UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Michael Nozzi, et al. Plaintiff(s), v. Housing Authority of the City of Los Angeles, et al. Defendant(s).	No. CV 07-380-GW(FFMx) **RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

<u>**Nozzi v. Housing Authority of the City of Los Angeles**</u>, Case No. CV 07-0380
Ruling on Cross-Motions for Summary Judgment

I. INTRODUCTION

Plaintiffs in this action are two recipients of federal benefits under the "Section 8 Housing Voucher Program" (henceforth "S8HVP") pursuant to 42 U.S.C. § 1437f(o), and a non-profit advocacy organization. Defendants are the Housing Authority of the City of Los Angeles (henceforth "HACLA") and Rudolf Montiel, the Executive Director of HACLA. In their First Amended Class Action Complaint (henceforth "FAC"), Plaintiffs alleged five causes of action: (1) "Denial of Due Process of Law (42 U.S.C. § 1983)" for failing to provide adequate notice to S8HVP recipients pursuant to 24 C.F.R. § 982.505(c)(3)(ii) before implementing a reduction of housing benefits; (2) "Violation of Rights created by 42 U.S.C. § 1437f (Private Right of Action Available under 42 U.S.C. § 1983)"; (3) "Violation of Cal. Gov't. Code § 815.6"; (4) "Violation of Art. I, § 7 of California Constitution"; and (5) "Negligence" pursuant to California Government Code § 815.2, Civil Code § 1714 and Evidence Code § 669. On November 26, 2007, this Court entered an order (henceforth "11/26/07 Order") dismissing Plaintiffs' Second and Fifth Causes of Action.

Plaintiffs and Defendants have filed cross-motions for summary judgment as to Plaintiffs' First Cause of Action under 42 U.S.C. § 1983, the Third Cause of Action under California Government Code § 815.6, and the Fourth Cause of Action under Article I, Section 7, of the California Constitution. For the following reasons, summary judgment is GRANTED on each of those causes of action in favor of Defendants and against Plaintiffs.

II. BACKGROUND

A. <u>The Statutory and Regulatory Scheme</u>

In its 11/26/07 Order, this Court described the relevant statutory and regulatory scheme in detail. That discussion is incorporated herein and a copy of the Order is attached hereto. To briefly reiterate, the Section 8 housing program was created to help low income families obtain housing by subsidizing private landlords who would rent to low-income tenants. <u>See</u> <u>Cisneros v. Alpine Ridge Group</u>, 508 U.S. 10, 12 (1993). One of the Section 8 programs is the S8HVP. 42 U.S.C. § 1437f(o); 24 C.F.R. § 982.1(a)(1). The S8HVP is usually administered by a state or local governmental entity called a "public housing agency" or "PHA" within a designated geographic area. <u>See</u> 24 C.F.R. § 982.1(a)(1). The United States Department of Housing and Urban Development ("HUD") provides housing assistance funds to the PHAs and also supplies money for the PHAs' administration of the programs. <u>Id.</u>

HUD publishes the fair market rents (henceforth "FMR") for designated geographic areas in the United States. 24 C.F.R. §§ 888.111 and 982.503(a). A PHA must adopt a payment schedule that establishes "voucher payment standard amounts" (henceforth "VPSA") for each FMR area within its jurisdiction. <u>See</u> 24 C.F.R. § 982.503(a). The PHA may establish the payment standard amount for a unit size at any level between 90 percent and 110 percent of the published FMR for that unit size without HUD approval. 42 U.S.C. § 1437f(o)(1)(B); see also 24 C.F.R. § 982.503(b)(1). It may also establish a separate payment standard amount within the basic range for a designated part of an FMR area. 24 C.F.R. § 982.503(b)(1)(ii). HUD approval is not required for HACLA to reduce the VPSA within the prescribed basic range. 42 U.S.C. § 1437f(o)(1)(B); see also 24 C.F.R. § 982.503(b)(1).

As conceded by the Plaintiffs in their FAC, "PHAs have discretion to raise or lower the VPS[A] within a statutorily prescribed range." See FAC at ¶ 26. If a PHA decreases the amounts on the payment standard schedule, "the lower payment standard amount generally must be used to calculate the monthly housing assistance payment for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease in the payment standard amount." 24 C.F.R. § 982.505(c)(3). Under the regulations promulgated by HUD, the PHA is required to advise the S8HVP participants that the application of the lower payment standard will be so deferred. See C.F.R. § 982.505(c)(3)(ii). 24 C.F.R. § 982.5 requires that such notice be in writing.

B. HACLA's Reduction of the VPSA

As eventually memorialized in a "Memorandum of Understanding" entered into between HUD and HACLA in April 2004, HUD required HACLA to address the latter's "significant projected deficits" in its S8HVP program and to bring its spending on Housing Assistance Payments ("HAP") into line with the HUD budget at the time. See Plaintiffs' Separate Statement of Genuine Issues of Material Facts in Opposition to Defendants' Motion for Summary Judgment ("PSSGI") at ¶ 10. HACLA elected to use its discretionary authority to take certain actions to reduce HAP expenditures, including lowering the VSPA within the prescribed basic range allowed by the statute and the HUD regulation. Id. at ¶ 11. On March 26, 2004, HACLA's Board of Commissioners ("Board") voted to reduce the VPSA from 110% to 100% of the FMR. Id. at ¶ 12. On August 25, 2004, a public hearing, with public comments, was held on HACLA's "Year 2005 Agency Plan" where the Board emphasized that the 2004 VPSA reduction would not take effect until the Spring of 2005. Id. at ¶ 14. Prior to the August hearing, copies of HACLA's draft of its 2005 Agency Plan, which included information relating to the VPSA reduction, were made available at all HACLA offices. Id. at ¶ 15. In addition, HACLA conducted approximately twenty outreach meetings at public housing sites and seven regional Section 8 meetings which included a slideshow presentation detailing the effects of the 2004 VPSA reduction. Id. at ¶ 16.

The written notice of the 2004 VPSA reduction ("reduction notice") was sent to each Housing Choice Voucher Program participant on or about the date of the participants' annual reexamination, a "full" year before the 2004 VPSA reduction was to go into effect. Id. at ¶ 17. The reduction notice stated that:

> Effective April 2, 2004, the Housing Authority lowered the payment standards used to determine your portion of the rent. We will not apply these lower payment standards until your next regular reexamination. If you move, however, these new lower payment standards will apply to your next unit.

PSSGI ¶ 18; Fields Decl., Ex. I. The reduction notice also contained a chart detailing the new payment standard by unit size. Id. at ¶ 19; Fields Decl., Ex I. Plaintiffs received the reduction notice. Id. at ¶ 21.

III. DISCUSSION

A. First Cause Of Action

In its 11/26/07 Order, this Court wrote:

> Plaintiffs' SCA [Second Cause of Action] is based on the following syllogism: 1) the S8VHP benefits are "a federally secured right"; 2) HUD regulations flesh out how HACLA's monthly payments are to be calculated; 3) by failing to provide the required notice, HACLA's reduction in S8HVP benefits is unlawful and 4) "HACLA, therefore, violated 42 U.S.C. § 1437f(o)(2) by failing to make the required payments under the 'applicable payment standard'" which constitutes a violation of 42 U.S.C. § 1983. See FAC at ¶¶ 68-69.

