

3-1-2010

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### Recommended Citation

Margaretta E. Homsey, *Procedural Due Process and Hearsay Evidence in Section 8 Housing Voucher Termination Hearings*, 51 B.C.L. Rev. 517 (2010), <http://lawdigitalcommons.bc.edu/bclr/vol51/iss2/5>

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# PROCEDURAL DUE PROCESS AND HEARSAY EVIDENCE IN SECTION 8 HOUSING VOUCHER TERMINATION HEARINGS

**Abstract:** The federal Section 8 Housing Choice Voucher Program provides critical housing subsidy assistance to over two million low-income families in the United States. Each year some of these families have their Section 8 voucher assistance terminated based solely on uncorroborated hearsay evidence relied on by local public housing authorities to prove various program violations. State and federal courts have reached differing conclusions as to whether these terminations violate families' procedural due process rights under the Fourteenth Amendment and federal regulations governing the program. This Note argues that terminations based solely on hearsay evidence violate procedural due process and the federal regulations. Applying the balancing test laid out by the U.S. Supreme Court in *Mathews v. Eldridge* in 1976, this Note concludes that Section 8 voucher terminations may not be based solely on hearsay evidence without affording families the right to confront and cross-examine those adverse witnesses who provide the evidence relied on by the housing authority. Further, this Note urges that the federal regulations be amended to make this requirement explicit.

## INTRODUCTION

The Section 8 Housing Choice Voucher Program was established in 1974 and is now the largest federal low-income housing assistance program in the United States.<sup>1</sup> Overseen by the Department of Housing and Urban Development (“HUD”) and administered by state or local public housing agencies (“PHAs”), the program helps families afford decent, safe, and sanitary housing and currently assists more than two million households.<sup>2</sup> The PHAs provide vouchers to eligible low-income families, who, in turn, use them to rent housing in the pri-

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<sup>1</sup> See CTR. ON BUDGET & POLICY PRIORITIES, INTRODUCTION TO THE HOUSING VOUCHER PROGRAM 1 (2009), available at <http://www.cbpp.org/5-15-09hous.pdf>. See generally 42 U.S.C. § 1437f(o) (2006); 24 C.F.R. § 982 (2009).

<sup>2</sup> See 24 C.F.R. § 982.1(a)(1) (“In the HUD Housing Choice Voucher Program . . . HUD pays rental subsidies so eligible families can afford decent, safe and sanitary housing.”); CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 1, at 1, 8.

vate market they might otherwise not be able to afford.<sup>3</sup> Voucher recipients generally pay thirty percent of their monthly income toward the rent, and the voucher subsidizes the remainder.<sup>4</sup>

PHAs have the right to terminate Section 8 housing voucher assistance when families violate lease terms for their subsidized units or other program regulations.<sup>5</sup> For example, PHAs may terminate if they discover individuals residing at a subsidized unit without prior approval, if a family is absent from its unit for a prolonged period of time, if a family member engages in criminal activity or alcohol abuse, or if a family member commits fraud in connection with the program.<sup>6</sup> Families have the right to receive notice stating the reasons for the PHA's decision to terminate assistance and the right to request an "informal hearing" prior to the termination.<sup>7</sup>

Families in the Section 8 voucher program have a critical interest in the outcome of these termination hearings, as the loss of a voucher can result in homelessness.<sup>8</sup> Those who have their vouchers terminated also face barriers to obtaining new vouchers.<sup>9</sup> First, PHAs have the discretion to find families ineligible for another voucher if any member was previously terminated from the voucher program.<sup>10</sup> Also, due to funding shortages, many PHAs have voucher waiting lists of several years or have closed their waiting lists to new families entirely.<sup>11</sup> Cur-

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<sup>3</sup> CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 1, at 1. Local housing agencies administering the Section 8 voucher program set the precise income requirements for admission to the program in their area. *Id.* at 2. Agencies are required to set the maximum family income between fifty and eighty percent of local area median income. *Id.* In addition, at least seventy-five percent of the families admitted to the program each year must qualify as "extremely low-income" households, with incomes at or below thirty percent of the area median income. *Id.* at 2-3.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> See 24 C.F.R. § 982.552(a)-(c).

<sup>6</sup> See *id.*

<sup>7</sup> See *id.* § 982.555(a) (1) (v)-(vi), (a) (2), (c); see also NAT'L HOUS. LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 1.3.5.1, at 1/39 (3d ed. 2004) (noting that the main sources of rights for tenants in the voucher program are the statute, the HUD regulations, an annual contribution contract between HUD and the PHA, a Housing Assistance Payments contract between the PHA and the tenant's landlord, the lease, and state and local law).

