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United States District Court, S.D. New York.

Pauline DAVIS, et al., on behalf of themselves and all others similarly situated, Plaintiffs,
v.
The NEW YORK CITY HOUSING AUTHORITY, Defendant.
United States of America, Plaintiff,
v.
The New York City Housing Authority, Defendant.

Nos. 90 CIV. 628(RWS), 92 CIV. 4873(RWS). | July 18, 1997.

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Opinion

OPINION

SWEET, District Judge.

***1** Plaintiffs in *Davis v. New York City Housing Authority* have moved to preliminarily enjoin defendant, the New York City Housing Authority ("NYCHA"), from implementing two proposed changes to the Tenant Selection and Assignment Plan (the "TSAP"), which was incorporated by reference in the Consent Decree in this matter.

For the reasons set forth below, the plaintiffs' motion will be granted to the extent that NYCHA will be enjoined from implementing a "Working Family Preference" as proposed. However, NYCHA will not be enjoined from expanding "Project Choice" to permit larger families to specify the project in which they wish to live.

The Parties

NYCHA is the largest public housing agency in the United States, operating more than 320 projects, comprising approximately 180,000 apartments which house nearly 500,000 people. NYCHA operates these projects pursuant to an Annual Contributions Contract and other agreements with the Department of Housing and Urban Development ("HUD"), New York State and New York City. To be eligible for admission to public housing, families must be "low-income," defined by the United States Housing Act of 1937 as receiving household income less than 80 percent of the median income for the area. *See* 42 U.S.C. §§ 1437a(a)(1), 1437a(b)(2).

The Davis plaintiffs are Latino and African–American individuals residing in or eligible for NYCHA housing.

Prior Proceedings

The facts and prior proceedings in this litigation are described in the prior opinions of this Court, familiarity with which is assumed. *See Davis v. New York City Hous. Auth.,* No. 90 Civ. 0628, 1992 WL 420923 (S.D.N.Y. Dec. 31, 1992) ("*Davis I* "); *Davis v. New York City Hous. Auth.,* 839 F.Supp. 215 (S.D.N.Y.1993) ("*Davis II* "); *Davis v. New York City Hous. Auth.,* 940 F.Supp. 80 (S.D.N.Y.1996) ("*Davis III* ").

On May 31, 1990, the Davis plaintiffs filed a class action complaint against NYCHA, styled *Davis v. New York City Housing Authority,* 90 Civ. 628, alleging discrimination on the basis of race, color, and national origin in the selection and assignment of public housing tenants in violation of the Fair Housing Act of 1968, as amended, 42 U.S.C. §§ 3601 *et seq.* (the "Fair Housing Act"); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and 42 U.S.C. §§ 1981, 1982, 1983. The United States later initiated a parallel action, *United States v. New York City Housing Authority,* 92 Civ. 4873, also alleging that NYCHA's policies and practices of selecting tenants for projects violated the Fair Housing Act.

On July 1, 1992, a Consent Decree was signed by the United States, the *Davis* plaintiffs and NYCHA. The Consent Decree consolidated the government and *Davis* complaints, certified a plaintiff class of African–American and Hispanic applicants and tenants in *Davis,* and provided certain relief to the class, including the implementation of the TSAP, which NYCHA now proposes to modify.

***2** Pursuant to Fed.R.Civ.P. 23(e), a fairness hearing was held on November 6, 1992. Additional written statements were received by the Court through November 11, 1992. A summary order approving the Consent Decree was entered on November 17, 1992, followed by a written opinion and order of the Court dated December 30, 1992. *Davis I,* 1992 WL 420923.

By opinion dated December 2, 1993, the Consent Decree was clarified, and NYCHA was enjoined from using "duplicate requests" in filling larger apartments at one of the NYCHA's projects. *Davis II,* 839 F.Supp. 215.

By order dated September 30, 1996, this Court granted plaintiffs' motion for an extension of time to file objections to the proposed modifications to the TSAP that are the subject of this motion. *Davis III,* 940 F.Supp. 80.

Plaintiffs filed the instant motion on November 15, 1996. Oral argument was heard on April 2, 1997. Submissions were received through April 17, 1997, at which time the matter was deemed fully submitted.

The Consent Decree

The Consent Decree provides for the following: (1) injunctive relief barring future housing discrimination on the basis of race, color or national origin, Consent Decree ¶ 4; (2) the implementation of a new TSAP which substantially revises NYCHA's tenant selection and assignment systems, and which prohibits further discrimination, Consent Decree ¶¶ 5–9, Ex. B; (3) remedial relief for 2,190 claimants[1] of NYCHA's past discrimination, Consent Decree ¶¶ 10–39; and (4) significant record keeping and reporting by NYCHA regarding tenant selection and assignment practices, Consent Decree ¶¶ 43–48.

[1] The remedial relief consisted of awarding HUD Section 8 housing vouchers to 200 claimants; the remaining 1,990 claimants received priority placement in one of 31 public housing projects.

The Consent Decree also requires NYCHA to "adopt and implement the TSAP ... to prevent any unlawful discrimination on the basis of race, color, or national origin, in compliance with the Housing Authority's obligations therewith under Title VI, the Fair Housing Act and the implementing regulations and requirements of HUD." Consent Decree ¶ 5. In adopting and implementing the TSAP with "respect to existing projects and new projects to be opened in the future," NYCHA agreed that it would use "no racial quota system, or other practice, technique or device to house Applicants in particular projects, buildings, or apartments, or to otherwise limit the availability of housing, on account of race, color, or national origin." Consent Decree ¶ 7(a).

The Consent Decree contains the following provision for raising objections to proposed modifications to the TSAP:

> If, during [the five year effective period of the Consent Decree], the Housing Authority finds it necessary to modify any provision of the TSAP, the Housing Authority will provide written notice to the parties.... If any party objects to the proposed modification on the ground that it may result in discrimination on the basis of race, color, or natural origin, it may petition the Court to resolve the objection.... Pending resolution by the Court, the Housing Authority may implement the proposed modification at its own risk, but without prejudice to the right of the plaintiffs to move the court to enjoin the proposed modification as inconsistent with the terms of this Consent Decree, and to seek full and complete relief for persons harmed by the changes, and any other appropriate relief authorized by the Fair Housing Act. Nothing in this paragraph shall be construed to relieve the Housing Authority of its obligation to obtain HUD approval of any modification to the TSAP pursuant to 24 C.F.R. § 1.4(b)(2)(ii).