Docket No. 63, 7:2-6. The Court found that this argument failed for a number of reasons. First, inadequate notice is not itself cognizable as a §1983 claim. Second, where (as here) the issue does not concern the procedural fairness of individual eligibility determinations and notice is not required by the governing statute but only in a concomitant regulation, Defendants' alleged failure to give notice as required by 24 C.F.R. § 982.505(c)(3) could not give rise to a § 1983 claim, because a regulation cannot create a right where Congress did not. See Alexander v. Sandoval, 532 U.S. 275, 291 (2001). Finally, even if the regulation here somehow could create a private right of action, HACLA has not violated the notice provision as set out in the regulation. Docket No. 63, 9:25-28.

In its previous Order, the Court also wrote that, although the statute did not impose any obligation with respect to notice, a failure of notice might still give rise to a due process complaint that could, in turn, give rise to a §1983 claim. This, in essence, is the substance of the First Cause of Action. Rather than alleging the violation of a specific statutory right to receive notice that is enforceable under § 1983, it alleges that Plaintiffs were deprived of a protected property interest without due process.

The "minimum" elements of a claim for procedural due process are "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process." Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996). Because the undisputed evidence establishes that Plaintiffs have not demonstrated the deprivation of a protected interest or a failure of due process, summary judgment as to the First Cause of Action is GRANTED in favor of Defendants.

1. Is There a Protectable Property Interest in Notice Alone?

As an initial matter, the Court rejects Defendants' contention that the cases - Blessing v. Freestone, 520 U.S. 329 (1997), and Gozanga University v. Doe, 536 U.S. 273, 285 (2002) - apply to Plaintiff's First Cause of Action. The First Cause of Action does not, as the Second Cause of Action purported to do, assert the violation of a right secured by federal statutes. Nor, obviously, is § 1983 limited in its application to the vindication of such rights. As noted above, the relevant threshold inquiry is whether Plaintiffs can establish a property interest that is protected by the Fourteenth Amendment.

Defendants argue that, because HACLA had statutory discretion to reduce the VPSA, "the law is clear that there is no property interest for Plaintiffs to assert." To say categorically that Plaintiffs could not have had any property interest in the benefit they were receiving is, at best, an oversimplification. It is clear, in the abstract at least, that Plaintiffs can have "a constitutionally protected 'property' interest in Section 8 benefits by virtue of [their] membership in a class of individuals whom the Section 8 program was intended to benefit." Ressler v. Pierce, 692 F.2d 1212, 1215 (9th Cir. 1982); see also Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 320 n.8 (1985) ("this Court has held that a person receiving . . . benefits [under a federal statutory program] has a 'property' interest in their continued receipt."). Nevertheless, the argument could be made (and perhaps this is the argument that HACLA is trying to make) that the only protectible claim of entitlement they could have is in the minimum allowable VPSA that the housing authority could permissibly establish without HUD approval - i.e., 90% of the published FMR. Because the Defendants have not sought to lower the VSPA amount below the prescribed basic range and because the Plaintiffs have conceded that the Defendants did not act improperly in deciding to reduce the VPSA amounts from 110% to 100% of the published FMR, the claimed property interest that has been allegedly violated herein is not as to the benefits themselves.

A statute, rule or regulation may create an entitlement to a government benefit. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."); see also Allen v. Beverly Hills, 911 F.2d 367, 370 (9th Cir. 1990) (looking to "California state law or City rules and regulations" to decide whether plaintiff had a property interest in continued employment). In Allen, the appellate court wrote:

> Whether an expectation of entitlement is sufficient to create a property interest "will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [decisionmaker]." Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980) (Jacobson). If "the decision to confer a benefit is unconstrained by 'particularized standards or criteria,' no entitlement exists." Fidelity Financial Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1436 (9th Cir. 1986) (Fidelity) , cert. denied, 479 U.S. 1064, 93 L. Ed. 2d 998, 107 S. Ct. 949 (1987), quoting Olim v. Wakinekona, 461 U.S. 238, 249, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983); see also Loehr v. Ventura County Community College District, 743 F.2d 1310, 1315 (9th Cir. 1984); Association of Orange County Deputy Sheriffs v. Gates, 716 F.2d 733, 734 (9th Cir. 1983) (Orange County Deputy Sheriffs), cert. denied, 466 U.S. 937, 104 S. Ct. 1909, 80 L. Ed. 2d 458 (1984); City of Santa Clara v. Andrus, 572 F.2d 660, 676 (9th Cir.) ("[A] statute will create an

> entitlement to a governmental benefit either if the statute sets out conditions under which the benefit must be granted or if the statute sets out the only conditions under which the benefit may be denied.") (quotation omitted, emphasis in original), cert. denied, 439 U.S. 859, 99 S. Ct. 176, 58 L. Ed. 2d 167 (1978).

911 F.2d at 370. Here, the relevant statute places no restriction on the PHA's discretion to raise or lower the VPSA within the prescribed basic range. Thus, arguably, HACLA's lowering the VPSA from 110% to 100% of the FMR did not effect a cognizable "property interest." However, because 24 C.F.R. § 982.505(c)(3) provides for a three-step procedure that must be followed when a decrease in payment amounts occurs during a HAP contract term, there might be some argument for the view that there could be a property interest in the "current" VPSA. But see Atkins v. Parker, 472 U.S. 115, 129-30 (1985). On the other hand, the regulation does not so much set out the conditions under which the benefit may be lowered as the procedure that must be followed *after* the benefit is lowered. Even assuming that the regulation is sufficient to create a property interest as described, that property interest would be contingent upon Plaintiffs not having received the regulatory notice. Plaintiffs' papers never adequately explain why the due process clause of the Fourteenth Amendment, and not the regulation itself, should be determinative of the nature and sufficiency of the notice required.

Plaintiffs' characterization of the potential interest at stake is often confusing. For example, Plaintiffs write: "Section 8 tenants have a property interest in this regulation (including in receiving timely notice of a change in the VPS[A] standard that effectively reduces their benefit and increases their rent) either on its own or in combination with their section 8 tenancy and/or California law allowing them to enforce federal regulations enacted for their benefit." Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("DMSJ Opp.") 1:25-2:5. It is safe to say that no one can have a property interest in a regulation or a property interest "in receiving timely notice," because there can only be a property interest in property.[1]

The regulatory notice requirement is arguably the only "restriction" (if that is the appropriate word) on HACLA's ability to reduce the VPSA within HUD limits. If the notice procedures set forth in 24 C.F.R. § 982.505(c)(3) were followed, it would obviate any property interest Plaintiffs might have claimed in continuing to receive the benefit they were receiving prior to the reduction. It does not aid our analysis in any way to think of this fact - as Plaintiffs would have us do - as creating a property interest in receiving notice. Nor is it useful to collapse the analysis of whether there is a protected interest into the analysis of whether there was due process. They are two separate inquiries. Plaintiffs' efforts to characterize their interest in receiving adequate notice as a property interest protected by the Fourteenth Amendment are understandable, because it is easy to see that the consequences of a sudden reduction in benefits

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[1] At page 2 of their opposition, Plaintiffs write, "As we shall discuss, Defendants fail to recognize that the right to notice of a change in benefits is part of the property interest here, and so the fact that HACLA could change the benefit does not eviscerate the property interest in the benefit." However, Plaintiffs never fulfill their promise by articulating exactly how a person can have a "property interest" in receiving notice of a change in benefits which is separate and legally cognizable from the underlying benefit/property itself.

to a Section 8 participant could be potentially devastating. However, Plaintiffs simply have not presented a coherent theory for stating such a § 1983 claim in the present context.

