Section 8 in the Courts: How Civil Rights Litigation Helped to Shape the Housing Choice Voucher Program

Philip Tegeler
Sam Reece
Poverty & Race Research Action Council

Abstract

From its inception as the Section 8 Existing Housing program, the Housing Choice Voucher program has been informed by civil rights litigation under the 14th Amendment and the Fair Housing Act, challenging policies and practices that perpetuate racial and economic segregation or have the effect of discriminating on the basis of race or disability. Those cases have arguably influenced almost every aspect of the voucher program and, in some cases, have led directly to policy reform. This article attempts to trace the impacts of civil rights litigation and advocacy on voucher portability, housing mobility, geographic limitations on voucher administration, residency preferences, Section 8 allocation and admissions policies, payment standards, and rules governing housing for persons with disabilities. The article concludes with a look toward the possible future of Section 8 in the courts.

Introduction

Almost from the beginning, the Housing Choice Voucher (HCV) program has been molded by civil rights litigation. The role of the new Section 8 certificate program in the settlement of the *Gautreaux* v. *HUD* public housing desegregation case established the program's role as a civil rights remedy in many similar cases and helped to set the regional aspirations of the program. Later cases helped to highlight problems in the program's design that were driving racial and economic segregation and limiting families' choices—and those cases often helped spur key policy reforms. This article will trace a 50-year dialogue between the courts, Congress, and the U.S. Department of Housing and Urban Development (HUD) on the application of the Fair Housing Act's nondiscrimination and affirmatively furthering fair housing provisions to the voucher program, grounded in a broader story of HUD's history in the courts (Hashimoto, 1997; PRRAC, 2023; Roisman, 1999).

First, this article will look at the impacts of the public housing desegregation cases on the evolution of the regional scope of the Section 8 certificate voucher programs,[1] followed by a closer look at cases involving geographic restrictions on voucher use, residency preferences, voucher allocation and admissions policies, payment standards, enhanced vouchers, and discrimination against persons with disabilities.[2]

Finally, this article will look to the potential for future civil rights litigation to further shape the voucher program and the ways that a reinstated Affirmatively Furthering Fair Housing rule, which includes public housing agencies (PHAs)[3] for the first time, may influence future voucher policy without the need for litigation.

One additional note: although this narrative naturally focuses on the research and insights of the civil rights and legal services lawyers who designed and prosecuted these cases, none of that progress could have occurred without their clients, who have repeatedly challenged injustice, often at personal cost and fear of retaliation.

The Public Housing Desegregation Cases, Portability, Housing Mobility, and Moving to Opportunity (MTO)

HUD was barely 1 year old when plaintiff Dorothy Gautreaux and her lawyer Alex Polikoff filed *Gautreaux* v. *Chicago Housing Authority*, along with its companion case against HUD, *Gautreaux* v. *Housing Assistance Administration* (Hill, 2022.),[4] during the 1966 "Chicago Freedom Movement." Following the theory of *Brown* v. *Board of Education*, the cases alleged unlawful segregation in public housing in violation of the 14th and 5th Amendments to the Constitution. Although the case involved public housing segregation, it highlighted the need for a broader approach to assisted housing that did not inexorably lead to the concentration of low-income families in segregated neighborhoods. The Gautreaux case was followed by the Fair Housing Act in 1968, with its powerful directive to "affirmatively further" the act's integrative goals (42 USC §3608). A year later, plaintiffs in Philadelphia filed *Shannon* v. *HUD*, which challenged HUD's lack of public housing siting standards under the new act. That decision led to regulations creating site and neighborhood

[1] The Section 8 certificate program (also known as the Section 8 Existing Housing program) was the primary form of tenant-based assistance until it was merged with the newer Section 8 voucher program in 1998 in the Quality Housing and Work Responsibility Act (HUD, 1998a; the voucher program was an innovation in the 1980s that allowed tenants to pay more than 30 percent of their income for rent). Since 1998, the merged program has been known as the Housing Choice Voucher program. For convenience, these programs are referred to as "vouchers" or the "voucher program" in this article.

[2] This article focuses on civil rights and fair housing cases and will not address a long line of procedural due process cases that have extended a range of protections to HUD tenants, including notice requirements, pre-termination hearings, and other procedural protections. See e.g., *Escalera* v. *New York City Housing Authority* [1970], *Pickett* v. *Housing Authority of Cook County* [2017]).