<sup>8</sup> See CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 1, at 2, 7.

<sup>9</sup> See *id.* at 1.

<sup>10</sup> 24 C.F.R. § 982.552(c) (1) ("The PHA may at any time deny program assistance for an applicant . . . . If a PHA has ever terminated assistance under the program for any member of the family.")

<sup>11</sup> CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 1, at 1; see NAT'L HOUS. LAW PROJECT, *supra* note 7, § 1.3.5.1, at 1/37 ("Generally, the demand for Vouchers has so severely outstripped availability that it is common to first have to apply just to be on the PHA's

rently, demand for Section 8 vouchers far exceeds the supply, and only one in four families eligible for vouchers receives federal housing assistance.<sup>12</sup>

Given the very high stakes involved in the outcome of termination hearings, many housing advocates have questioned whether families receive adequate procedural due process protections at the hearings to ensure that PHAs do not terminate vouchers erroneously.<sup>13</sup> One possible source of error is the frequent PHA practice of relying on hearsay evidence at voucher termination hearings in order to prove lease violations.<sup>14</sup> For example, PHAs often introduce statements given by

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Voucher waiting list.”). The average waiting time for voucher assistance is especially long in large cities. See NAT’L HOUS. LAW PROJECT, *supra* note 7, § 2.3, at 2/23. For example, in 1999, the average wait for a voucher was ten years in Los Angeles and Newark, eight years in New York City, seven years in Houston, and five years in Memphis and Chicago. *Id.*

<sup>12</sup> CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 1, at 1. The demand for Section 8 vouchers is likely to continue to rise due to the current economic downturn in the United States. See BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, NUMBER OF HOMELESS FAMILIES CLIMBING DUE TO RECESSION 10 (2009), available at <http://www.cbpp.org/files/1-8-09hous.pdf>. Based on the relationship between increases in the unemployment rate and increases in poverty in the last three recessions, experts expect that the number of families in the U.S. living at below half of the poverty line will rise by 900,000 to 1.1 million due to the current downturn. *Id.* at 4. Families living at this level of poverty are at the highest risk of homelessness because they will have the greatest difficulty paying their rent, and thus may need to turn to voucher assistance. *Id.* Although some families leave the voucher program each year, “fewer families are likely to become independent of federal housing assistance during an economic downturn, which means fewer new families can be assisted now than would usually be the case.” *Id.* at 10. Also, experts have noted that the 2009 federal Omnibus Appropriations Act failed to provide sufficient funding to renew all of the vouchers used by families in 2008, falling short by up to \$400 million, which also makes vouchers more difficult to obtain for new families. See CTR. ON BUDGET & POLICY PRIORITIES, UPDATE ON HUD FUNDING FOR 2009, at 1–3 (2009), available at <http://www.cbpp.org/files/3-13-09housprac.pdf>.

<sup>13</sup> See Eric Dunn et al., *Housing Choice Voucher Termination Hearings: Best Practices for Public Housing Agencies*, CLEARINGHOUSE REV., July–Aug. 2008, at 134, 135 (“Since voucher termination tends to cause catastrophic consequences, helping families contest unjust terminations is already a top priority among legal aid providers.”). Once accepted into the Section 8 voucher program, families have an entitlement to continue their participation until they are over income or violate program requirements, and they cannot be terminated from the program without procedural protections. See 24 C.F.R. §§ 982.552, 982.555; NAT’L HOUS. LAW PROJECT, *supra* note 7, § 14.4.2, at 14/129. Although HUD did not originally provide for procedural due process protections for families facing termination, after years of litigation it promulgated regulations providing basic protections in 1984. See Section 8 Housing Assistance Payments Program; Existing Housing, 49 Fed. Reg. 12,215, 12,224–31 (Mar. 29, 1984); NAT’L HOUS. LAW PROJECT, *supra* note 7, § 14.4.2, at 14/129.