2. The First Cause of Action Is Untenable in Light of the Holding in *Atkins.*

Plaintiffs' due process cause of action based upon purported insufficiency of notice is contrary to the holding of the Supreme Court in Atkins v. Parker, 472 U.S. 115 (1985). In Atkins, Congress had amended the Food Stamp Act to reduce the earned-income "disregard" used in computing eligibility from 20 percent to 18 percent. Thereafter, the Massachusetts Department of Public Welfare mailed a notice to all food-stamp recipients with earned income in the state notifying them that: 1) the reduction might result in a lowering or termination of their benefits; 2) they had a right to request a hearing; and 3) their benefits would be reinstated if a hearing was requested within ten days of the notice. A class action was brought claiming that the notice was inadequate. The lower courts agreed and found that the initial and subsequent notices violated the Due Process Clause of the Fourteenth Amendment. The statute itself did not mandate any notice at all but merely provided that a household "which timely requests . . . a fair hearing after receiving individual notice of agency action reducing or terminating its benefits" would continue to receive the same level of benefits until the hearing is completed. Id. at 123-24.

In reversing the lower courts' rulings, the Court initially observed that:

> Food-stamp benefits, like the welfare benefits at issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970), "are a matter of statutory entitlement for persons qualified to receive them." *Id.*, at 262 (footnote omitted). Such entitlements are appropriately treated as a form of "property" protected by the Due Process Clause; accordingly, the procedures that are employed in determining whether an individual may continue to participate in the statutory program must comply with the commands of the Constitution.

Id. at 128. The Court went on to hold that:

> This case, however, does not concern the procedural fairness of individual eligibility determinations. Rather, it involves a legislatively mandated substantive change in the scope of the entire program. Such a change must, of course, comply with the substantive limitations on the power of Congress, but there is no suggestion in this case that the amendment at issue violated any such constraint. * * * * The procedural component of the Due Process Clause does not "impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Richardson v. Belcher*, 404 U.S. 78, 81 (1971).
>
> The congressional decision to lower the earned-income deduction from 20 percent to 18 percent gave many food-stamp households a less valuable entitlement in 1982 than they had received in 1981. But the 1981 entitlement did not include any

> right to have the program continue indefinitely at the same level, or to phrase it another way, did not include any right to the maintenance of the same level of property entitlement. Before the statutory change became effective, the existing property entitlement did not qualify the legislature's power to substitute a different, less valuable entitlement at a later date. As we have frequently noted: "[A] welfare recipient is not deprived of due process when the legislature adjusts benefit levels. . . . [T]he legislative determination provides all the process that is due."
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> The participants in the food-stamp program had no greater right to advance notice of the legislative change - in this case, the decision to change the earned-income disregard level - than did any other voters.
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> * * * *
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> The claim that petitioners had a constitutional right to better notice of the consequences of the statutory amendment is without merit. All citizens are presumptively charged with knowledge of the law, see, *e.g., North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925). Arguably that presumption may be overcome in cases in which the statute does not allow a sufficient "grace period" to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it. See *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982). In this case, however, not only was there a grace period of over 90 days before the amendment became effective, but in addition, every person affected by the change was given individual notice of the substance of the amendment.
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> As a matter of constitutional law there can be no doubt concerning the sufficiency of the notice describing the effect of the amendment in general terms. Surely Congress can presume that such a notice relative to a matter as important as a change in a household's food-stamp allotment would prompt an appropriate inquiry if it is not fully understood. The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny. To contend that this notice was constitutionally insufficient is to reject that premise.

Id. 128-31 (footnotes omitted).

This case is similar to Atkins in that: 1) it does not concern individual eligibility determinations as to welfare benefits; 2) it involves a substantive change in a rate that is utilized to calculate the amount of benefits for persons within a federal program administered by the states; 3) that change results in the participating households' receiving a "less valuable entitlement" than prior to the change; 4) there is no challenge that the change itself is beyond the authority of the enacting government body nor to the manner in which it was promulgated; 5) there is no challenge to the change itself but simply as to notice given; and 6) the operative federal statutes do not require any specific notice to be given to participants prior to the change becoming effective. In light of Atkins, Plaintiffs' fundamental claim in their First Cause of Action in the FAC that they have a "constitutional right to better notice of the consequence of the . . . amendment [here, the change in the VPSA within the prescribed basic range] is without merit." Id. at 130.

3. The HACLA Complied with the Requirements 24 C.F.R. § 982.505(c)(3)(ii).

Once again, Plaintiffs frame the issue of Defendants' compliance with the regulatory notice requirement confusingly:

> In its order on the Motion to Dismiss, this Court suggested that HACLA had complied (in a literal sense) with the HUD regulation. However, since that motion did not challenge Plaintiff's due process claims, the issue was not before the Court of whether literal compliance with a regulation is lawful compliance if applicable due process standards were not met in implementing the regulation.

Plaintiffs' Motion for Summary Judgment ("PMSJ") 14:16-20. Plaintiffs have never established why the Court would look beyond the regulations to decide the procedural minimum for compliance when the "case . . . does not concern the procedural fairness of individual eligibility determinations."[2] Atkins, 472 U.S. at 129. Either the regulatory requirements were satisfied or they were not - and the Court, in its previous Order, found that they were. It could not have made this finding if the notice Defendants sent did not communicate the information that the HUD regulation requires that it convey.

Plaintiffs argue that "where a regulation establishes a right to notice, and the notice did not comport with due process, the regulation was not lawfully implemented." But, here Plaintiffs confuse their own First and Second Causes of Action. The Court has already determined that the regulation did not create a "right to notice." Moreover, inadequate notice by itself does not give rise to a § 1983 claim. While a failure of notice might, for the reasons described above, effect a property interest such that due process concerns would be implicated, there is - again - no reason to look beyond the regulatory language for the notice requirements. The assertion that "the

[2] Although Plaintiffs cite Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483,489 n.13 (9th Cir. 1974) for the proposition that "once a substantive right has been created, it is the Due Process Clause which provides the procedural minimums, and not a statute or regulation," they have not established the existence of such a substantive right. The cited text in Geneva Towers refers to the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), in which a majority of the justices rejected Justice Rehnquist's "bitter with the sweet" approach to property interests conferred by statute. This majority view has prevailed. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) ("While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."). The corollary of this view is not, however, that anytime there is a statutory or regulatory procedure, it automatically invokes the full range of due process protection.

notice did not comport with due process" here is essentially meaningless.