[3] Although most PHAs are organized as "public housing authorities" under state law, HUD uses the term more broadly to refer to public housing *agencies*—"any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof)" or "any other public or private nonprofit entity" operating a voucher program as of 1998 (42 USC 1437a(b)(6)).

[4] For a full procedural history of the Gautreaux case, see the University of Michigan's extremely helpful Civil Rights Litigation Clearinghouse, which contains court records for many of the cases discussed in this article. (Hill, 2022; see also Civil Rights Litigation Clearinghouse, https://clearinghouse.net/; Polikoff, 2006.) Note that *Gautreaux* v. *Housing Assistance Administration* was re-captioned *Gautreaux* v. *HUD* following a reorganization of HUD shortly after the filing of the lawsuit. (See Congress.gov, 1965). Eventually, the *Gautreaux* v. *CHA* and *Gautreaux* v. *HUD* cases were merged (Hill, 2022).

standards for new public housing developments, Section 8 new construction, and, eventually, project-based vouchers (Vernarelli, 1986).

The Gautreaux case and HUD's response to *Shannon* v. *HUD* evolved alongside the development of the Section 8 certificate program. Efforts to find a more flexible alternative to traditional public housing began in pilot form with the Experimental Housing Allowance Program (EHAP) in Section 504 of the Housing and Urban Development Act of 1970, which gave housing subsidies directly to tenants (Frieden, 1980). Four years later, in part due to the success of the EHAP program, Congress authorized Section 8 of the Housing and Community Development Act of 1974, with a general statement of purpose that included addressing the "concentration of persons of lower income in central cities," "the reduction of the isolation of income groups within communities and geographical areas," and "the spatial deconcentration of housing opportunities for persons of lower income" (42 USC §5301). The bill provided funding for Section 8 "existing housing certificates" (certificates) to be used by tenants in the private market, along with project-based Section 8 new construction and rehabilitation programs based on the same monthly subsidy model.

For the first 15 years of the Section 8 program, certificates were required to be used only within the "area of operation" of the public housing authority (PHA) to which they were allocated. However, the Gautreaux case placed early pressure on that restriction with its proposal in 1973 for a regional housing mobility program, which allocated portable and project-based certificates to Chicago public housing residents. The certificates were intended for use in less segregated neighborhoods, including in the Chicago suburbs, outside the jurisdiction of the Chicago Housing Authority. That approach was consistent with—and partly indebted to—the Experimental Housing Allowance program, which had not been tied to a PHA's area of operation. However, HUD objected to a regional remedy in the Chicago case, and the U.S. District Court agreed, rejecting the plaintiffs' proposal in 1973.

Fortunately for the plaintiffs on appeal, in 1974 the Court of Appeals disagreed and approved a regional remedy in the Gautreaux case. The Court of Appeals distinguished the earlier 1974 Supreme Court decision in *Milliken* v. *Bradley* (the Detroit schools case), which held that the federal court did not have the authority to impose a remedy on jurisdictions that had not been found responsible for the original constitutional violation. Two years later, the U.S. Supreme Court also distinguished the Milliken case and affirmed the legality of a court-ordered regional housing mobility program using the new Section 8 certificate program, and the Gautreaux housing mobility program launched. Between 1976 and 1998, 7,100 families participated in the Gautreaux mobility program through the Section 8 program, moving to nonsegregated neighborhoods in both Chicago and its suburbs (Hill, 2022; Polikoff, 2006).

The Gautreaux litigation was followed by a steady march of similar cases demanding both public housing desegregation and Section 8 regional housing mobility programs as part of their court-ordered remedies. Cases such as *NAACP-Boston Chapter* v. *HUD*, *Walker* v. *HUD*, and *Thompson* v. *HUD* further defined the methods and policies of housing mobility as key elements of the voucher program (exhibit 1).