***3** Consent Decree at 13–14, ¶ 6(b).

Findings of Fact
In approving the Consent Decree, the Honorable Pierre N. Leval, then a district judge, found that the "Plaintiffs' evidence supports their allegations that during specified periods of time the Housing Authority selected and assigned applicants for public housing, and tenants requesting transfers, to certain housing projects using methods that resulted in unlawful discrimination against Blacks and Hispanics. These methods included (1) the intermittent use of codes denoting housing projects to which only white families could be assigned; (2) the use of zip code and other geographic restrictions on admission to projects; (3) the use of racial goals or targets [in new projects]; and (4) the assignment of families to projects where vacancies were not expected to arise." *Davis I,* 1992 WL 420923, at *2.

In support of the fairness of the Consent Decree, NYCHA submitted a memorandum conceding that it used race-conscious tenant assignment practices that led to the "steering" of white applicants to predominantly white projects.

The TSAP is a central feature of the relief provided by the Consent Decree. The current TSAP establishes a three-stage process for selecting applicants for vacancies in NYCHA housing. In the first stage, applicants are chosen for eligibility interviews from the overall applicant pool. Based on information applicants provide in written application forms, NYCHA assigns priority codes to each application. Certain priority codes correspond to preferences required by federal statutes and regulations. These "Federal Preferences" include preferences for applicants who are involuntarily displaced from their dwellings, live in substandard housing, or pay more than 50% of their income in rent. Other priority codes correspond to NYCHA's "Local Preferences." Applicants who receive a sufficiently high priority code are called in for eligibility interviews. In 1995, approximately 15% of all applicants were granted interviews.

The second stage of the selection process under the current TSAP involves the assignment of individuals to waiting lists for vacancies. At the eligibility interview, applicants deemed eligible for housing are asked to select either a project or a borough in which they wish to live. Applicants needing larger apartments (more than two bedrooms) and applicants in emergency categories are asked to select only the borough in which they wish to live. Their names are added to a waiting list for that borough, and when vacancies arise in that borough, the vacancies are filled with applicants chosen from the list. In contrast, applicants needing a smaller apartment (0–2 bedrooms) are asked to select a particular project where vacancies were expected within six to nine months and are placed on the waiting list for that specific project. The option to select a particular project is referred to as "Project Choice."

In the final phase of the selection process, applicants on project or borough waiting lists are chosen to fill vacancies as they arise. A key factor in selecting applicants from the waiting list is the applicant's "Income Tier." NYCHA divides applicants into three tiers. Tier I families have the lowest income, while Tier III families have the highest incomes. Under the current TSAP, in selecting applicants from the waiting lists, NYCHA attempts to rent 25% of all vacancies to Tier III families, 37.5% to Tier II families and 37.5% to Tier I families. To do so, NYCHA adheres to the following selection protocol: the first vacancy is offered to the Tier III applicant with the highest priority and the oldest date of certification; the second vacancy is offered to the Tier II applicant with the highest priority and the oldest date of certification; the third vacancy is offered to the Tier I applicant with the highest priority and oldest date of certification; and the sequence is repeated until 25% of the expected annual vacancies are filled with Tier III families, after which all subsequent vacancies are offered only to Tier I and II applicants.

***4** Historically, public housing applicants in the lowest income categories accounted for approximately ⅓ of all NYCHA rentals. Since 1990, however, an increase in homeless families applying for housing has resulted in a significant increase in the number of rentals to the lowest income applicants. By 1995, these lowest income applicants accounted for 77.6% of new admissions. NYCHA states, and plaintiffs do not dispute, that unless a higher proportion of applicants with higher incomes receive rentals, the stability of the projects will be jeopardized. Moreover, ten years ago, nearly one half of families in NYCHA projects were working families. Today, fewer than one third are employed.

NYCHA proposes two changes to the TSAP. First, NYCHA proposes to adopt a "Working Family Preference." NYCHA would establish new local priorities as part of the applicant selection process. The highest local priority would be assigned to the highest income, Tier III applicants. The second priority is given to Tier II families. The lowest priority is given to Tier I families, but only to those who are working or are disabled. Tier I families receiving public assistance would receive no local priority. In addition, the proposed TSAP would categorize federal preference holders as working (including the disabled) or "nonworking." The federal preference holders who are working or disabled would

receive a priority over those who are not. NYCHA also proposes to increase to 50% the proportion of new rentals to local preference holders and reduce the proportion of rentals to federal preference holders to 50%.

Second, NYCHA proposes expanding "Project Choice" to permit families needing larger apartments of up to four bedrooms to select not only the borough in which they wish to live, but the project as well. Non-emergency applicants seeking 0–4 bedroom apartments would now be permitted to choose the project in which they wish to live.

The following facts are essentially undisputed. White families constitute 10% of NYCHA's adjusted applicant pool. Under the existing TSAP, white applicants received 4.2% of the rentals in 1995. Had the Working Family Preference been in place in 1995, 9.9% of the families admitted to public housing would have been white. African–American families constitute 35.6% of the applicant pool, received 45.9% of the rentals under the current TSAP in 1995, and would have received 44.1% of the rentals had the proposed TSAP been in place. Puerto Rican families constitute 22.3% of the applicant pool, received 30% of the rentals in 1995, and would have received 22.7% of rentals under the proposed TSAP. Hispanics (other than those of Puerto Rican descent) constitute 18.4% of the pool, received 14.6% of the rentals in 1995, and would have received 14.2% of the rentals under the proposed TSAP. Applicants who identified themselves as "other" constitute 13.7% of the applicant pool, received 5.2% of the rentals in 1995, and would have received 9.1% of the rentals under the proposed TSAP. With the exception of the non-Puerto Rican Hispanics, the differences between the percentage of each racial group receiving apartments under the old TSAP and the percentage of that racial group receiving apartments under the new TSAP are all statistically significant.

***5** In addition, the plaintiffs' expert compared the projected white admission rate of 9.9% under the proposed TSAP to the white admission rates for each year from 1990 through the present, and found that the 9.9% rate was significantly higher than the rate in any other year examined.

Implementation of the proposed TSAP would also result in a statistically significant change in the racial composition of the top 15% of applicants, who are those likely to be called for interviews. Under the current TSAP, only 7.2% of the top 15% of applicants are white. If the new Working Family Preference were implemented, there would be a statistically significant increase in the percentage of white families in the top 15% of the list of applicants. These conclusions are not disputed by NYCHA.