<sup>14</sup> See C. Martin Lawyer III, *Eleventh Circuit Limits Section 8 Housing Subsidy Terminations and Defines and Applies “Burden of Persuasion,”* CLEARINGHOUSE REV., July–Aug. 2008, at 194, 194 (noting that many PHAs and hearing officers fully accept hearsay evidence as grounds for termination even without any corroborating direct testimony). Hearsay is a statement, whether consisting of a verbal assertion or nonverbal assertive conduct, other than one

neighbors or landlords to a PHA employee, or statements contained in newspaper articles or police reports.<sup>15</sup> It is common practice for many PHAs across the country to give lists of subsidized families' addresses to criminal reporting companies who are paid to monitor police reports for activity at these addresses.<sup>16</sup> PHAs then send automatic notices of termination to these families based on information in the police reports.<sup>17</sup> These notices may claim that there has been illegal activity at a family's dwelling or that the family has an unauthorized person living in the unit if a person listed in the police report is not also on the lease.<sup>18</sup> PHAs then introduce copies of these police reports as evidence at the informal hearing as a basis for termination.<sup>19</sup>

This practice of relying on hearsay evidence to support a voucher termination has led to litigation in state and federal courts around the country as families challenge voucher terminations based on hearsay.<sup>20</sup> Voucher recipients argue that basing a termination decision solely on hearsay evidence is a violation of their procedural due process rights under the Fourteenth Amendment because it denies them the chance to confront and cross-examine witnesses against them.<sup>21</sup> PHAs counter

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made by the declarant while testifying at the trial or hearing, that is offered in evidence to prove the truth of the matter asserted. BLACK'S LAW DICTIONARY 739 (8th ed. 2004). Testimony may not be admitted in a court unless it is or has been subject to testing by cross-examination or the opportunity for cross-examination, unless it falls under some kind of exception. *Id.* The Federal Rules of Evidence list twenty-three exceptions where hearsay statements may be admitted regardless of whether the declarant is available to testify, and five exceptions where statements may be admitted even if the declarant is unavailable. FED. R. EVID. 803, 804.

<sup>15</sup> See *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312, 315 (D. Conn. 1993); *Costa v. Fall River Hous. Auth.*, 881 N.E.2d 800, 809 (Mass. App. Ct. 2008), *aff'd in part, rev'd in part*, 903 N.E.2d 1098 (Mass. 2009); see also *Lawyer*, *supra* note 14, at 194.

<sup>16</sup> *Lawyer*, *supra* note 14, at 194.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *Edgecomb*, 824 F. Supp. at 315; *Costa*, 881 N.E.2d at 809.

<sup>21</sup> See *Williams v. Hous. Auth. of Raleigh*, 595 F. Supp. 2d 627, 629 (E.D.N.C. 2008); *Costa*, 881 N.E.2d at 802; see also *Dunn et al.*, *supra* note 13, at 143 (arguing that PHAs should adopt policies that make hearsay evidence insufficient by itself to support a voucher termination); William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 835–36 (2005) (noting that because the goal of relaxing evidentiary standards in administrative proceedings is “to encourage broad admission of evidence, including hearsay, there frequently can be situations where a respondent’s ability to test the evidence, particularly hearsay, may be lessened so much that he or she is denied due process,” and therefore “reviewing courts frequently determine specific evidence issues on constitutional requirements rather than statutory or regulatory requirements”). Due process is a recurring issue that must be addressed in the context of hearsay evidence because hearsay inherently involves the absence of cross-examination. Kuehnle, *supra*, at

that under HUD regulations the formal rules of evidence do not apply to voucher termination hearings and, therefore, hearsay alone can be sufficient evidence upon which to base a voucher termination.<sup>22</sup>

Courts have come to widely differing conclusions as to whether procedural due process permits PHAs to terminate families based on hearsay evidence alone, or whether it requires that families have the right to confront and cross-examine the witnesses who made statements that PHAs relied on in deciding to terminate.<sup>23</sup> This Note examines what evidence should be sufficient to terminate a family from the Section 8 voucher program, specifically whether a termination can be based solely on hearsay evidence without violating the right to due process.<sup>24</sup> Part I of this Note discusses the U.S. Supreme Court's jurisprudence regarding the dictates of procedural due process in administrative hearings regarding the deprivation of public benefits.<sup>25</sup> Part II reviews the HUD regulations governing the use of evidence in Section 8 voucher termination hearings and goes on to examine the variety of approaches federal and state courts have taken in determining what level of procedural due process the regulations and the Supreme Court's decisions require in these hearings.<sup>26</sup> Finally, Part III argues that in the context of voucher termination hearings, the HUD regulations and Supreme Court precedent require that termination decisions not be based solely on uncorroborated hearsay without affording families the opportunity to confront and cross-examine adverse witnesses, and suggests that HUD consider amending its regulations to make this requirement explicit.<sup>27</sup>

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857; see also Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 976 (2006) (noting, in the context of formal court proceedings, that if adversaries are allowed to substitute hearsay for available live testimony, "[m]ost jurists would agree that the principal harm would be the loss of cross-examination").