Even assuming that a failure of regulatory notice could here give rise to a § 1983 claim, Plaintiffs have not proffered any evidence which raises a dispute as to a material fact which would demonstrate any failure on Defendants' part to provide the notice required under the applicable regulation. It is *not* disputed by the Plaintiffs that:

> The reduction notice that was sent to each participant stated that, "Effective April 2, 2004, the Housing Authority lowered the payment standards used to determine your portion of the rent. We will not apply these lower payment standards until your next regular reexamination. If you move, however, these new lower payment standards will apply to your next unit." [See PSSGI at ¶ 18.]
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> * * * *
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> The reduction notice also contained a chart that detailed the new payment standard amount by bedroom size. [See PSSGI at ¶ 19.]
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> * * * *
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> The reduction notice also included a form titled HAPP RE-38 ("RE-38") which showed the amount of rent each participant would be required to pay the landlord/owner and the amount that HACLA would pay the landlord/owner on the participant's behalf for that year. [See PSSGI at ¶ 22.]
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> * * * *
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> Approximately four weeks prior to the 2004 VPS reduction going into effect, each participant received a second RE-38 which detailed the actual amount of rent each participant would be required to pay for that year. [See PSSGI at ¶ 24.]

The declaration of Plaintiffs' expert (Dr. Finegan), which is employed in an attempt to create a material issue of fact, is premised upon the incorrect assumption that the requirement of 24 C.F.R. § 982.505(c)(3)(ii) is to give tenants notice of an increase in rent rather than informing them that "the application of the lower payment standard will be deferred until the second regular reexamination . . . ." Compare Finegan Decl. Page 2, lines 20-23 and page 4, line 4-6 with 24 C.F.R. § 982.505(c)(3)(ii). There is no basis for reading Finegan's requirements or misunderstandings into the regulation. Similarly, Plaintiffs' argument that the notice flyer was defective because it "did not explain the reasons or legal justification for the action" finds no support in the regulation. Moreover, the Finegan Declaration assumes that Section 8 participants are not familiar with the term "Voucher Payment Standard" and the payment standard chart, whereas Defendants have submitted unrebutted evidence to the contrary. See Agbor Decl. ¶¶ 4-8; Baldwin Decl. ¶ 12. Finally, to paraphrase Atkins, 472 U.S. at 131:

> As a matter of constitutional law there can be no doubt concerning the sufficiency of the notice describing the effect of the amendment in general terms. Surely [the HACLA] can presume that such a notice relative to a matter as important as [the effective date of] a change in a household's [VPSA] allotment would

> prompt an appropriate inquiry if it is not fully understood. The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny. To contend that this notice was constitutionally insufficient is to reject that premise.

In light of the above discussion, the Court need not consider Defendants' argument that a "lesser" due process standard exists for "across-the-board" reductions in benefits. See DMSJ § IV(3)(a). Similarly, Defendants' evidence regarding additional "outreach" efforts to Section 8 recipients is immaterial to resolving this claim. Finally, because there is no fact in dispute whether Plaintiffs have a cognizable §1983 claim, the Court need not reach Defendants' challenge - in the context of their opposition to Plaintiffs' summary judgment motion - to Plaintiffs' ability to act as class representatives.[3]

B. Third Cause Of Action

Plaintiffs' Third Cause of Action, for violation of Cal. Govt. Code § 815.6, is also premised upon a purported failure of due process. Section 815.6 provides:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Plaintiff relies upon the Due Process Clause to create the "mandatory duty" that Defendants allegedly breached. Plaintiffs also appear to contend that § 815.6 could have independently created a protected property interest in the HUD regulation. Again, however, this contention is never cashed out. Accepting Plaintiff's argument that § 815.6 creates a statutory right to enforce federal and state regulations, there is still no basis for concluding that Defendants' literal compliance with the regulation was an abrogation of their duty. Plaintiffs' argument that § 815.6 itself implicates a somehow more robust due process standard is a non-sequitor. Citing Wolff v. McDonnell, 418 U.S. 539 (1974), they write that because due process standards apply to insure state created rights are not arbitrarily abrogated, HUD "had to comply with due process" in providing notice under the HUD regulations. This is simply another iteration of the argument which the Court has already rejected in its earlier ruling on Defendants' Motion to Dismiss.

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[3] With regard to this latter contention, Defendants are correct that the admissions of Nozzi and Palaez that they do not recall reading the notification flyer until right around the time the VPSA went up do indeed indicate that they could not have suffered the harm allegedly suffered by the rest of the class - i.e., confusion by the notice a year before. Plaintiffs' argument from Nelson v. City of N.Y., 352 U.S. 103 (1956), where the court found that notice was sufficient to satisfy due process even though plaintiffs never read the notice, suffers from a logical fallacy. Plaintiffs have not shown why common law causation principles should not apply here.

C. Fourth Cause Of Action

Plaintiffs' Fourth Cause of Action alleges a violation of the California Constitution, Art. 1 § 7. Defendants argue correctly that this cause of action fails because it is well settled under California law that only those governmental decisions that are adjudicative in nature, and not legislative or quasi-legislative, are subject to procedural due process principles. See e.g. McKinney v. Board of Trustees, 31 Cal.3d 79, 98-99 (1982). Plaintiffs respond that the cases cited by Defendants for this proposition involve challenges to the decision itself or challenges to the decision making process, whereas "Plaintiffs are challenging the notice from the perspective of tenants being able to plan for their rent increase, which was the purpose for the regulation's one-year notice requirement." Opp. 14:27-15:1. The provision of the California Constitution which provides that no person shall be deprived of property without due process of law, "has been held to be identical in scope and purpose with the due process clause of the federal Constitution." Russell v. Carleson, 36 Cal.App.3d 334, 342 (1973). Plaintiffs do not contend that their claim under the California Constitution would still be viable even if their federal due process claim were not. Accordingly, summary judgment is granted as to this claim.

IV. CONCLUSION

For the reasons stated above and in the 11/26/07 Order, summary judgment is granted in favor of the Defendants and against the Plaintiffs as to the First, Third and Fourth Causes of Action in the FAC.

V. RULINGS ON EVIDENTIARY OBJECTIONS

A. Plaintiffs' Objections; Motion to Strike Declarations in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment

1. Declaration of Megumi Takarabe
   a) Request to strike entire declaration is denied.
   b) Objections to paragraph 3 sustained on the basis of Federal Rules of Evidence 408 as to the second sentence only. Otherwise, objections overruled.
   c) Objections to paragraph 4 sustained as to the word "always" in the first sentence. Otherwise, objections overruled. The Court treats paragraph 4 as a description of HACLA's position on the subject delineated therein and not as a statement of applicable law.
   d) Objections to paragraph 5 sustained on the basis of relevance.