Finally, plaintiffs' expert has concluded that of the eleven projects that remained more than 50% white as of June 1996, the process of desegregation occurring under the current TSAP would be reversed at four of the projects, desegregation would stop at four projects, and desegregation would slow significantly at three of the projects if the proposed Working Family Preference were implemented.

Plaintiffs contend that the expansion of Project Choice to larger apartments would perpetuate past discrimination. Plaintiffs' expert has calculated that, in 1995, Project Choice for smaller apartments has resulted in 54 more white families moving into projects that are greater than 25% white than would have moved into such projects had Project Choice been unavailable. If Project Choice had been expanded, an additional five white families would have moved into such projects, for a total of 59 white families in projects that are 25% or more white who would not have moved into such projects in the absence of Project Choice. In addition, 38 white families who would not otherwise have been admitted to projects that are between 10% and 25% white were admitted to such projects because of Project Choice for smaller apartments. Three additional white families would have moved into these projects had Project Choice been available for those needing larger apartments. Thus 8 additional white families would move into "white" projects if Project Choice were expanded as proposed. In projects that are greater than 10% white, however, there has been a net decline of more than 800 white families per year since 1990, when Project Choice was available only for small apartments, and in projects that are greater than 30% white, there has been an annual decline of 880 white families.

NYCHA submitted these proposed TSAP changes to HUD for approval. NYCHA also submits routine data reports to HUD, from which the racial effects of tenant selection and assignment practices can be evaluated. By letter dated July 31, 1996, HUD stated that, with regard to the proposed Working Family Preference, "HUD does not approve local preferences, and thus NYCHA may create these local preferences, so long as notice and comment requirements are met. However, NYCHA should be mindful of the injunctive relief provided for by the *Davis* consent decree and its responsibilities under civil rights statutes." By letter dated October 24, 1996, HUD approved the implementation of Project Choice for three and four bedroom apartments, concluding that "the

extension of Project Choice ... is not likely to affect the racial identifiability of developments in New York City for the remaining period of the *Davis* TSAP." HUD required NYCHA to collect and report data on the effect of the expansion of Project Choice.

Discussion

I. ***The Legal Standards***

A. ***Preliminary Injunction***

***6** In general, a party seeking a preliminary injunction under Fed.R.Civ.P. 65 must demonstrate: (1) irreparable injury and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tipping decidedly in favor of the movant. *Blum v. Schlegel,* 18 F.3d 1005, 1010 (2d Cir.1994); *Sweeney v. Bane,* 996 F.2d 1384, 1388 (2d Cir.1993); *Laureyssens v. Idea Group, Inc.,* 964 F.2d 131, 135–36 (2d Cir.1992).

"Where a moving party challenges government action taken in the public interest pursuant to a statutory or regulatory scheme, however, the moving party cannot rely on the 'fair ground for litigation' standard, but is required to demonstrate irreparable harm and a likelihood of success on the merits." *Jolly v. Coughlin,* 76 F.3d 468, 473 (2d Cir.1996) (citations and internal quotations omitted); *NAACP v. Town of East Haven,* 70 F.3d 219, 223 (2d Cir.1995); *Bane,* 996 F.2d at 1388. Plaintiffs concede that they must demonstrate a likelihood of success on the merits and irreparable harm to obtain the injunctive relief they seek.

B. ***The Fair Housing Act***

Paragraph 5 of the Consent Decree incorporates the standards of the Fair Housing Act for the evaluation of the implementation of the TSAP. Accordingly, to show a likelihood of success on the merits, plaintiffs must be likely to succeed in proving that the challenged provisions of the proposed TSAP would violate the Fair Housing Act.

To establish a violation of the Fair Housing Act, a plaintiff must prove that "the challenged practice of the defendant 'actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect.' " *Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 934 (2d Cir.), *aff'd,* 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988). Discriminatory effect "arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation." *Id.* at 937.

Once a plaintiff has made a *prima facie* showing that the challenged action has an adverse impact on a minority group or perpetuates segregation resulting from past discrimination, the burden shifts to the defendant to prove "that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Id.* at 936, (citing *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 149 (3d Cir.1977), *cert. denied,* 435 U.S. 908 (1978)).

II. ***The Working Family Preference***

A. ***Adverse Impact***

1. ***The Appropriate Comparison Group***

Plaintiffs contend that the proposed Working Family Preference would have a disparate adverse impact on minorities.

The parties do not differ significantly over the accuracy of the statistics presented by the experts. They do disagree over the legal significance of those statistics. Although disproportionate adverse impact is generally demonstrated through the use of statistics, to be meaningful the statistical analyses must employ appropriate comparison groups in assessing the challenged practice. *See Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development,* 56 F.3d 1243, 1253 (10th Cir.1995) ("Although discriminatory effect is generally shown by statistical evidence, any statistical analysis must involve the appropriate comparables.").

***7** Conventionally, the adverse impact of an applicant selection practice in housing and employment cases is determined by whether minority applicants are chosen at a rate lower than their proportional representation in the overall applicant pool. *See, e.g., United States v. Starrett City Assocs.,* 840 F.2d 1096, 1099 (2d Cir.) (comparing racial composition of apartment occupancy to racial composition of applicants in "active file"), *cert. denied* 488 U.S. 946, 109 S.Ct. 376, 102 L.Ed.2d 365 (1988); *Bronson v. Crestwood Lake Section 1 Holding Corp.,* 724 F.Supp. 148, 154–55 (S.D.N.Y.1989) (comparing percentage of minorities excluded by challenged policy to percentage of minorities in "applicant pool" of households eligible for residence); *cf. Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650–51, 109 S.Ct.

2115, 104 L.Ed.2d 733 (1989) (comparison between racial composition of qualified persons in relevant labor market and persons holding at-issue jobs generally forms proper basis for initial inquiry in disparate impact case under Title VII), *superseded by statute on other grounds,* Civil Rights Act of 1991, § 105, 42 U.S.C. § 2000e–2(k) (1994); *Teamsters v. United States,* 431 U.S. 324, 339–40 n. 20, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

"There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." *Dothard v. Rawlinson,* 433 U.S. 321, 330, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) (in Title VII case, permitting showing of disparate impact using general population statistics where application process might discourage potential female applicants from applying). The ultimate question is whether a challenged action has a disproportionate impact on the minorities in the relevant eligible population.