<sup>22</sup> See 24 C.F.R. § 982.555(e)(5) (2009) ("Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.").

<sup>23</sup> Compare *Gammons v. Mass. Dep't of Hous. & Cmty. Dev.*, 502 F. Supp. 2d 161, 165–66 (D. Mass. 2007), with *Costa*, 881 N.E.2d at 809.

<sup>24</sup> See *infra* notes 28–271 and accompanying text.

<sup>25</sup> See *infra* notes 28–83 and accompanying text.

<sup>26</sup> See *infra* notes 84–203 and accompanying text.

<sup>27</sup> See *infra* notes 204–271 and accompanying text.

## I. THE DEPRIVATION OF PUBLIC BENEFITS: DEFINING PROCEDURAL DUE PROCESS

This Part briefly reviews the evolution of the U.S. Supreme Court's jurisprudence regarding the requirements of procedural due process as applied to hearings involving the deprivation of public benefits.<sup>28</sup> First, this Part discusses the Court's landmark ruling that a pretermination evidentiary hearing is required in the case of welfare recipients.<sup>29</sup> It then reviews the Court's narrowing of this requirement in the context of applicants for federal disability benefits.<sup>30</sup> Finally, this Part examines the Court's articulation of the current test applied in determining what aspects of procedural due process should be incorporated in a hearing regarding the deprivation of public benefits.<sup>31</sup>

### A. *The Due Process Revolution: Goldberg v. Kelly and Its Progeny*

Although administrative hearings are informal and the rules of evidence are not strictly applied, the U.S. Supreme Court has held that due process requires basic procedural safeguards in hearings involving the deprivation of public benefits.<sup>32</sup> In 1970, in *Goldberg v. Kelly*, the Court issued its landmark decision pronouncing these safeguards.<sup>33</sup> In *Goldberg*, the Court had to decide whether New York State's termination of a recipient's public assistance payments without a prior evidentiary hearing violated the Due Process Clause of the Fourteenth Amendment.<sup>34</sup> Under existing New York procedures, only a posttermination hearing was available to public assistance recipients.<sup>35</sup> The Court held that, in the welfare context, a posttermination hearing alone was insufficient and that due process also required a pretermination evidentiary hearing.<sup>36</sup>

The Court started with the premise that the extent to which welfare recipients must be afforded due process depends on the extent to which they may be "condemned to suffer grievous loss" and whether their interest in avoiding this loss outweighed the government's interest in

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<sup>28</sup> See *infra* notes 32–83 and accompanying text.

<sup>29</sup> See *infra* notes 32–54 and accompanying text.

<sup>30</sup> See *infra* notes 55–63 and accompanying text.

<sup>31</sup> See *infra* notes 64–83 and accompanying text.

<sup>32</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 261, 264 (1970).

<sup>33</sup> See *id.*

<sup>34</sup> *Id.* at 255–56; see U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

<sup>35</sup> *Goldberg*, 397 U.S. at 256–57.

<sup>36</sup> *Id.* at 264.

summary adjudication.<sup>37</sup> It then weighed the recipient's interest in receiving welfare against the government's interest in conserving its fiscal and administrative resources.<sup>38</sup> In terms of the recipient's interest, the Court noted that because welfare provides a means of accessing vital food, clothing, housing and medical care, a "crucial factor" in determining whether a pretermination hearing was necessary was that waiting for a posttermination hearing "may deprive an *eligible* recipient of the very means by which to live while he waits."<sup>39</sup> As for the government's interest, the Court observed that it was also in the government's interest to avoid improperly terminating eligible recipients' welfare benefits, noting that public assistance was not "mere charity" but rather a means of promoting the dignity and well-being of all persons within the United States.<sup>40</sup>

Although the government had an interest in conserving its resources, that interest was outweighed by the competing interest of recipients as well as the government in not having the benefits terminated erroneously.<sup>41</sup> The risk of grievous loss to recipients was simply too high.<sup>42</sup>

In *Goldberg*, the Court also detailed the required form of the pretermination hearing.<sup>43</sup> It noted that the hearing did not need to be in the form of a judicial or quasi-judicial trial, and that both the government and welfare recipients had an interest in reaching a resolution swiftly.<sup>44</sup> Thus, a hearing could be limited to minimal procedural safeguards adapted to the particular situation of welfare recipients and the nature of the issues to be resolved.<sup>45</sup>

The Court decided that procedural due process in the case of welfare recipients required: (1) timely and adequate notice to the recipient of the reasons for the termination; (2) an opportunity to confront any adverse witnesses and present arguments and evidence orally; (3) an opportunity to be represented by counsel at the recipient's expense; (4) an impartial decisionmaker; and (5) a decision that rests solely on the legal rules and evidence adduced at the hearing, and states the rea-

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<sup>37</sup> *Id.* at 262–63 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

<sup>38</sup> *See id.* at 263, 265–66.