2. Declaration of Kenneth Baldwin
   a) Objections to paragraph 11 sustained in part because vast portions of it consist of arguments and/or characterization/interpretation of regulations which are improper in a declaration.
   b) Objections to paragraphs 12 and 13 sustained in part because vast portions of those paragraphs consist of arguments and/or characterization or

interpretation of regulations which are improper in a declaration.

3. Declaration of Agbor I. Agbor
   a) Request to strike entire declaration denied.
   b) Objections to paragraphs 4 - 8 denied.

B. Plaintiffs' Objections to the Declaration of Shirley Fields

Plaintiffs' objections to the Declaration of Shirley Fields is unclear in that most of it appears to be in the form of substantive arguments rather than proper evidentiary objections. Moreover, it seems that the Plaintiffs are only objecting to the contents of paragraph 20 in the declaration. Plaintiffs' objections are denied except that: 1) as to the last three sentences in paragraph 20, it is unclear as to what documents are being referenced therein and whether those documents are included in the Defendants' Appendix of Exhibits; and 2) copies of those documents should have been provided and would "speak for themselves."

C. Defendants' Objections and Motion to Strike the Declarations Filed in Support of Plaintiffs' Motion for Summary Judgment

1. Declaration of Edward Finegan
   While the Court agrees that Dr. Finegan's declaration contains a multitude of incorrect assumptions, unsupported factual assertions, and misstatements as to applicable law, it will not strike the entire declaration. Had Defendants specified particular portions of the declaration to strike, this Court would have been more receptive to that approach.

2. Declarations of Michael Nozzi and Nidia Pelaez
   The Defendants' request to strike the entire declarations of Michael Nozzi and Nidia Pelaez is denied. The Defendants' request to strike the specified language on page 2 of the respective declarations is granted.

Dated: This 8th day of March, 2009.

George H. Wu
GEORGE H. WU
United States District Court Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL NOZZI, et al., Plaintiffs, v. HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, et al., Defendants.	)	No. CV 07-380-GW (FFMx) **RULING ON DEFENDANTS' MOTION TO DISMISS THE SECOND AND FIFTH CAUSES OF ACTION IN THE FIRST AMENDED CLASS ACTION COMPLAINT**

I. INTRODUCTION

Plaintiffs in this action are two recipients of federal benefits under the "Section 8 Housing Voucher Program" (henceforth "S8HVP") pursuant to 42 U.S.C. § 1437f(o) and a non-profit advocacy organization. Defendants are the Housing Authority of the City of Los Angeles (henceforth "HACLA") and Rudolf Montiel, the Executive Director of HACLA.

In their First Amended Class Action Complaint (henceforth "FAC"), Plaintiffs allege that:

> 2. In or around July of 2005, the Housing Authority of the City of Los Angeles ("HACLA"), which administers the Section 8 Program locally, began implementing a large-scale rollback of housing benefits provided to Section 8 recipients in its jurisdiction. [* * * *].
>
> 3. Before doing so, however, HACLA was required by applicable federal regulations, independently enforceable as well through state law, to provide adequate notice at least *one year* prior to the cut in the level of services. [* * * *].
>
> 4. HACLA did not make any meaningful attempt to comply with this notice requirement. Rather than separately providing a formal administrative notice informing Section 8 recipients that they would be

> responsible for a specific increase in rent, HACLA inserted into a large stack of materials sent to each recipient a nondescript and technically worded flyer that failed to convey any useful information relating to the change in benefits.

See FAC at ¶'s 2, 3 and 4. Plaintiffs raise five causes of action: 1) "Denial of Due Process of Law (42 U.S.C. § 1983)" for failing to provide notice to S8HVP recipients pursuant to 24 C.F.R. § 982.505(c)(3)(ii) before implementing the rollback of housing benefits which are a protected property interest under 42 U.S.C. § 1437f(o); 2) "Violation of Rights Created by 42 U.S.C. § 1437f (Private Right of Action Available under 42 U.S.C. § 1983)"; 3) "Violation of Cal. Gov't. Code § 815.6"; 4) "Violation of Art. I, § 7 of California Constitution"; and 5) "Negligence" pursuant to California Government Code § 815.2, Civil Code § 1714 and Evidence Code § 669.[1] Defendants now move to dismiss the second and fifth causes of action.

II. BACKGROUND

A. The S8HVP

As noted in Cisneros v. Alpine Ridge Group, 508 U.S. 10, 12 (1993):

> In 1974, Congress amended the United States Housing Act of 1937 (Housing Act) to create what is known as the Section 8 housing program. Through the Section 8 program, Congress hoped to "ai[d] low-income families in obtaining a decent place to live," 42 U.S.C. § 1437f(a) (1988 ed., Supp. III), by subsidizing private landlords who would rent to low-income tenants. Under the program, tenants make rental payments based on their income and ability to pay; the Department of Housing and Urban Development (HUD) then makes "assistance payments" to the private landlords in an amount calculated to make up the difference between the tenant's contribution and a "contract rent" agreed upon by the landlord and HUD.

One of the Section 8 programs is the S8HVP. See 42 U.S.C. § 1437f(o); 24 C.F.R. § 982.1(a)(1). The S8HVP is usually administered by a state or local governmental entity called a "public housing agency" or "PHA" within a designated geographic area. See 24 C.F.R. § 982.1(a)(1). HUD provides housing assistance funds to the PHAs and also supplies monies for the PHAs' administration of the programs. Id.

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[1] Plaintiffs' original Complaint contained two additional causes of action for "Violation of Cal. Civ. Code § 52.1" (which this Court dismissed without leave to amend) and "Taxpayers' . . . Suit for Declaratory and Injunctive Relief under Cal. Code of Civil Procedure § 526a" (which Plaintiffs voluntarily withdrew). Also, this Court granted Defendants' initial Motion to Dismiss as to the second cause of action, but with leave to amend, because it found that count to be unclear as to the basis of the claim since it appeared to be entirely duplicative of the first cause of action. Further, at the hearing on the Motion to Dismiss, the Court also heard Defendants' Motion to Strike Causes of Action Pursuant to California Code of Civil Procedure § 425.16. In their papers and at the oral argument, Plaintiffs conceded that their lawsuit did not challenge the decision to lower the S8HVP benefits but rather the Defendants' failure to give adequate notice to recipients prior to the effectuating the change. See e.g., Reporter's Transcript of April 30, 2007 hearing at page 12.

HUD publishes the fair market rents (henceforth "FMR")[2] for designated geographic areas in the United States. See 24 C.F.R. §§ 888.111 and 982.503(a). A public housing agency must adopt a payment schedule that establishes "voucher payment standard amounts" (henceforth sometimes "VPSA") for each FMR area within its jurisdiction. See 24 C.F.R. § 982.503(a). As to each FMR area, the PHA must set the VPSA for each "unit size" where unit size is measured by the number of bedrooms (i.e., zero-bedroom or studio, one-bedroom and so on). Id. The public housing agency is initially limited as to its choice of the voucher payment standard amount. As stated in 24 C.F.R. § 982.503(b)(1):

> (i) The PHA may establish the payment standard amount for a unit size at any level between 90 percent and 110 percent of the published FMR for that unit size. HUD approval is not required to establish a payment standard amount in that range ("basic range").
> (ii) The PHA may establish a separate payment standard amount within the basic range for a designated part of an FMR area.