Here, the proposed TSAP, with the Working Family Preference, does not result in an under-representation of minorities selected for apartments relative to their representation in the overall applicant pool. Indeed, as plaintiffs concede, white applicants, who make up 10% of the applicant pool, would receive only 9.9% of apartments under the new TSAP.[2]

[2] Plaintiffs contend that *Connecticut v. Teal,* 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), forbids the use of the overall applicant pool as a point of comparison. *Teal* does not stand for the proposition that the racial composition of the applicant pool is an inappropriate point of comparison. It stands, rather, for the proposition that an employer (or a housing authority) may not defend a screening practice that disproportionately affects minority applicants by contending that some practice later in the selection process results in a "bottom line" minority hiring rate that matches or exceeds the percentage of minorities in the overall applicant pool.

Plaintiffs, however, contend that only those applicants who have sufficiently high priority rankings under the TSAP are truly "eligible" for NYCHA housing. Thus, they contend, the appropriate pool of qualified applicants is actually the highest ranked 15% of the applicant pool.

In *Waisome v. Port Authority,* 948 F.2d 1370 (2d Cir.1991), job applicants were required to take a written test. Applicants receiving a 66 on the written test were "eligible" for the positions in question. Minorities achieved this threshold score in numbers proportional to their representation in the applicant pool. However, as a practical matter, only those scoring above 76 on the test would be eligible for promotion. Minority applicants achieved this score at a rate lower than their rate of representation in the applicant pool. The Second Circuit held that, where the score on a written test served as both a threshold bar to promotion and as a component in the ultimate promotion decision for those who passed the threshold, a racial disparity in the distribution of scores above the threshold could make out a *prima facie* case of disparate impact, even if there was no disproportionate racial impact at the threshold score itself. *Id.* at 1378.

***8** Plaintiffs observe that white applicants make up only 7.2% of the top 15% of the applicant pool under the existing TSAP and that they would constitute a significantly higher percentage of the top 15% under the proposed TSAP. Plaintiffs have provided no direct evidence about the racial composition of the top 15% of the applicant pool under the new TSAP. In the absence of contrary evidence, it will be assumed that the percentage of whites—the top of the pool—would reflect their percentage in the overall pool. Thus, whites would make up 10% of the top 15% of the pool under the new TSAP. Under both the current and the proposed TSAP, then, whites are not over-represented at the threshold priority ranking at which they have a practical chance of receiving an apartment. Thus, as in *Waisome,* the Working Family Preference has no apparent selection bias against minority applicants at the level of the "cut-off score." However, under *Waisome,* if plaintiffs could demonstrate that whites had higher priority rankings than minorities within the top 15% under the proposed TSAP, they would still make out a *prima facie* case.

Plaintiffs, however, have not presented any evidence that whites have higher priority scores than minorities within the top 15% under the proposed TSAP. Instead, they contend that the composition of the top 15% would be significantly more "white" under the proposed TSAP than it is under the *current* TSAP. *Waisome* did not compare differences in racial composition under different selection procedures, but the effect of a single selection procedure on individuals who achieved a cutoff score.

Plaintiffs, however, insist that the proper comparison is between the racial composition of the top of the applicant pool under the current TSAP and the composition of the top of the pool under the proposed TSAP. They also present evidence indicating that the 9.9% white admission rate under the proposed TSAP would be significantly higher than the white admission rate for each of the years 1990 through 1995, and urge that these historical discrepancies demonstrate a disparate adverse impact.

In some employment discrimination cases, a change in the racial or gender composition of a workforce over time may be relevant to the disparate impact inquiry. *See* Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1700–1701 & n. 70 (3d Ed.1996). For example, in *Valentino v. U.S. Postal Service,* 511 F.Supp. 917 (D.D.C.1981), *aff'd,* 674 F.2d 56 (D.C.Cir.1982), the court concluded that evidence that the number of women in higher paid positions increased while the number of male employees in these positions decreased rebutted plaintiff's claim that women were disadvantaged in promotions. *Id.* at 954.

While temporal analyses may be useful in some circumstances, current applicant flow data is generally preferred for establishing the adverse impact of a challenged selection practice. *See Moore v. Hughes Helicopter, Inc.,* 708 F.2d 475, 482 (9th Cir.1983) ("Disparate impact should always be measured against the actual pool of applicants or eligible employees unless there is a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate."). The use of historical comparisons, such as that proposed by plaintiffs, can be suspect, because time-dependent factors other than the challenged practice, such as demographic changes in the composition of the underlying pool, could account for observed changes in racial composition. For example, one court recognized that the use of 1980 census data in 1989 could bias results because of the possibility of significant racial changes in the population of the community. *Bronson,* 724 F.Supp. at 155.

***9** When more accurate data on the racial impact of a challenged selection method are unavailable, the use of alternative statistics, such as historical trends or time-series analysis correlating drops in minority representation with the implementation of a challenged employment practice, may be useful. Moreover, historical trends may illuminate the significance of other data. *See Hazelwood School District v. United States,* 433 U.S. 299, 309, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (courts should consider selection during relevant time period, rather than "snap-shot" of current racial composition of workforce, because current composition may be result of discriminatory practices that took place before effective date of Title VII, rather than current discriminatory practice). Here, however, data on the impact of the Working Family Preference on current applicants are available, and the historical data provides no additional information on the racial effect of the proposed TSAP on current applicants.

Plaintiffs next contend that the implementation of the new TSAP should be conceptualized as a "reordering" of the existing top 15% of the list. Such a reordering, they argue, disproportionately affects the minorities who have a realistic chance of obtaining an apartment, because some of them will be eliminated from the list, while the representation of white applicants will be increased.

In *Giles v. Ireland,* 742 F.2d 1366 (11th Cir.1984), the employer's past discriminatory hiring practices resulted in a disproportionate number of African–Americans being hired into the employer's lowest level Mental Health Worker I ("MHW–I") positions. The higher MHW–II and MHW–III positions were predominantly filled by whites. *Id.* at 1379. The employer imposed a freeze on promotions from MHW–I to MHW–II level, but did not freeze promotions from MHW–II to MHW–III. *Id.* The "no-promotion" policy thus appeared to fall more heavily on African–Americans than whites. *Id.* at 1376. Because of the freeze on promotions, the district court was unable to determine who had been denied a promotion from MHW–I and how many individuals would have been promoted in the absence of the freeze. *Id.* at 1377. The Eleventh Circuit concluded that, in the absence of more precise evidence of who would have been promoted, the top half of the register of applicants for promotions represented those individuals most likely to have lost promotions as a result of the policy. *Id.* at 1377–78.[3] Because applicants in the top half of the register were predominantly African–American for one of the years during which the freeze was effective, the no-promotion policy deprived a greater number of African–Americans than whites of the opportunity for advancement. *Id.* at 1378. The Eleventh Circuit held that the record was inadequate to determine the discriminatory impact of the no-promotion policy, but stated that Giles' evidence could establish a *prima facie* case, and remanded to the district court for further proceedings on the issue. *Id.* at 1378–80.