Exhibit 1

Public Housing Desegregation Remedies Including Section 8 Regional Housing Mobility Programs

Case	City	Date Filed	Date of Remedial Orders
Gautreaux v. *HUD*	Chicago	1966	1976
Hale v. *HUD*	Memphis	1973	1985
Jaimes v. *Toledo MHA*	Toledo	1974	1989
NAACP, Boston Chapter v. *Kemp*	Boston	1978	1989
Hutchins v. *Cincinnati MHA*	Cincinnati	1979	1984
Young v. *Pierce*	East Texas	1980	1995
Walker v. *HUD*	Dallas	1985	1987
Sanders v. *HUD*	Pittsburgh	1988	1994
Comer v. *Kemp*	Buffalo	1989	1996
Hawkins v. *Cisneros*	Omaha	1990	1994
Christian Community Action v. *Cisneros*	New Haven	1991	1995
Hollman v. *Cisneros*	Minneapolis	1992	1995
Thompson v. *HUD*	Baltimore	1995	2005

Source: Data by the authors

The Gautreaux case and its progeny appear to have increased pressure on HUD to ease geographic restrictions in the Section 8 programs overall. Beginning in 1977, President Jimmy Carter's new HUD Secretary, Patricia Harris, established a "Gautreaux Task Force," charged with "analyz[ing] HUD housing policies in the light of the Gautreaux litigation," followed by an "Assisted Housing Mobility Task Force" in 1978 "to make specific recommendations to promote mobility and deconcentration in the Section 8 Existing and other assisted housing programs" (Vernarelli, 1986). The task force succeeded in generating a formal policy statement in January 1979 (following a 1978 Government Accountability Office (GAO) report criticizing HUD for failing to implement the deconcentration goals of the 1974 act). However, it was not until 1984 that HUD first proposed a pilot "portability" program designed to allow Section 8 certificates to be transferable from one PHA to another. Several reports on interjurisdictional housing programs were also released during that time (e.g., Metropolitan Action Institute, 1982). Congress took up portability in a 1985 housing bill and held related hearings in 1985 and 1986 on "Discrimination in Federally Assisted Housing Programs," which included key testimony from the National Committee Against Discrimination in Housing addressing Section 8 concentration and regional mobility (United States Congress, House Committee on Banking, Finance, and Urban Affairs, Subcommittee on Housing and Community Development, 1986a, 1986b). Congress finally authorized the portability of certificates within metropolitan areas in 1987 (Congress.gov, 1988) and statewide portability in 1989 (1990). Litigation and threatened litigation following widespread noncompliance with the new portability requirements led to the issuance of HUD notices to PHAs in 1990 and 1991 (Tegeler, 1994), and Congress later expanded the statute to permit nationwide portability of certificates and vouchers in 1998 (Congress.gov, 1999). Although the system of portability implemented by HUD has given families valuable flexibility to cross jurisdictional lines, it is far from a seamless process, as evident in the discussion that follows, and creates its own set of bureaucratic barriers to housing choice (Miller, 2024).

Also, during the 1990s, impressive outcomes for families participating in the Gautreaux regional housing mobility program were documented by Professor James Rosenbaum and colleagues at Northwestern (see Rubinowitz and Rosenbaum, 2000; see also Duncan and Zuberi, 2006). Their research results, along with the powerful indictment of government-sponsored segregation in Massey and Denton's (1993) *American Apartheid*, helped to inspire President Clinton's new HUD Secretary Henry Cisneros to bring in Elizabeth Julian, a former plaintiffs' lawyer (in the *Walker* and *Young* cases) to facilitate settlement of the remaining public housing desegregation cases, using their potential to shape HUD policy. Each of those consent decrees included a Section 8 regional housing mobility remedy in addition to targeted public housing redevelopment. Later in the Clinton Administration, HUD also released a new PHA "report card," the Section 8 Management Assessment rule (HUD, 1998b), which included a "deconcentration bonus" for PHAs making progress on voucher mobility.

The Gautreaux research also inspired HUD and Congress in the Clinton Administration to fund the Moving to Opportunity (MTO) demonstration, which sought to test the results of the Gautreaux results in a randomized controlled study designed to eliminate the potential self-selection bias of a program consisting only of volunteers. Although the initial results of the MTO demonstration showed primarily health and mental health benefits for families, later MTO research by Raj Chetty and colleagues showed dramatic outcomes in the next generation for children who grew up in low-poverty neighborhoods (Chetty et al., 2020, 2019, 2016). Those research results helped persuade a later Congress to fund the $50 million Community Choice Demonstration in 2019–2020, which now involves ten PHAs across eight metro areas and, more recently, a $25 million mobility services grants program for an additional seven PHAs.