<sup>39</sup> *See id.* at 264.

<sup>40</sup> *Id.* at 264–65.

<sup>41</sup> *Goldberg*, 397 U.S. at 265–66.

<sup>42</sup> *See id.* at 263–66.

<sup>43</sup> *See id.* at 266–67.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 267.



sons for the determination and upon what evidence the determination relies.<sup>46</sup>

The Court was influenced by the fact that a hearing decision based merely on written submissions would be unsatisfactory because recipients' credibility and veracity would often be at issue; therefore, it stated that recipients should be allowed to present positions orally, and to confront and cross-examine adverse witnesses.<sup>47</sup> Relying on its 1959 decision in *Greene v. McElroy*, the U.S. Supreme Court observed that where important decisions turn on questions of fact, procedural due process requires the opportunity to confront and cross-examine.<sup>48</sup> In *Greene*, the Court noted that the requirements of confrontation and cross-examination have ancient roots and that the Court had zealously protected them from erosion not only in criminal cases but also in "all types of cases where administrative . . . actions were under scrutiny."<sup>49</sup> The Court concluded that welfare recipients, therefore, had to have an opportunity to confront and cross-examine the witnesses relied on by the welfare department and that the absence of this opportunity was "fatal" to the constitutional adequacy of the hearing procedures.<sup>50</sup>

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<sup>46</sup> See *id.* at 267–68, 270–71.

<sup>47</sup> See *Goldberg*, 397 U.S. at 269.

<sup>48</sup> *Id.* at 269–70; see *Greene v. McElroy*, 360 U.S. 474, 508 (1959).

<sup>49</sup> *Goldberg*, 397 U.S. at 270 (quoting *Greene*, 360 U.S. at 496–97). In *Greene*, the Court held that a government agency was not authorized to deprive a government contractor of his job after a proceeding where he was not provided with the safeguards of confrontation and cross-examination. See 360 U.S. at 508. In *Goldberg*, the Court found *Greene* highly relevant to its analysis of whether relying on hearsay in the form of a secondhand presentation of evidence by a welfare caseworker would violate a recipient's due process rights. *Goldberg*, 397 U.S. at 270. It devoted significant space in its decision to a quotation from *Greene* that read:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures the individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative . . . actions were under scrutiny.

*Id.* (quoting *Greene*, 360 U.S. at 496–97).

<sup>50</sup> See *Goldberg*, 397 U.S. at 268, 270.

Although *Goldberg* dealt specifically with the termination of welfare benefits, lower courts soon began applying its reasoning to require more protections in hearings for other types of public benefits, including housing.<sup>51</sup> For example, in 1970, in *Escalera v. New York City Housing Authority*, the U.S. Court of Appeals for the Second Circuit held that tenants in public housing projects had stated a claim for relief where the PHA denied them the opportunity to confront and cross-examine parties who supplied information upon which the authority based its adverse action.<sup>52</sup> The court, relying on *Goldberg*, stated that if a PHA did not want to disclose the names of those who provided the information or have tenants confront them at a hearing because it could cause hostility within housing projects, then the PHA could not base its determination on that information.<sup>53</sup> The Second Circuit thus gave early support to the idea that the *Goldberg* due process analysis could apply to cases involving the deprivation of housing assistance as well as welfare benefits.<sup>54</sup>

#### B. *The U.S. Supreme Court's Application of Goldberg to Hearsay Evidence*

Soon after its decision in *Goldberg*, the U.S. Supreme Court had to determine whether procedural due process could permit the deprivation of public benefits based on hearsay evidence.<sup>55</sup> In 1971, in *Richardson v. Perales*, the Court held that a decision could be based on hearsay in the context of applications for Social Security disability assistance, and this remains the Court's leading case regarding the admissibility of hearsay in administrative hearings.<sup>56</sup>

In *Perales*, the government denied the plaintiff's application for disability benefits based solely on examining physicians' written medical reports; the plaintiff asserted that his inability to confront and cross-examine these physicians at the application hearing violated his right to due process.<sup>57</sup> The Court, however, held that a written report by licensed physicians who examined a claimant could be received into evi-

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<sup>51</sup> See *Escalera v. N.Y. City Hous. Auth.*, 425 F.2d 853, 861–62 (2d Cir. 1970).