[3] In contrast to the Davis plaintiffs, who contend that only the top of the applicant list should be considered, Giles argued that the court should have considered the total number of MHW–I's or the entire register of applicants, which had a higher percentage of African–American employees than the top of the register. *Id.* at 1376.

***10** Plaintiffs contend that the implementation of the Working Family Preference here adversely affects minorities, who make up a disproportionately large share of those in the top 15% of the applicant pool, just as the implementation of the promotion freeze in *Giles* adversely affected minorities, who made up a disproportionately large share of those in the top half of the applicant register for promotions to the MHW–II

positions.

Giles' holding on disparate adverse impact is inapposite. In *Giles,* the employer permitted continued advancement for employees in positions that were held predominantly by whites, but froze promotion for those in positions that were occupied predominantly by African–Americans. Because the challenged policy was not applied uniformly to all job categories and employees were racially segregated by job category, the policy had a manifest asymmetrical impact. Here, in contrast, NYCHA has proposed the implementation of a new tenant selection preference that applies to all applicants, and there is no asymmetry similar to that in *Giles. See United States v. City and County of San Francisco,* 656 F.Supp. 276, 284 (N.D.Cal.1987) (*Giles* not analogous where promotion freeze did not have impact only on disproportionately minority job classifications).

Moreover, the *Giles* court did not compare historical promotion rates to promotion rates under the challenged practice, as plaintiffs here propose. Instead, the *Giles* court used, in the absence of better data, the composition of a portion of the applicant pool as a proxy for those who would have been promoted, and thus been adversely affected by the challenged promotion freeze.

Finally, plaintiffs' proposed interpretation of *Giles* would create perverse incentives that could actually retard rapid integration efforts. If a reduction in minority representation from previous practices alone made out a *prima facie* case of disparate impact under Title VIII, a housing authority or landlord would effectively be bound to maintain the past selection criteria that produced the highest level of minority representation. Such a rule would create a "ratchet" effect: a housing authority could institute selection criteria that increase minority representation, but could never make changes that would reduce minority representation below the previously established benchmark. If Title VIII actually imposed such a "historical quota," a housing authority might be reluctant to use criteria that would have the effect of favoring minorities, for fear it would be forever locked into those criteria. Such disincentives to temporary aggressive integration efforts should not be imposed on all housing authorities, regardless of past discriminatory practices.

Accordingly, the proposed Working Family Preference does not have an "adverse impact" on minority applicants.

B. ***Perpetuation of Past Discrimination***

1. ***Existence of Past Discrimination***

***11** Where a plaintiff fails to demonstrate that a challenged practice imposes a disproportionate burden on minority applicants, she may still make out a *prima facie* case under a disparate impact theory if she can demonstrate that the challenged practice has the effect of perpetuating past segregation. *See Huntington,* 844 F.2d at 937 (*citing Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 558 F.2d 1283, 1290 (7th Cir.1977), *cert. denied,* 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978)). In order to prove that the Working Family Preference perpetuates past segregation, plaintiffs must first demonstrate the existence of past segregation.

The record establishes the existence of past segregation in NYCHA housing. Judge Leval's findings demonstrate the persistence of discriminatory practices and resulting segregation in New York City public housing as late as 1991. *See Davis I,* 1992 WL 420923, at *2. Where, as here, a defendant enters into a settlement without rebutting the plaintiffs' *prima facie* case, the settlement amounts to an admission of unlawful discrimination for purposes of evaluating the validity of the remedies imposed. *See Kirkland v. New York State Dep't of Correctional Serv.,* 711 F.2d 1117, 1131–32 (2d Cir.1983), *cert. denied,* 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984). Indeed, in order to approve race conscious remedies, such as those approved in this case, a court must find that a *prima facie* case of discrimination has been established. *Id.* at 1132, 1134.

NYCHA points to the Consent Decree's disclaimers of liability, which state that "this Consent Decree shall not constitute an adjudication or admission by the Housing Authority of any violations of any law, executive order or regulation." In *Kirkland,* however, the Second Circuit held that such disclaimers are to be construed not as a rebuttal of a *prima facie* case, but as a reservation of rights to explain admitted statistical disparities in future litigation. *Id.* at 1131 n. 16. NYCHA has not provided any rebuttal of the allegations of discrimination relied upon by Judge Leval in approving the Consent Decree.

The Consent Decree's disclaimer of liability does not bar consideration of the underlying evidence for the purpose of establishing the existence of past discrimination. In *City of San Francisco,* 656 F.Supp. at 285, the plaintiffs alleged that the cancellation of certain employment examinations perpetuated past segregation by the City of San Francisco. In a prior action, the City of San Francisco had entered into a consent decree prohibiting discrimination, but disclaiming any admission of liability. The court concluded that, notwithstanding the disclaimer, it could consider the evidence of discrimination

underlying the consent decree in determining whether the practice challenged in the case before it perpetuated the past discrimination the prior decree was intended to remedy. *Id. at* 285 & n. 9.

Here, the record discloses considerable evidence of past discrimination. In its memorandum in support of the fairness and adequacy of the Consent Decree, NYCHA admitted to race-conscious admissions practices that led to "racial steering" of white applicants to predominantly white housing projects. Move-in, move-out data also demonstrated a consistent pattern of white families being replaced by other white families over time, a pattern the United States, in its memorandum in support of the Decree, concluded "could only occur as a result of a deliberate racial quota system."

***12** Accordingly, the existence of past segregative practices has been adequately established.

2. ***Perpetuation of Discrimination***

Segregation in public housing exists if housing projects are "significantly out of racial balance." *Jaimes v. Toledo Metro. Housing Auth.,* 715 F.Supp. 835, 838 (N.D.Ohio 1989); *cf. Brown v. Board of Education of Topeka,* 892 F.2d 851, 869–70 (10th Cir.1989) (school segregation endures if schools remain "racially identifiable," *i.e.,* predominantly of one race), *remanded for further consideration,* 503 U.S. 978 (1992), *reinstated* 978 F.2d 585 (11th Cir.), *cert. denied,* 509 U.S. 903, 113 S.Ct. 2994, 125 L.Ed.2d 688 (1993). Under the TSAP, a project is considered disproportionately white if more than 30% of its families are white. TSAP at 29. In *Jaimes,* the court stated that a family housing unit was out of balance if minority representation was over 85% or under 55%, and white representation was over 45% or under 15%. 715 F.Supp. at 838.

