it. Some have engaged in the lengthy process of asking for mobility counseling as a reasonable accommodation, only to receive a patronizing denial of responsibility from HANH's reasonable accommodations coordinators, in the form of a reminder that "you may select to live in any eligible apartment." Others have been told that their request for search assistance was granted, only to inquire further and learn that no one was prepared to assist them. In essence, these letters show the disabled household that all they can expect from its Section 8 specialist is a voucher—the same paper work that housing authorities must produce when any Section 8 household moves. In the face of this record, whether or not HANH claims to have changed its official policy, see subsection II.B. 2, *infra*, any such change is so clearly motivated by a desire to avoid further liability that it has no bearing on class certification.

III. CONCLUSION

The proposed class meets the prerequisites for certification. Proposed named plaintiffs Hunter and Taylor respectfully ask the Court to be mindful that unusually high numbers of putative class members are being required to move or experiencing homelessness, due to the current turbulent housing market. For this reason, they urge the Court to certify their class at the earliest possible opportunity.

Respectfully submitted by,

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ORDER

Order GRANTED/ DENIED at New Haven, Connecticut, this ____ day of _____, 2008.

BY THE COURT

_____

Judge

CERTIFICATION

I hereby certify that the foregoing Memorandum in Support of Motion for Class Certification has been served electronically on this 7th day of August, 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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