<sup>52</sup> See *id.* This case was decided prior to the establishment of the Section 8 Housing Choice Voucher Program, and thus its holding was limited to evictions from public housing projects, although its reasoning has been applied in later cases involving voucher terminations. See *id.*; *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312, 316 (D. Conn. 1993).

<sup>53</sup> *Escalera*, 425 F.2d at 862–63 (citing *Goldberg*, 397 U.S. at 270).

<sup>54</sup> See *id.*

<sup>55</sup> See *Richardson v. Perales*, 402 U.S. 389, 390, 402 (1971).

<sup>56</sup> *Id.* at 402; Kuehnle, *supra* note 21, at 854.

<sup>57</sup> See *Perales*, 402 U.S. at 392–95, 401.

dence at the administrative hearing; although hearsay, the report was sufficient to support a finding against the plaintiff where he had not subpoenaed the reporting physicians and, therefore, denied himself the opportunity to cross-examine them.<sup>58</sup>

The Court based its decision on a number of factors that it believed would assure the underlying reliability and probative value of the evidence including: the routine, standard and unbiased nature of the physicians' reports, which were based on personal examinations of the applicant involving accepted medical procedures and tests; the number and range of the medical examinations undertaken; the lack of any inconsistency among the reports; the claimant's failure to take advantage of his opportunity to subpoena the physicians; the past judicial recognition of the inherent reliability of physician reports; and the magnitude of the cost of providing live medical testimony at all Social Security disability hearings.<sup>59</sup>

The Court dismissed the plaintiff's claims that *Goldberg* required an opportunity to confront and cross-examine adverse witnesses at the hearing, distinguishing his situation from that of a welfare recipient.<sup>60</sup> The Court pointed out that the plaintiff's case did not involve termination of benefits already granted, as *Goldberg* had, and that the plaintiff had the opportunity to subpoena the physicians for cross-examination, but failed to do so.<sup>61</sup> It also noted that the authors of the reports were known, and that the "specter of questionable credibility and veracity [was] not present" the way it was in *Goldberg* because of the physicians' training and reputations.<sup>62</sup> Thus the Court established that hearsay evidence alone could form substantial evidence sufficient to support an adverse finding in a hearing regarding an application for disability

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<sup>58</sup> *Id.* at 402. The Court concluded:

[A] written report by a licensed physician who has examined the claimant and who sets forth in his report medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.

*Id.*

<sup>59</sup> *See id.* at 402–06.

<sup>60</sup> *Id.* at 406–07.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 407.

benefits, thereby validating a set of administrative procedures much narrower than that outlined in *Goldberg*.<sup>63</sup>

### C. The Current Test: *Mathews v. Eldridge*

In 1976, in *Mathews v. Eldridge*, the U.S. Supreme Court laid out the current test for determining what the specific dictates of procedural due process require for a given hearing regarding the deprivation of public benefits.<sup>64</sup> There, the Court considered a plaintiff's claim that the termination of his Social Security disability benefits violated his right to procedural due process where he did not receive a full pretermination evidentiary hearing of the kind contemplated in *Goldberg*.<sup>65</sup> The plaintiff in *Mathews* had been receiving disability benefits when the state agency asked him to complete a medical questionnaire about his condition.<sup>66</sup> He stated that his condition had not improved, and provided the names of his physicians.<sup>67</sup> The state agency then obtained reports from these doctors and determined that the plaintiff was no longer disabled.<sup>68</sup> The plaintiff was allowed to respond in writing with additional information, but the agency again determined he was not disabled and was no longer eligible to receive disability benefits.<sup>69</sup>

The Court held that these administrative procedures were constitutionally adequate in the case of termination of benefits of a Social Security disability recipient, and that a hearing like that in *Goldberg* was not required.<sup>70</sup> It emphasized that due process is not a technical conception; rather, it is flexible and varies according to the particular situation.<sup>71</sup> It held that identification of the specific requirements of due

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<sup>63</sup> *Perales*, 402 U.S. at 407. The Court in *Perales* defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 401 (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>64</sup> See 424 U.S. 319, 333–35 (1976). The *Mathews* decision was a turning point in the Court's approach to due process requirements in administrative hearings as it had developed in *Greene*, *Goldberg*, and *Perales*, particularly as such requirements related to hearsay. Kuehnle, *supra* note 21, at 865–68 (noting that in *Mathews* the Court "revisited the due process requirements in a way that narrowed *Goldberg* and put the cross-examination/hearsay issue more in the *Perales* mode," because "balancing is required to determine what due process is to be afforded, and one of the considerations is what level of procedural testing of truth is needed").