See also 42 U.S.C. § 1437f(o)(1)(B).

The voucher payment standard amount is used to calculate the monthly housing assistance payment for a family. See 24 C.F.R. § 982.505(a). Where the PHA has established a VPSA within the "basic range" and where the rent for a family (including utilities except for telephone) for their particular unit falls within that range, the amount of monthly assistance payment for that family will normally be:

> . . . the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds the greatest of the following amounts, rounded to the nearest dollar:
> (i) 30 percent of the monthly adjusted income of the family.
> (ii) 10 percent of the monthly income of the family.

42 U.S.C. § 1437f(o)(2)(A);[3] see also 24 C.F.R. § 982.505(a).

Persons seeking S8HVP assistance must apply to the PHA and supply income and other information to establish their eligibility to participate in the program. See 42 U.S.C. § 1437f(o)(4); 24 C.F.R. § 982.201(a) and (b). Once in the program, the PHA must conduct, at a minimum, a yearly review of the family income and other information of the S8HVP participants. See 42 U.S.C. § 1437f(o)(5); 24 C.F.R. § 982.516(a).

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[2] "Fair market rent means the rent, including the cost of utilities (except telephone), as established by HUD . . . for units of varying sizes (by number of bedrooms), that must be paid in the market area to rent privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature with suitable amenities." 24 C.F.R. § 888.111(b).

[3] "Adjusted income" is defined in 42 U.S.C. § 1437a(b)(5).

As conceded by the Plaintiffs in their FAC, "PHAs have discretion to raise or lower the VPS[A] within a statutorily prescribed range." See FAC at ¶ 26. Under regulations promulgated by HUD, if a PHA decreases the amounts on the payment standard schedule, "the lower payment standard amount generally must be used to calculate the monthly housing assistance payment for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease in the payment standard amount." 24 C.F.R. § 982.505(c)(3). There is a three step process.

> *Decrease in the payment standard amount during the HAP* [housing assistance payments] *contract term.* If the amount on the payment standard schedule is decreased during the term of the HAP contract, the lower payment standard amount generally must be used to calculate the monthly housing assistance payment for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease in the payment standard amount. The PHA must determine the payment standard for the family as follows.
>
> (i) *Step 1*: At the first regular reexamination following the decrease in the payment standard amount, the PHA shall determine the payment standard for the family [. . .] (using the decreased payment standard amount).
>
> (ii) *Step 2* (first reexamination payment standard amount): The PHA shall compare the payment standard amount from step 1 to the payment standard amount last used to calculate the monthly housing assistance payment for the family. The payment standard amount used by the PHA to calculate the monthly housing assistance payment at the first regular reexamination following the decrease in the payment standard amount is the higher of these two payment standard amounts. <u>The PHA shall advise the family that the application of the lower payment standard amount will be deferred until the second regular reexamination following the effective date of the decrease in the payment standard amount.</u>
>
> (iii) *Step 3* (second reexamination payment standard amount): At the second regular reexamination following the decrease in the payment standard amount, the lower payment standard amount shall be used to calculate the monthly housing assistance payment for the family unless the PHA has subsequently increased the payment standard amount . . . .

24 C.F.R. § 982.505(c)(3)(i) thru (iii) [emphasis added].

As stated in 24 C.F.R. § 982.5: "Where part 982 requires any notice to be given by the PHA, the family or the owner, the notice must be in writing."

B. <u>Operative Allegations</u>

In regards to the HACLA's purported failure to provide notice to the Plaintiff class, the operative allegations are contained in paragraphs 28 through 31 of the FAC which state:

> 28. On April 2, 2004, HACLA made a decision to reduce the pre-

> existing VPS[A]. The impact on Section 8 participants was significant. For example, the VPS[A] for a 0-bedroom ("bachelor") apartment plummeted from $795 to $674, a reduction of $121 per month.
>
> 29. To implement this change in policy, the HACLA stuck a one-page flyer in the materials mailed to each recipient on the date of their annual re-examination. Unlike other explanatory notices contained in these packets, the flyer did not require the recipient to acknowledge receipt by signing and returning the form. The flyer was not on letterhead, did not contain a phone number for inquiries, and did not give a legal basis for the decision. More importantly, the flyer did not advise recipients that their out-of-pocket rent payment would actually be going up, much less specify the amount of the increase. Plaintiffs are informed and believe, and on that basis allege, that these flyers were sent out, buried among other reexamination materials, from approximately July 2004 through July 2005.
>
> 30. The language of the flyer did not meaningfully communicate to the recipient that there would actually be a reduction in the portion of his or her rent that HACLA would pay, and a corresponding increase in the portion of his or her rent that the recipient would be required to pay.
>
> 31. The VPS[A] decrease went into effect with re-examinations that took place from July 2005 to July 2006.

See FAC at ¶'s 28 through 31.

Plaintiffs' first cause of action is a 42 U.S.C. § 1983 claim of a denial of due process against Defendant HACLA. They contend that they have "a property interest in the provisions of [24] C.F.R. § 982.505(c)(3)(ii) under both state and federal law . . . ." See FAC at ¶ 58. In paragraph 59 of the FAC, Plaintiffs assert that:

> By failing to provide Plaintiff Class clear or meaningful notice of the actions HACLA intended to take and its consequences at the time required by 24 C.F.R. 982.505(c)(3)(ii), most particularly by failing to meaningfully or effectively advise the Plaintiff Class that their out of pocket share of future rents would be increased [. . .] and by failing to indicate from whom the notice emanated, the legal basis for the action, a phone number for inquiries, or how to protest or appeal the action, Defendant HACLA deprived the Plaintiff Class of due process of law in violation of the Fourteenth Amendment, thereby entitling the Class to bring the suit and recover damages pursuant to 42 U.S.C. § 1983.

Plaintiffs seek "injunctive and declaratory relief, an accounting, restitution and/or damages." Id. at ¶ 61.

Plaintiffs' second cause of action seeks to establish a claim based upon a purported violation of rights created by 42 U.S.C. § 1437f(o) which allegedly can be litigated through a "private right of action available under 42 U.S.C. § 1983." See FAC at page 17. As stated in paragraphs 68 and 69 of the FAC:

> 68. In sum, 42 U.S.C. § 1437f(o)(2) and the other sections cited above required HACLA to make monthly payments for the benefit of

> recipients according to the "applicable payment standard." That is a federally secured right. The regulations flush [sic] out how HACLA's monthly payments are to be calculated by specifying how the applicable payment standard is to be determined. By failing to provide the required notice, the new payment standard implemented by HACLA was unlawful. HACLA, therefore, violated 42 U.S.C. § 1437f(o)(2) by failing to make the required payments under the "applicable payment standard."
>
> 69. Defendants, as described in this complaint, deprived Plaintiffs and the Plaintiff Class of their federal rights, specifically their voucher payment standard rights created by 42 U.S.C. § 1437f(o), including § 1437(o)(2) and § 1437f(o)(1), under the color of state law, and thereby violated 42 U.S.C. § 1983.