Plaintiffs have identified eleven NYCHA projects that remain over 50% white, and are thus "disproportionately white" and "out of racial balance" as a result of NYCHA's past segregative practices. NYCHA does not dispute that these projects are out of racial balance or that under the current TSAP these eleven projects are desegregating.

The implementation of a policy that "freeze[s] the effects of past discrimination" may violate Title VII, and, by analogy,[4] Title VIII. *See Giles,* 742 F.2d at 1380–81 (where past discrimination concentrated blacks at bottom of employment hierarchy, no-promotion policy that freezes effects of past discrimination may violate Title VII). Here, the past segregative practices had the effect of creating racially imbalanced housing projects, eleven of which remain. According to plaintiffs' expert, assuming that existing turnover and move-in rates persist and that for each vacancy set aside for claimants under the *Davis* decree, a family of color would replace a white family, implementation of the Working Family Preference would effectively "freeze" the desegregation process at the racially identifiable projects, in violation of Title VIII. Specifically, the Working Family Preference would reverse the desegregation process at four of the eleven majority-white projects, there would be no further desegregation at another four, and desegregation would be slowed significantly at three other projects. The Working Family Preference will have this effect because it will more than double white admission rates and because existing trends demonstrate that many of these additional white families will be concentrated in predominantly white developments.

[4] *See Huntington,* 844 F.2d at 934 (noting relevance of Title VII case law to Title VIII cases).

NYCHA advances four principal arguments in response to plaintiff's evidence of perpetuation of past discrimination. First, NYCHA contends that the effects of past discrimination have been "attenuated" by the passage of time. NYCHA cites *Almonte v. Pierce,* 666 F.Supp. 517, 529 (S.D.N.Y.1987), to support the contention that such attenuation renders the past segregation of little relevance to the legality of the proposed TSAP. However, *Almonte* involved not allegations of perpetuation of past discrimination in violation of Title VIII, but a charge that HUD and the Housing Authority failed to conduct special outreach to the Hispanic community in accordance with factors listed in a HUD Handbook. The Handbook directed that "the possible existence of practices or policies of discrimination" should be considered in formulating an outreach plan. The plaintiffs pointed to the discriminatory practices identified in ten-year old litigation as a basis for requiring special outreach to the Hispanic community. The court in *Almonte* construed the "existence of discriminatory practices" factor to refer only to *present* discriminatory practices, and thus concluded that the discriminatory practices that had been uncovered and terminated by the litigation of ten years earlier was not relevant to the issue of whether additional outreach should be presently required under the HUD Handbook. *Id.* at 529–30. *Almonte* does not cast doubt on the well-established principle that actions may violate Title VIII if they perpetuate segregation that has not been fully eradicated.

***13** Second, NYCHA contends that because the cause of the past segregation was racial steering practices, not

tenant selection practices, the fact that proposed tenant selection practices would perpetuate or prolong existing segregation is irrelevant. NYCHA cites no authority in support of this contention. Indeed, the *Arlington Heights* litigation demonstrates that a difference between the past practice that caused the current segregation and the nature of the practice that would cause the perpetuation of that segregation does not insulate a defendant from Title VIII liability. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 517 F.2d 409, 413–14 & n. 1 (7th Cir.1975), *rev'd on other grounds,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), the Seventh Circuit concluded that the Village was racially segregated. The plaintiffs challenged the Village's refusal to rezone a parcel of land to permit the construction of low income housing, which would have substantially increased the minority population in the largely white community. The existing segregation was not attributed by the Seventh Circuit to the zoning practices of the Village, *id.* at 414 (Village asserted, and court did not deny, that Village did not cause existing segregation), and acknowledged that high housing costs were at least partially responsible. *Id.* at 414 n. 2. Later in the litigation, the Seventh Circuit concluded that the failure to rezone the parcel could violate Title VIII by perpetuating past segregation, if no other land in the Village would permit construction of the proposed development. *Arlington Heights,* 558 F.2d at 1294. Title VIII liability thus was possible, even though there was no conclusion that the Village's prior zoning practices had caused the housing segregation that its current zoning practices would perpetuate. Similarly, the fact that one set of practices (racial steering) may have caused the initial segregation of NYCHA housing does not prevent a finding that a different set of practices (the Working Family Preference) would impermissibly perpetuate that discrimination.

Moreover, adoption of NYCHA's position would allow perpetrators of housing discrimination to perpetuate the segregation caused by their unlawful practices by the expedient of adopting an unrelated, facially-neutral mechanism to maintain the racial status quo. In the absence of authority for such a result, NYCHA's contention must be rejected.

Third, NYCHA seems to suggest that the fact that the proposed Working Family Preference will actually align the racial composition of new admissions with that of the applicant pool somehow prevents a finding of perpetuation of past segregation. However, this contention impermissibly collapses the distinction between the adverse impact and perpetuation of segregation theories of disparate impact. Moreover, the courts have held in the school desegregation setting that the mere implementation of race-neutral practices may be inadequate to remedy past segregation, if that segregation will persist despite the adoption of race neutral measures. *See, e.g., Brown,* 892 F.2d at 868 ("Mere adherence to a race-neutral but ineffective neighborhood school plan is insufficient. In general, any course of action that fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is unacceptable.") (citing *Wright v. Council of City of Emporia,* 407 U.S. 451, 460, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972)).

***14** Finally, NYCHA contends that the fact that only a small number of projects continue to be disproportionately white, while the majority of tenants are minority and the bulk of the projects are racially integrated, vitiates any claim of segregation. NYCHA again cites no authority for the proposition that perpetuating the existence of racially-identified projects may be justified by the overall level of minorities in the NYCHA system or by the integration of other projects. Indeed, segregation exists where, as here, a racial group is concentrated in a small number of projects because of past discrimination, *Jaimes,* 758 F.2d at 1108, even when minorities constitute a large proportion of tenants in public housing generally. *Id.* at 1090 (minorities constituted 70% of tenants in family projects).

In sum, plaintiffs have adequately demonstrated a likelihood of success in proving a *prima facie* case that the Working Family Preference would perpetuate past segregation in predominantly white projects.