The spirit of the Gautreaux and Shannon cases was also present during the Obama Administration's development of the Rental Assistance Demonstration (RAD), HUD's most recent public housing redevelopment program. Court-ordered remedies in cases such as *Walker* v. *HUD* often combined in-place improvements to public housing and public housing neighborhoods along with a Section 8 mobility program designed to give public housing families choices outside segregated neighborhoods. The combination of redevelopment and mobility is reflected in the RAD program's "choice mobility" requirement, a key element of the program that permits any resident in a RAD redevelopment to exchange their unit for a portable voucher (HUD, 2023b). This provision was included in the RAD program's design through several legislative iterations, meaning, for the first time, that public housing residents in these developments are not required to accept racial and economic segregation as a condition of continued federal housing assistance.

Direct Challenges to Geographic Restrictions in the Voucher Program That Limit Family Choice: Comer, Giddins, and Hanover Cases

Although the Section 8 certificate and voucher programs were intended to expand choice for families, the programs have been bedeviled by PHA jurisdictional boundaries imposed by state law, which have been interpreted to prohibit public housing authorities from administering vouchers outside their "area of operation." In practice, this interpretation makes moving across jurisdictional boundaries complicated and time-consuming for families. The state laws were likely intended to regulate the location of public housing development—laws adopted in the mid-20th century,

before the existence of a portable voucher-style program. Even after the advent of the portability of vouchers in the late 1980s, limits on PHA jurisdiction have imposed numerous administrative barriers in the path of Section 8 families.

The *Comer* v. *Kemp* case was filed in 1989 by Michael Hanley and Ellen Yacknin at the Greater Upstate Law Project (now Empire Legal Services) and a team of lawyers from the Buffalo Neighborhood Legal Services Program. *Comer* was a public housing desegregation case, but it also challenged how Buffalo-area PHAs administered the voucher program. The complaint alleged, in part, that the City of Buffalo, in its administration of Section 8 certificates and vouchers, was restricting the right of families to move outside the city. Plaintiffs successfully pointed out that the City of Buffalo was not a public housing authority subject to New York State's restrictive area-of-operation laws and thus faced no barrier to administering vouchers throughout Erie County.

Similarly, the *Giddins* v. *HUD* case, filed in 1991 by Jerrold Levy at Westchester-Putnam Legal Services, challenged the concentration of locally and county-administered vouchers in one segregated corner of Westchester County (notably, the same southwest area of Yonkers that was at issue in the landmark *United States* v. *Yonkers* public housing and school desegregation litigation in the 1980s). The settlement in the Giddins case, approved by HUD, released the Yonkers Housing Authority from its state-law-imposed jurisdictional restrictions and created a countywide housing mobility program that is still in operation today.

In Massachusetts, the 1994 case of *Williams* v. *Hanover Housing Authority et al.* took a different approach to PHA geographic limitations, finding that under HUD's then-applicable definition of PHA jurisdiction (the area within which the PHA was not "legally barred" from entering into contracts), no state law barrier existed to local PHAs administering vouchers anywhere in the state. The next year, HUD adopted a more restrictive definition of PHA jurisdiction ("[t]he area in which the HA has authority under State and local law to administer the program") to clarify application of the jurisdictional requirement following the advent of portability (HUD, 1995; Konkoly, 2008). Notwithstanding the new definition, the Massachusetts ruling remains in place to this day, and other PHAs that had received prior approval from HUD for more expansive definitions of jurisdiction were permitted to continue operating where they were "not legally barred" (HUD, 1995).

The fair housing impacts of limited PHA jurisdiction under state law are still confounding HUD and limiting housing opportunities for families with vouchers. Most recently, in 2020, the Open Communities Alliance filed a HUD fair housing complaint against the State of Connecticut, claiming that the state's 1949 "area of operation" law, arguably designed originally to keep public housing out of the suburbs, was now limiting families' choices in the Housing Choice Voucher program and perpetuating segregation in violation of the Fair Housing Act.