II. DISCUSSION

A. Applicable Law

Defendants herein seek to dismiss the second and fifth causes of action pursuant to Federal Rules of Civil Procedure 12(b)(6). As stated in Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

> A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal can be based on lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). On a motion to dismiss, the court accepts the facts alleged in the complaint as true. Shah, 797 F.2d at 745.

B. Plaintiffs' Second Cause of Action

Before considering the viability of the Plaintiffs' Second Cause of Action (henceforth "SCA"), it should initially be noted that Defendants have not moved to dismiss the First Cause of Action (henceforth "FCA") which asserts that HACLA violated 42 U.S.C. § 1983 by denying Plaintiffs due process in failing to give them sufficient notice as required by 24 C.F.R. § 982.505(c)(3)(ii) before reducing S8HVP benefits. Likewise, Plaintiffs have conceded that PHAs (such as HACLA) have the discretion to lower the voucher program standard amount (which is used to calculate the S8HVP benefits) within certain limitations. Plaintiffs have not (and apparently do not) contend that HACLA acted substantively or procedurally in an unlawful manner in deciding to reduce the S8HVP benefits, except as to the notice issue. In light of the above, Plaintiffs' SCA either : 1) is simply the same claim as the FCA but stated in slightly different words, or 2) fails to state a cognizable legal theory other than a due process claim based on lack of notice and fails to allege sufficient facts that would establish a cognizable legal theory under 42 U.S.C. § 1983.

Plaintiffs' SCA is based on the following syllogism: 1) the S8VHP benefits are "a federally secured right"; 2) HUD regulations flesh out how HACLA's monthly payments are to be calculated; 3) by failing to provide the required notice, HACLA's reduction in S8HVP benefits is unlawful and 4) "HACLA, therefore, violated 42 U.S.C. § 1437f(o)(2) by failing to make the required payments under the 'applicable payment standard'" which constitutes a violation of 42 U.S.C. § 1983. See FAC at ¶'s 68-69. Plaintiffs' SCA fails to state a claim for the reasons stated below.

As held in Wright v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418, 423 (1987), 42 U.S.C. § 1983 is available to enforce violations of federal statutes by agents of a state with two exceptions: where Congress has foreclosed such enforcement and where the statute did not create enforceable rights within the meaning of § 1983. The Court stated, as to the first exception, that "we conclude that nothing in the Housing Act . . . evidences that Congress intended to preclude . . . [a] § 1983 claim against [a PHA]." Id. at 429. In regards to the second exception, the Supreme Court has retreated from its position in Wright that spending legislation automatically gives rise to enforceable rights under § 1983. As delineated in Gonzaga University v. Doe, 536 U.S. 273, 281 (2002): "Our more recent decisions, however, have rejected attempts to infer rights from Spending Clause statutes." The Court went on to state:

> We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is rights, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.
>
> We have recognized that whether a statutory violation may be enforced through § 1983 "is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute." Wilder, supra, 496 U.S. 498 at 508, n.9. But the inquiries overlap in one meaningful respect - in either case we must first determine whether Congress intended to create a federal right. Thus, we have held that "[t]he question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative" where "a statute by its terms grants no private rights to any identifiable class." Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979). For a statute

> to create such private rights, its text must be "phrased in terms of the persons benefited." Cannon v. University of Chicago, 441 U.S. 677, 692, n. 13 (1979). * * * * But even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent "to create not just a private right but also a private remedy." Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (emphases omitted).

Id. at 283-84. See also Hill v. Richardson, 7 F.3d 656, 658 (7th Cir. 1993) ("Wright was closely divided, and Suter [v. Artist M., 503 U.S. 347 (1992)] shows that the Court is unwilling to press Wright for the most it can be worth.").

In this case, Plaintiffs are not claiming that the HACLA's decision to reduce voucher payment standard amounts was unlawful, improper or beyond its authority. Thus, while S8HVPs may be a federally secured right, HACLA's reduction of the VPSA has not violated that right. Rather, Plaintiffs' actual complaint is as to a purported failure by HACLA to give adequate notice before effectuating the reduction. While such failure of notice may give rise to a due process complaint that could in turn give rise to a § 1983 claim (which is, in essence, the substance of Plaintiffs' FCA),[4] inadequate notice by itself is not otherwise cognizable as a § 1983 deprivation of rights claim.

First, the applicable federal statute does not require any notice to be given before a PHA reduces the VPSA so long as the reduction is not less than 90 percent of the FMR published by HUD for the designated geographic area within the PHA's jurisdiction. See 42 U.S.C. § 1437f(o). Therefore, even if HACLA's notice in this case was inadequate, such conduct would not violate a federal statute so as to give rise to a § 1983 claim under the previously established (but now questioned) holding in Wright that § 1983 is available to enforce violations of federal statutes by agents of a State.

Second, Plaintiffs cite to HUD's regulation at 24 C.F.R. § 982.505(c)(3) for the existence of such notice requirement and then argue that the failure to comply with that regulation gives rise to the § 1983 claim. That contention must fail in light of the decision in Alexander v. Sandoval, 532 U.S. 275 (2001). In Alexander, the Supreme Court rejected the argument that, where a regulation contains some "rights-creating language," the regulation can provide a basis for private enforcement under § 1983 that goes beyond what the statute itself requires. Id. at 291 and 293 fnt. 8. As stated by the Court:

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[4] For purposes of deciding this motion, this Court need not and does not reach a decision as to whether a failure to give adequate notice would constitute a due process violation which can be litigated as a § 1983 claim in this case.

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. *Touche Ross & Co. v. Redington*, 442 U.S., at 577 n. 18 ("[T]he language of the statute and not the rules must control"). Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Id. at 291. See also Save Our Valley v. Sound Transit, 335 F.3d 932, 936-940 (9th Cir. 2003).

Plaintiffs' reliance on the Wright decision and Johnson v. Housing Authority of Jefferson Parish, 442 F.3d 356 (5th Cir.), cert. denied, 127 S.Ct. 136 (2006), is unavailing. In both of those cases, the disputes revolved around the allocation of utilities expenses; in Wright it was a claim of over-billing for utilities by the defendant City Housing Authority (see 479 U.S. at 419), and in Johnson it was the failure of the defendant PHA to use current rates in calculating the utility allowance (see 442 F.3d at 359). As explained in Johnson:

> . . . the statutory language of the voucher program unmistakably provides - in the text of the act itself - for an "amount [to be] allowed for tenant paid utilities." [42 U.S.C. § 1437f(o)(2)(A), (B).] Contrary to the Housing Authority's assertion, the HUD regulations are not necessary to establish Plaintiff-Appellants' right to the utility allowance, and certainly no more so than they were in Wright, where such an allowance was not even mentioned in the text of the statute itself. Congress's intent to benefit Plaintiffs-Appellants here cannot be gainsaid.