C. *NYCHA's Justifications*

Once a plaintiff has established a *prima facie* case of disparate impact in a Title VIII case, the burden shifts to the defendant to prove both: (1) that its actions furthered, in theory and practice, a legitimate, bona fide governmental interest; and (2) that no alternative would serve that interest with less discriminatory effect. *Huntington,* 844 F.2d at 936 (adopting formulation set forth in *Rizzo,* 564 F.2d at 148–49); *United States v. Incorporated Village of Island Park,* 888 F.Supp. 419, 445 (E.D.N.Y.1995); *Oxford House, Inc., v. Town of Babylon,* 819 F.Supp. 1179, 1183 (E.D.N.Y.1993).

NYCHA asserts two legitimate interests that its proposed Working Family Preference would serve: (1) income integration in public housing; and (2) increasing the number of working families in public housing. Income integration is important to the survival of public housing because it promotes both financial and social stability. Congress has expressly required local housing authorities "to ensure that, to the maximum extent feasible, the

projects of an agency will include families with a broad range of incomes and will avoid concentrations of low-income and deprived families with serious social problems." 42 U.S.C. 1437d(c)(4)(A)(iv).

Recent federal regulations expressly permit local preferences favoring working families. *See* 24 C.F.R. § 960.205(a) (1995). In adopting these regulations, HUD stated that it was "convinced that housing agencies must have the flexibility to give preference to working families to assure diversity in the residency of projects and to include families who can serve as role models for other families." 59 Fed.Reg. 36,618–19 (July 18, 1994).

Plaintiffs concede that these objectives are legitimate, and that the Working Family Preference would help NYCHA achieve these goals. However, plaintiffs contend that NYCHA has not sustained its burden of demonstrating that there is no less discriminatory means of advancing the same interests.

***15** Plaintiffs propose an alternative method of increasing the representation of upper income families that would have a less racially discriminatory effect than the Working Family Preference as proposed by NYCHA. Rather than assigning a separate local preference to Tier I working families, plaintiffs propose that all Tier I families, working and non-working, be assigned the lowest local preference. Under this plan, Tier I families would continue to rank below Tier II and Tier III families, and thus the number of rentals to upper income families would still increase. Because there are almost twice as many white applicants among Tier I working families as among Tier I non-working families, however, the elimination of the distinction between working and non-working families in the lowest income Tier would result in a higher rate of minority admissions and thus minimize perpetuation of past segregation.

NYCHA responds that, while this proposal may advance income integration, it would frustrate the goal of increasing the proportion of rentals to working families. However, NYCHA presents no evidence that the implementation of local preferences that favor Tier II and III families over Tier I families would not in itself increase the proportion of working families. Since it is plausible that Tier II and III applicants have higher incomes because of employment, it seems likely that increasing the number of such families admitted would have precisely this effect. Thus, NYCHA has failed to carry its burden of demonstrating that a less-discriminatory alternative would not advance its claimed interest. Moreover, NYCHA has considerable flexibility in implementing local preferences and has presented no reason that it could not adopt yet other measures that would increase working family rentals without perpetuating segregation.

It also appears that NYCHA could eliminate the objectionable perpetuation of discrimination by making revisions to their plan that are even less drastic than those proposed by plaintiffs. The Working Family Preference could be instituted in essentially the proposed form, provided white applicants selected under the preference are not placed in projects in which whites are over-represented relative to the applicant pool. The extent to which such a modification would be administratively feasible or desirable is, of course, a question for NYCHA.

In order to effectuate the purposes of the decree, NYCHA will be enjoined from implementing the Working Family Preference as proposed. However, NYCHA will be permitted to seek modification of the injunction to permit a Working Family Preference that will not affect desegregation at predominantly white projects.

III. *Expansion of Project Choice*

A. *Deference to HUD Approval*

NYCHA contends that HUD's limited-term approval of the proposed expansion of Project Choice is entitled to judicial deference. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844–45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Supreme Court held that considerable weight should be given to an agency's construction of a statutory scheme that it has been entrusted to administer. HUD's interpretation of the Fair Housing Act "ordinarily commands considerable deference" because "HUD [is] the federal agency primarily assigned to implement and administer Title VIII." *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 107, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); *see also Pfaff v. United States Dep't of Housing & Urban Devel.,* 88 F.3d 739, 747 (9th Cir.1996).

***16** A court defers to an agency's findings of fact where they are reasonable and supported by substantial evidence on the record as a whole. *NLRB v. Gordon,* 792 F.2d 29, 32 (2d Cir.1986), *cert. denied,* 479 U.S. 931, 107 S.Ct. 402, 93 L.Ed.2d 355 (1986); 5 U.S.C. § 706(2)(E). Substantial evidence is something less than the weight of the evidence, and the possibility of drawing inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966).

However, the "substantial evidence" standard applies only to agency decisions made upon a formal hearing required by statute. *See National Nutritional Foods Ass'n v. Weinberger,* 512 F.2d 688, 700–01 (2d Cir.1975), *cert. denied,* 423 U.S. 827, 96 S.Ct. 44, 46 L.Ed.2d 44 (1975); *Aircraft Owners & Pilots Ass'n v. Federal Aviation Admin.,* 600 F.2d 965, 969–70 (D.C.Cir.1979). When an informal administrative adjudication is being reviewed, the appropriate standard is the more deferential test of whether the agency's action is arbitrary, capricious or an abuse of discretion. *See Castillo v. Army & Air Force Exchange Service,* 849 F.2d 199, 203 & n. 1 (5th Cir.1988).

B. ***Plaintiffs Have Not Established that the Expansion of Project Choice Would Violate the Fair Housing Act***

HUD has concluded, as a factual matter, that the proposed expansion of Project Choice is "not likely to affect the racial identifiability of developments in New York City for the remaining period of the *Davis* TSAP." By approving the proposal, HUD effectively concluded that the expansion of Project Choice does not violate Title VIII.

Technically, this motion is not an appeal pursuant to the Administrative Procedure Act. In effect, however, consideration of the motion amounts to judicial review of HUD's approval of the expansion of Project Choice to larger apartments. Accordingly, HUD's determination will be subjected to the degree of judicial scrutiny applied to agency actions in the ordinary appeal context.

The approval of the proposed expansion of Project Choice was granted after an informal procedure involving the review of paper submissions. There was no formal, statutorily-required hearing or formal record developed. Thus, this Court reviews HUD's factual determinations for arbitrariness, capriciousness or abuse of discretion.