<sup>65</sup> *Mathews*, 424 U.S. at 325.

<sup>66</sup> *Id.* at 323–24.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 324.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 325–26.

<sup>71</sup> See *Mathews*, 424 U.S. at 334.

process in any particular case required consideration of three factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest under current procedures and any probable value of additional or substitute procedures; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."<sup>72</sup>

Applying these three factors to the case of a Social Security disability recipient, the Court distinguished the *Mathews* plaintiff's situation from that of the *Goldberg* plaintiffs, noting that *Goldberg* was the only case where it had held that a hearing closely approximating a judicial trial was necessary.<sup>73</sup> In terms of the first factor, or the private interest affected, the Court observed that eligibility for disability benefits like those received by the plaintiff was unrelated to financial need; in contrast, the welfare recipients in *Goldberg* were "on the very margin of subsistence."<sup>74</sup> Thus, the private interest of the recipient as measured by the degree of the potential deprivation was generally likely to be less in a disability benefits termination case than in a welfare termination case.<sup>75</sup>

As for the second factor, the Court noted that the risk of erroneous deprivation of disability benefits and the probable value of additional procedures were also lower than they would be for welfare benefits.<sup>76</sup> The Court stated that the central consideration in evaluating the second factor is the nature of the particular inquiry.<sup>77</sup> In the case of disability benefits, eligibility depends on recipients showing they are unable to work by reason of a "medically determinable" impairment.<sup>78</sup> The Court reasoned that a medical assessment is more sharply focused and easier to document than the typical welfare eligibility determination because, as in *Perales*, the decision is based on routine and unbiased reports by physician specialists.<sup>79</sup> By contrast, in a welfare case a much wider variety of information is relevant to the eligibility inquiry

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<sup>72</sup> *Id.* at 335.

<sup>73</sup> *Id.* at 333-34.

<sup>74</sup> *Id.* at 340.

<sup>75</sup> *Id.* at 341. The Court noted that if disabled workers did in fact face significant financial hardship due to an erroneous termination, the workers would still be able to apply for other forms of government assistance like welfare if they fell below the subsistence level. *Id.* at 342.

<sup>76</sup> *Id.* at 343-45.

<sup>77</sup> *Mathews*, 424 U.S. at 343.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 343-44 (citing *Perales*, 402 U.S. at 404).

and evaluating witness credibility and veracity is often critical.<sup>80</sup> Because assessments based on routine written medical reports rarely involve issues of credibility and veracity, the risk of erroneous deprivation is low and the value of allowing a full evidentiary hearing or oral testimony would be minimal.<sup>81</sup>

Applying the third factor, the Court decided that the government's interest was significant due to the fiscal and administrative burden of increasing the number of hearings and the cost of providing benefits to workers pending a decision.<sup>82</sup> Thus, the government's interest in conserving fiscal and administrative resources outweighed the private interest of a Social Security disability recipient and the low risk of an erroneous deprivation; therefore, an evidentiary hearing like the one described in *Goldberg* was not required to comport with procedural due process.<sup>83</sup>

## II. PROCEDURAL DUE PROCESS LIMITATIONS ON THE USE OF HEARSAY IN SECTION 8 VOUCHER TERMINATION HEARINGS: FEDERAL AND STATE INTERPRETATIONS

This Part examines the HUD regulations that govern the use of evidence in Section 8 voucher termination hearings and the way various federal and state courts have construed these regulations to determine what due process requires in these hearings.<sup>84</sup> First, this Part reviews the HUD regulations concerning what evidence may be considered in a voucher termination hearing.<sup>85</sup> Next, it examines federal and state cases where courts have found that the regulations and procedural due process require termination decisions be based on more than uncorroborated hearsay.<sup>86</sup> This Part then looks at federal and state cases where courts have reached the opposite conclusion, interpreting the regulations and procedural due process to allow decisions based exclusively on uncorroborated hearsay.<sup>87</sup> Finally, this Part describes a recent federal appellate case and subsequent decisions interpreting it to demonstrate

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<sup>80</sup> *Id.*

<sup>81</sup> *See id.* at 344–45.

<sup>82</sup> *See id.* at 347–48.