Residency Preferences That Exclude Families From Opportunity: The Comer and Langlois Cases and the HUD Residency Preference Rule

It has long been clear that admissions preferences for existing residents of a community can have a discriminatory effect, where, for example, the eligible resident population of a town is disproportionately White in comparison with the demographics of the eligible population in the

regional housing market. But HUD did not formally restrict residency preferences in the voucher program until October 1999, in a regulation that effectively bars such preferences when they have a discriminatory effect:

> "Any PHA residency preferences must be included in the statement of PHA policies that govern eligibility, selection, and admission to the program, which is included in the PHA annual plan (or support documents) pursuant to Part 903 of this title. Such policies must specify that the use of a residency preference will not have the purpose or effect of delaying or otherwise denying admission to the program based on race, color, ethnic origin, gender, religion, disability, or age of any member of an applicant family."
>
> —24 C.F.R. § 982.207(b)(1)(iii). *See also* §§ (b)(1)(i, ii, iv, v).

That carefully worded provision was responsive to increasing criticism of discriminatory PHA residency preferences, exemplified by two highly publicized cases in New York and Massachusetts. In New York, in addition to attacking Buffalo's restrictions on the use of vouchers outside the city, the *Comer* v. *Kemp* complaint also challenged the Section 8 residency preference employed by a consortium of suburban towns that forced African American residents of Buffalo to the back of the line. The Second Circuit's 1994 decision affirming standing and class certification for the plaintiffs in *Comer* set the stage for a 1996 consent order that included all Buffalo applicants in the residency preference, thus eliminating the discriminatory effect (Gehl, 2020).

Two years after the Comer orders were entered, Judith Liben and colleagues at Massachusetts Law Reform Institute filed *Langlois* v. *Abington Housing Authority*, challenging local residency preferences in predominantly White suburbs of Boston. The Langlois case was preceded by an internal HUD reasonable cause finding (signed by HUD lawyers Harry Carey and Sara Pratt) in a challenge to a residency preference in another, virtually all-White suburb of Boston. The U.S. District Court in the Langlois case promptly issued a temporary injunction, followed by wider injunctive relief in December 1998. The case was appealed to the First Circuit, and while on appeal, on May 14, 1999, HUD introduced 24 CFR § 982.207 as an interim rule—but without any language on residency preferences. On October 4, 1999, *Langlois* was argued in the First Circuit, and two weeks later, on October 21, 1999, HUD promulgated a final rule that included the language above, effectively restricting discriminatory residency preferences. The following spring, on March 27, 2000, the First Circuit affirmed the preliminary injunction granted to the *Langlois* plaintiffs by the District Court.

Reforms to Improve Fairness in Section 8 Allocation and Application Policies

The challenges to discriminatory residency preferences in the Comer and Langlois cases were closely related to policies that governed how vouchers were distributed to PHAs within regions and how families accessed those vouchers.

Civil rights investigations in Massachusetts in the early 1990s sought to understand why Black homeless families in Boston had to wait longer to obtain vouchers than White homeless families in the suburbs and discovered a variety of HUD practices that had the effect of disproportionately allocating vouchers to PHAs in predominantly White communities. Although no litigation on

those allocation issues was recorded, a HUD complaint and threats of litigation from legal services advocates led to a change in the Section 8 allocation process, embodied in a March 3, 1995 Federal Register notice, prioritizing unmet housing need in the annual distribution of vouchers and rewarding PHAs that eliminate discriminatory residency preferences (Sard, 1995).

Even with the elimination of residency preferences and fairer voucher allocation processes, other local exclusionary application and waitlist practices continued to have a discriminatory effect on persons with disabilities, persons with limited English proficiency, and persons of color. For example, many PHAs in the 1990s were still using waitlists organized by first-come, first-served priority, which can have a significant discriminatory impact on applicants who are not immediately aware of application openings or unable to respond quickly when applications open. Further exacerbating the exclusionary impact of this practice, many PHAs had a limited number of dates when applications were accepted, limited locations, limited ability to apply by mail or online, and limited or nonexistent affirmative marketing efforts. Advocacy from civil rights and legal services advocates eventually led to HUD guidance strongly recommending random selection, lottery-style waitlist management, affirmative marketing, and elimination of exclusionary practices (HUD, 2012). As a result, in some parts of the country, exclusionary application and waitlist practices in the voucher program have been largely eliminated.