Id. at 364 (footnote omitted). In both Wright and Johnson, the claims were based on the statutory right to receive the correct amount of rent assistance payments as delineated in the Housing Act as amended. Here, unlike the Wright and Johnson cases, Plaintiffs are not challenging the PHA's calculation as to the amount of the assistance as set forth in the statute. Rather, they are raising an issue of adequacy of notice which is not required in the applicable statute but only in the regulation. Thus, the Wright and Johnson decisions are inapplicable, while the holdings in Alexander and Save Our Valley are controlling.

Moreover, even assuming arguendo that a violation of a notice provision in a regulation (that is not required by the underlying statute) can serve theoretically as a basis for a § 1983 action, Plaintiffs would still not have stated a cognizable claim for two reasons. First, HACLA has not violated the notice provision as set out in the regulation. Second, if the notice provision requires more than what HACLA provided, it is too vague and amorphous to confer an enforceable right.

Plaintiffs claim that the notice provided by HACLA was inadequate because it: 1) did not require the recipient to acknowledge receipt by signing and returning the form; 2) was not on HACLA letterhead; 3) did not contain a phone number for inquiries; 4) did not state a legal basis for the decision; and 5) did not advise the recipient of how much their out of pocket rent payments would increase. See FAC ¶'s 29 and 59. However, the only regulation cited by Plaintiffs does not state that any of those items are required. 24 C.F.R. § 982.505(c)(3)(ii) merely provides that, after a PHA has calculated the appropriate payment standard amount at the first yearly reexamination following the decrease in the VPSA, "the PHA shall advise the family that the application of the lower payment standard amount will be deferred until the second regular reexamination following the effective date of the decrease in the payment standard amount." It makes no reference to having the recipient acknowledge receipt, letterhead, phone numbers, explanation of the legal basis for its decision, etc.

Plaintiffs have not alleged that HACLA failed in fact to give the only advisal that is required by the language of 24 C.F.R. § 982.505(c)(3)(ii). Moreover, 24 C.F.R. § 982.5, which sets out the only condition for notice, merely states that "[w]here Part 982 requires any notice to be given by the PHA . . . , the notice must be in writing." Here, Plaintiffs in paragraph 4 of the FAC indicate that HACLA did give written notice.

It is further noted that where specific information is required to be given to a S8HVP participant, the HUD regulation will set forth these requirements. See, e.g., 24 C.F.R. §§ 982.301(b) and 982.554(a). Likewise, where a participant can challenge the PHA decision, the PHA must give that participant notice of the availability of an informal hearing. However, a PHA's decision setting the VPSA within the basic range is not subject to informal hearings. 24 C.F.R. § 982.555.

Finally, in order for a court to conclude that a statute creates a right enforceable under § 1983, it must find: 1) the statute was intended to benefit the plaintiffs; 2) the statute imposes a binding obligation on the government unit rather than merely expressing a congressional preference for a certain kind of conduct, and 3) the interest asserted by the plaintiff is not so vague and amorphous that it is beyond the competence of the judiciary to enforce. See Wilder v. Virginia Hosp. Ass'n., 496 U.S. 498, 509 (1990); Legal Services of N. Calif. v. Arnett, 114 F.3d 135, 138 (9th Cir. 1997). Here, as noted above, the statute does not impose any obligation (let alone a binding one) in regards to notice. Even if one were to utilize the referenced regulation as an appropriate surrogate for a statute, 24 C.F.R. § 982.505(c)(3)(ii) does not set out any binding obligation insofar as the procedural requirements which Plaintiffs seek to impose (e.g., acknowledgment of receipt of notice, explanation of legal basis, telephone numbers, etc.). Moreover, aside from the due process claim which is the subject of the FCA, the interest asserted by Plaintiffs in the SCA is so vague and amorphous that it fails to confer on S8HVP participants an enforceable "right" within the meaning of § 1983.

For all of the above reasons, the SCA is dismissed with prejudice.

C. Plaintiffs' Fifth Cause of Action

Plaintiffs' fifth cause of action is for negligence based on California Government Code § 815.2, Evidence Code § 669, and Civil Code § 1714. None of those provisions provides a basis for Plaintiffs' negligence claim.

As stated in Eastburn v. Regional Fire Protection Agency, 31 Cal.4th 1175, 1179 (2003):

> . . . the California Tort Claims Act provides that "[a] public entity is not liable for an injury," "[e]xcept as otherwise provided by statute." (Gov. Code, § 815, subd. (a).) As that language indicates, the intent of the Tort Claims Act is to confine potential governmental liability, not expand it. (Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1127.

Civil Code § 1714(a) states that "Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . ." Eastburn held that the ordinary negligence liability provision in Civil Code § 1714 is inapplicable to public entities. As stated in Eastburn, 31 Cal.4th at 1183:

> In other words, direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714. Otherwise, the general rule of immunity for public entities would be largely eroded by the routine application of general tort principles.

Government Code § 815.2(a) provides that: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative [emphasis added]." § 815.2(a) does not provide a basis for a common law claim for negligence against a public entity for its own negligent conduct. As stated in Zelig v. County of Los Angeles, 27 Cal.4th 1112, 1127 (2002) (emphasis omitted):

> The Tort Claims Act draws a clear distinction between the liability of a public entity based on its own conduct, and the liability arising from the conduct of a public employee. Although the Act provides that a public employee generally is liable for an injury caused by his or her act or omission "to the same extent as a private person" (Gov. Code., § 820, subd. (a)) and that, when the act or omission of the public employee occurs in the scope of employment the public entity will be vicariously liable for the injury (Gov. Code § 815.2), the Act contains no provision similarly providing that a public entity generally is liable for its own conduct or omission to the same extent as a private person or entity. Rather, the Act provides that a public entity is not liable for an injury "[e]xcept as otherwise provided by statute . . . ." (Gov. Code, § 815.)

Evidence Code § 669(a) provides that a "failure of a person to exercise ordinary case is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity . . . ." However, as noted in California Service Station etc. Assn. v. American Home Assurance Co., 62 Cal.App.4th 1166, 1177-78 (1998), a claim of ordinary negligence must be viable before the presumption of negligence in Evidence Code § 669(a) can be employed. The mere fact that a person has violated a statute or regulation does not, by itself, establish that the result will be the tort of negligence. Id. at 1178-79. Plaintiffs have offered nothing to suggest that a purported failure to provide adequate notice under 24 C.F.R. § 982.505(c)(3)(ii) should be treated as negligence. Moreover, as discussed above, Plaintiffs' allegations in the FAC do not set forth a basis for finding that HACLA has violated the notice requirement of § 982.505(c)(3)(ii). That regulation does not delineate any duty or standard of care as to how the advisal is to be given. To the extent that the HUD regulations in 24 C.F.R. Part 982 can be said to set forth a duty of care regarding notice, as discussed above, HACLA has complied with it.

IV. CONCLUSION

For the reasons stated above and at the hearings on Defendants' Motion to Dismiss, the second and fifth causes of action in the FAC are hereby dismissed with prejudice.

DATED: November 26, 2007.

George H. Wu
GEORGE H. WU
United States District Judge