HUD's action here was not arbitrary or capricious. HUD reviewed NYCHA's submissions and had sufficient data at its disposal to assess the effect of the proposed expansion of Project Choice on the racial identifiability of NYCHA projects.

Plaintiffs contend that this Court should not defer to HUD's approval for a variety of reasons. First, they note that HUD does not ordinarily permit Project Choice and has granted a waiver under the Consent Decree only as a limited term "demonstration" project. They cite to *Jaimes* in support of their contention that Project Choice rules tend to perpetuate past discrimination in violation of Title VIII by permitting white families to choose to concentrate in primarily white projects. *See* 715 F.Supp. at 841 (policy permitting applicants to refuse offered apartments three times maintained segregation in violation of Title VIII); *see also Jaimes v. Toledo Metropolitan Housing Auth.,* 758 F.2d 1086, 1108 (6th Cir.1985) and *Jaimes v. Toledo Metropolitan Housing Auth.,* 833 F.2d 1203, 1206 (6th Cir.1987) (affirming finding of liability for perpetuation of discrimination).

***17** While HUD's normal reluctance to permit Project Choice and *Jaimes* 's holding both reflect the potential problems with Project Choice rules, it does not establish a *per se* rule against such plans. In fact, plaintiffs conceded at oral argument that Project Choice would be unobjectionable in the absence of past discrimination. In *Jaimes,* the Court concluded that the plan would maintain segregation, and considered whether the percentage of white families in segregated projects was decreasing in coming to that conclusion. 715 F.Supp. at 841. Here, in contrast to *Jaimes,* all of the projects identified by plaintiffs as having disproportionately large white populations[5] are desegregating. According to plaintiffs' own expert, only seventeen additional white families would be eligible for Project Choice under the proposed TSAP, and of those only 8.3 would move into developments that are more than 10% white. This is a tiny fraction of the 1,885 three- and four-bedroom apartments rented by NYCHA in 1995. The eight additional families are also dwarfed by the 880 white families per year leaving projects that are over 30% white and the 800 families per year leaving projects that are over 10% white. Plaintiffs have not produced any evidence that the "influx" of eight additional white families will have any significant effect on the process of desegregation at any of these "white" projects[6], as they have with the Working Family Preference. The effect of expanding Project Choice is *de minimis,* and thus does not establish a *prima facie* violation of Title VIII. *See In re Malone,* 592 F.Supp. 1135, 1167 (E.D.Mo.1984), *aff'd,* 794 F.2d 1283 (8th Cir.1986).

5 Plaintiffs include projects that are more than 10% white among the "racially identified" projects, even though only projects that are greater than 30% white are considered racially-identified under the TSAP. In *Jaimes,* the court identified projects that were more than 45% white as unbalanced.

6 While plaintiffs have shown that the Working Family Preference would significantly slow or halt the desegregation process at eleven predominantly white projects, they have failed to make such a showing with respect to the expansion of Project Choice. The fact that

> the proposed expansion would result in a statistically significant difference in the distribution of white families to "white" projects does not mean that the change in distribution would have the effect of perpetuating past segregation at these projects, which would apparently continue to desegregate at a rapid pace.

Plaintiffs, however, urge consideration of the effect of not only the proposed expansion of Project Choice, but the effect of existing Project Choice for small apartments combined with the expansion to large apartments. However, a challenge to the effect of Project Choice for smaller apartments is precluded by the terms of the Consent Decree. Including the effects of Project Choice for smaller apartments in deciding this motion would exaggerate the effect of the proposal actually before the Court and impermissibly undermine the terms of the Consent Decree that permitted Project Choice for smaller apartments.

Plaintiffs finally contend that HUD did not have sufficient evidence before it to assess the "clustering" effect of Project Choice. If HUD had approved the proposed expansion of Project Choice without essential data, its action would have been arbitrary, and thus, subject to reversal on appeal. However, HUD had before it the existing TSAP, the proposed TSAP changes, and data reports routinely submitted by NYCHA. These data were sufficient to make an informed decision on the effect of the proposed expansion of Project Choice. Moreover, this Court's independent review of the parties' submissions supports HUD's conclusion.[7]

[7] Plaintiffs also contend that the extension of Project Choice will encourage more white families to apply for housing and that a large portion of these additional families will choose white projects. Plaintiffs have provided no statistical support for this assertion. If such a trend should materialize, Plaintiffs may seek an injunction at that time.

Accordingly, the proposed expansion of Project Choice will not be enjoined.

IV. ***Irreparable Harm***

***18** When a plaintiff establishes likelihood of success in proving housing discrimination, a rebuttable presumption of irreparable injury arises. *See Gresham v. Windrush Partners, Ltd.,* 730 F.2d 1417, 1423–24 (11th Cir.), *cert. denied,* 469 U.S. 882, 105 S.Ct. 249, 83 L.Ed.2d 187 (1984); *Bronson,* 724 F.Supp. at 153 (citing *Gresham*); *cf. Town of East Haven,* 70 F.3d at 224 (denial of job opportunities may constitute irreparable harm for purposes of issuing preliminary injunction in Title VII case; inability to displace white workers if liability is later found justifies issuance of preliminary injunction).

As discussed above, plaintiffs have established a likelihood of success on the merits of their claim that the Working Family Preference would perpetuate segregation in eleven predominantly white projects. NYCHA contends that because the plaintiffs do not identify the individuals harmed or the particular apartments of which they are deprived, the allegations are too speculative to support a finding of irreparable harm. However, it is not necessary to identify particular apartments or plaintiffs to obtain injunctive relief. In cases relying on statistical evidence to challenge discriminatory practices, it can rarely be determined precisely who has been harmed by what precise deprivation, but preliminary injunctions in such cases are permissible. *See Town of East Haven,* 70 F.3d at 224.

Accordingly, NYCHA has failed to rebut the presumption of irreparable harm arising from the perpetuation of segregation that would likely be caused by the Working Family Preference.

Conclusion

Upon the above findings of fact and conclusions of law the plaintiffs' motion is granted in part and denied in part. Specifically, the motion to enjoin implementation of the proposed Working Family Preference as proposed will be granted. However, NYCHA is granted leave to apply for a modification of the injunction upon a showing that the Working Family Preference will be implemented in a manner that will not affect desegregation in projects with a disproportionately high rate of white occupancy. The motion to enjoin the implementation of the proposed expansion of Project Choice will be denied.

Settle order on notice.

It is so ordered.