Small Area Fair Market Rents to Expand Housing Choice: *ICP* v. *HUD* (and *Open Communities Alliance* v. *Carson*)

The setting of rent caps or "payment standards" for the Section 8 program using a single regional average has been criticized by fair housing advocates for decades (e.g., Tegeler, Hanley, and Liben, 1995) because of the way segregated regional housing markets and exclusionary zoning interact to set payment standards far below the average rents in lower-poverty, less segregated neighborhoods and communities, essentially steering families to more segregated areas. Despite this consensus view, not until 2007 did civil rights advocates bring the issue to court in *Inclusive Communities Project (ICP)* v. *HUD*. The lawsuit relied on the Fair Housing Act and the Section 8 statute, arguing that the current Fair Market Rent (FMR) system discriminated against families who wished to move to less segregated areas of Dallas and its suburbs.

The *ICP* v. *HUD* case finally settled in June 2010 with HUD's announcement of the Small Area FMR demonstration a few weeks earlier, setting rents based on ZIP Code in the Dallas region and five other metro areas as part of the HUD Small Area FMR demonstration study (HUD, 2010). The study aimed to test whether ZIP Code-based payment standards would be feasible—and without adverse impacts—in anticipation of extending Small Area FMRs on a wider, national basis. The settlement in *ICP* v. *HUD* and the subsequent demonstration study led directly to the final 2016 Small Area FMR rule (HUD, 2016), which identified 24 metropolitan areas where the new payment standards would be in effect, eventually opening up new housing options for hundreds of thousands of families with vouchers.

Not only did civil rights litigation help to establish the Small Area FMR rule but it later saved the rule after its suspension by Secretary Ben Carson in 2017 (*Open Communities Alliance* v. *Carson*). Although the Open Communities Alliance case was based primarily on the Administrative

Procedure Act, the complaint and the federal court's preliminary injunction were suffused with the Fair Housing Act implications of the regulation's suspension, and the fair housing impacts on the individual named plaintiffs played an important role in the decision. Shortly after the court's preliminary injunction order in late December 2017, the U.S. Department of Justice declined to appeal, and HUD issued a detailed notice implementing the regulation in 24 metropolitan areas beginning on April 1, 2018. This important civil rights rule was further expanded in 2023 to 41 additional mandatory metropolitan areas, and many other PHAs have voluntarily adopted Small Area FMRs through the exception payment standard process (HUD, 2024b).

Conversion of Subsidized Housing and the Right to Remain: Establishing the Contours of the Section 8 Enhanced Voucher

HUD's enhanced voucher program was initially adopted in 1990 to protect tenants in formerly HUD-subsidized Section 8 properties (also known as project-based rental assistance properties) where the owner has decided to opt out of the HUD subsidy program. The enhanced voucher is designed to allow existing tenants to stay in their units—even as the rent increases—exceeding the allowable payment standards for housing choice vouchers.

After the enhanced voucher statute was enacted, a series of cases filed in New York; Washington, DC; California; and Minnesota further broadened the statute to guarantee the right to remain in a unit. The statutory language at issue in those cases, which is codified at 42 U.S.C. § 1437f(t)(1)(b), reads, "The assisted family may elect to remain in the same project in which the family was residing on the date of the eligibility event for the project."

Starting with *Jeanty* v. *Shore Terrace Realty* (2004) and then *Estevez* v. *Cosmopolitan Associates* (2005), courts interpreted that language to require that as long as units remained rental units, absent good cause for eviction, the landlord had to accept the enhanced vouchers. Those cases were routinely cited as this interpretation spread across the country. *Feemster* v. *BSA Limited Partnership* (2008) extended that interpretation to the D.C. Circuit and made clear that local law should govern whether good cause had been established.

In 1999, *215 Alliance* v. *Cuomo* challenged HUD's refusal to continue increasing enhanced voucher payments *after* the initial rent increase. The *215 Alliance* decision held that payment standards for enhanced vouchers were required to increase as rents increased for as long as the enhanced vouchers were in place. Congress subsequently clarified the statute to conform to this view in a 2000 appropriations bill. *Barrientos* v. *1801–1825 Morton LLC* (2010) continued this line, holding that raising rents was not a good cause for termination under the statute, and *Riverside Park Community* v. *Springs* (2015) demonstrated how those interpretations can lead to multigenerational use of the right to remain in the unit.

Securing Housing Rights for People With Disabilities

The 1991 *Olmstead* v. *L.C.* decision, broadly requiring deinstitutionalization of persons with disabilities, had a series of significant impacts on HUD (Korman, 2007). First, HUD promulgated 24 C.F.R. § 982.207(b)(3), which barred PHAs from giving preference to persons with a *specific*

disability in voucher allocation, although PHAs could, generally, give preference to individuals with disabilities. The rule generally prevented PHAs from granting project-based vouchers to institutions offering residential services to persons with specific disabilities. However, the need for project-based vouchers allocated to those residential services resulted in a complicated and uncertain waiver process. The problems of the waiver process led to HUD supplementation of the rule in 2005, allowing such allocations under 24 C.F.R. § 983.231(d). Second, Congress created the Section 811 program, which includes some project-based rental assistance funding consistent with *Olmstead*, allowing projects to give preference to individuals with a specific disability with HUD's approval when project-based units do not exceed 25 percent of all units in a development. Third, Congress created the Mainstream Voucher program, which was designed to provide families with independent housing options in the community outside of disability-targeted developments. The Mainstream Voucher program is administered identically to the Section 8 voucher program, but mainstream vouchers are available only to non-elderly disabled families.

HUD's standard voucher program was also influenced by evolving court interpretations of the "reasonable accommodation" provision of regulations implementing Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Amendments Act of 1988. Those changes are reflected in guidance documents on exception payment standards, extended search times, and other voucher program flexibilities to meet the needs of families with disabilities (HUD, 2020a, 2020b, 2024a).

However, families with disabilities have also seen courts reject the acceptance of vouchers as an accommodation. In *Salute* v. *Stratford Greens Garden Apartments*, plaintiffs sought to require a landlord to accept their housing voucher as a reasonable accommodation under the Fair Housing Amendments Act of 1998. The Second Circuit observed that requiring acceptance of vouchers was not reasonable, in part because of the purported "burdens" of the program, as evidenced by Congress's repeal of the "take one, take all" provision, which had required landlords who accepted any housing choice voucher to also accept additional tenants seeking to use a voucher.[5] More important, the court found that the accommodation was not reasonable because it was unrelated to the plaintiff's disability, reasoning that "impecunious people with disabilities stand on the same footing as everyone else." Thus, the court held that the accommodation sought by the plaintiffs was not "necessary" to afford disabled persons "equal opportunity" to use and enjoy a dwelling. This issue remains contested, however, with a continuing split among the circuit courts (National Housing Law Project, 2023).

In-person, first-come, first-served application practices—policies that severely disadvantage persons with mobility impairments—were the subject of widely publicized HUD disability discrimination

[5] The Salute case may, in fact, have been one of the factors leading to the repeal of the so-called take one, take all requirement. The District Court in the Salute case found that an exception should be read into the provision that would allow landlords to not participate if they accepted vouchers solely from tenants who started as market tenants but then began using their vouchers during their tenancy. The District Court reasoned that those landlords were engaged in kindness to vulnerable tenants who would otherwise lose housing and that requiring the landlords to "take all" would incentivize them to instead evict those vulnerable tenants for fear of being required to accept other voucher-using tenants. Accordingly, the court "grafted" an exception to the statute for such situations. Following the District Court's decision, Congress repealed the take one, take all provision, and the Second Circuit suggested that the repeal was a sign that Congress would rather repeal the entire provision than take the risk that a higher court would overturn the District Court's exception.

complaints against the Fall River (MA) housing authority in 1997–1998, part of the advocacy that led to HUD's guidance on application and waitlist management in 2012 (previously discussed).

Litigation has also worked to enforce requirements in the Housing and Community Development Act of 1992 that HUD promulgate rules allowing voucher applicants to name a representative to aid them in obtaining a voucher, in communications regarding their tenancy, or in disputes that may arise. HUD did not implement this requirement for many years but did so following the filing of *Maxwell* v. *HUD*, which led to the creation of the HUD-92006 form to allow voucher holders to name their representatives.

The Future of Section 8 in the Courts

The Housing Choice Voucher program has benefited from the 50-year interplay between civil rights litigation and policymaking. Nonetheless, even with all the advances previously described, the voucher program is still a work in progress, with program structures and local PHA administrative issues that continue to perpetuate segregation and limit family choices. Some of those issues may be addressed in the future by litigation, some through HUD fair housing complaints, and others through improved HUD accountability measures. Even if litigation is not contemplated, the strong precedents permitting civil rights injunctive claims against HUD through the Administrative Procedure Act (e.g., *Open Communities Alliance* v. *Carson*) and against PHAs through the Fair Housing Act and 42 USC § 1983 provide a valuable backdrop for reform.

One continuing challenge to family choice is related to the large number of PHAs that administer the voucher program—more than 2,200 PHAs nationwide (Sard and Thrope, 2016). Having so many PHAs administering vouchers can sometimes mean multiple PHAs operating in the same housing region, limited by antiquated state law PHA jurisdictional restrictions, facing widely varying voucher payment standards, and a slow bureaucratic process for families who seek to move ("port") from one PHA's area of operation to another, sometimes even including re-screening for program eligibility at the new PHA. This bureaucratic complexity and delay can limit family choices and place barriers in the path of families seeking less segregated housing opportunities. Some potential, politically difficult, long-term policy fixes are available for those problems—through the state law expansion of PHA "areas of operation," a federal statute overriding (preempting) those state law jurisdictional restrictions, or consolidation of PHAs within regions (Sard and Thrope, 2016). Congress could also steer more voucher funds to PHAs with regionwide jurisdiction and adopt financial incentives to encourage PHA consolidation or the adoption of interagency cooperation agreements. A revival of the original direct cash assistance approach to tenant-based assistance could also address the interjurisdictional barriers to housing choice (Joice, O'Regan, and Ellen, 2024). In the meantime, HUD could use its regulatory authority to eliminate portability as a bureaucratic obstacle for families by making vouchers freely transferable without PHA involvement. But, as in prior areas where civil rights laws have met tension with HUD policy, more litigation may need to occur before HUD or Congress takes action.

Relatedly, HUD has made significant progress in expanding mandatory Small Area Fair Market Rents (HUD, 2024), and many PHAs have also adopted exception payment standards in higher-cost neighborhoods based on the Small Area FMRs—to the point where it is estimated that more

than 45 percent of voucher tenants now live in areas where payment standards are adjusted to neighborhood rents. As this trend continues, and as HUD data on voucher concentration become more publicly available, legal questions will inevitably be asked about PHAs that do not adopt some version of Small Area FMRs.

The interplay between expanding source-of-income discrimination protections (Knudsen, 2022) and HCV rules and procedures may also present new opportunities for civil rights litigation. For example, the pending case of *Louis* v. *Saferent* in Massachusetts deals with whether a credit-based rental admission algorithm that has a disparate impact on Black applicants violates the Fair Housing Act as applied to voucher tenants (whose individual credit is only marginally relevant given the existence of the subsidy); this case could have vast implications on the prospective utility of vouchers especially in jurisdictions with source-of-income discrimination protections.

Looking beyond traditional civil rights litigation and the HUD fair housing complaint process, the next phase of fair housing reform in the voucher program might happen largely through new HUD accountability processes—what Johnson (2012) has called "equality directives." Chief among them is the anticipated final Affirmatively Furthering Fair Housing rule, which would apply directly to PHAs, and will force some serious introspection at agencies that have not yet examined the discriminatory effects of their HCV policies in the context of their local housing markets (PRRAC and NHLP, 2021). Although the prior Obama Administration's Affirmatively Furthering Fair Housing (AFFH) rule did not include direct enforcement provisions (Julian, 2018), the new rule may enable advocates to challenge inadequate plans (HUD, 2023a).

Similarly, the long-delayed updating of the Section Eight Management Assessment Program rule (SEMAP) may include an assessment of progress on reducing the proportion of families in high-poverty areas (and increases in access to low-poverty areas) as mandatory indicators in HUD's annual report card for PHAs, which would bring a new level of civil rights accountability at PHAs for the families they serve.

It is hard to predict the future course of civil rights advocacy at HUD in light of emerging judicial attacks on the administrative state and on race-conscious policies. However, the Fair Housing Act continues to be a powerful mandate both inside and outside HUD. Thus, the constructive dialogue between civil rights advocates and policymakers described in this article should continue to "bend" the long arc of housing voucher policy toward justice.

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Authors

Philip Tegeler is the executive director of the Poverty & Race Research Action Council (PRRAC), a civil rights policy organization based in Washington, DC. Sam Reece is a law and policy intern at PRRAC, J.D. Georgetown University Law Center, 2024.

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