<sup>83</sup> *See Mathews*, 424 U.S. at 349.

<sup>84</sup> *See infra* notes 89–203 and accompanying text.

<sup>85</sup> *See infra* notes 89–102 and accompanying text.

<sup>86</sup> *See infra* notes 103–133 and accompanying text.

<sup>87</sup> *See infra* notes 134–155 and accompanying text.

the continuing lack of clarity surrounding what evidence is sufficient to terminate a Section 8 voucher.<sup>88</sup>

*A. Hearsay and HUD Regulations Governing Section 8 Voucher Termination Hearings*

The HUD regulations governing Section 8 voucher termination hearings provide tenants with several basic procedural protections.<sup>89</sup> These protections include the right to prompt written notice of the decision to terminate, including the reasons for the decision, the opportunity to request an informal hearing, the right to representation by a lawyer or other representative at the family's expense, and the right to an impartial hearing officer.<sup>90</sup> The regulations also provide guidance as to the admissibility of evidence and burden of proof at the informal hearing.<sup>91</sup> The applicable section of the Code of Federal Regulations reads:

(5) *Evidence.* The PHA and the family must be given the opportunity to present evidence, and may question any witnesses. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.

(6) *Issuance of decision.* The person who conducts the hearing must issue a written decision, stating briefly the reasons for the decision. Factual determinations relating to the individual circumstances of the family shall be based on a preponderance of the evidence presented at the hearing. A copy of the hearing decision shall be furnished promptly to the family.<sup>92</sup>

Thus, the regulations establish that the rules of evidence do not apply in Section 8 voucher termination hearings and they contain no explicit ban on hearsay evidence.<sup>93</sup> Also, although the regulations provide that

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<sup>88</sup> See *infra* notes 156–203 and accompanying text.

<sup>89</sup> See 24 C.F.R. § 982.555(c)–(e) (2009).

<sup>90</sup> See *id.* § 982.555(c), (e) (3), (e) (4) (i).

<sup>91</sup> *Id.* § 982.555(e) (5)–(6).

<sup>92</sup> *Id.* The HUD voucher guidebook advising PHAs on the administration of the program adds little to the regulations, simply stating: “Both the PHA and the family must be given the opportunity to present evidence, and each may question any witnesses. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings.” U.S. DEP’T OF HOUS. & URBAN DEV., VOUCHER PROGRAM GUIDEBOOK, HOUSING CHOICE 7420.10G § 16.5, at 16-5 (2001), available at <http://www.hud.gov/offices/adm/hudclips/guidebooks/7420.10G/7420g16GUID.pdf>.

<sup>93</sup> 24 C.F.R. § 982.555 (e) (5)–(6).

the family “may question any witnesses,” there is no power for it to subpoena witnesses.<sup>94</sup>

The HUD regulations were intended to incorporate the due process analysis of the U.S. Supreme Court’s 1976 decision in *Mathews v. Eldridge*, where it established the current test for determining what procedural due process requires in a hearing regarding the deprivation of public benefits.<sup>95</sup> In 1984, HUD promulgated a rule amending certain notice and hearing requirements for the Section 8 program.<sup>96</sup> In its discussion of the timing of hearings, HUD noted that a hearing was required prior to the termination of a voucher, although a prior hearing was not necessary in making a determination about the size of a unit or determination of rent, and stated that this distinction was based on the constitutional principles enunciated in *Mathews*.<sup>97</sup> An erroneous decision would not have as much of a negative impact in the case of a unit size or rent determination as it would in terminating the entire voucher.<sup>98</sup>

The HUD regulations for voucher termination hearings also closely align with the requirements laid out by the U.S. Supreme Court in 1970 in *Goldberg v. Kelly*.<sup>99</sup> In fact, when promulgating a rule revising its regulations to permit PHAs to terminate assistance to participants if family members engage in drug-related or violent criminal activity, the drafters stated, “Under this rule, PHAs must adopt written informal pretermination hearing procedures for participants, which fully meet the requirements of *Goldberg v. Kelly*.”<sup>100</sup> In response to public comments suggesting that the proposed rule violated due process requirements set out in *Goldberg* because participants did not have the right to subpoena witnesses, HUD stated:

The Department does not agree that these procedures are defective because they do not provide participants with the right to subpoena witnesses. . . . The Department has no subpoena power to grant either PHAs or participants with respect to these matters, nor are they needed to afford procedural due

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<sup>94</sup> See *Edgecomb v. Hous. Auth. of Vernon*, 824 F. Supp. 312, 316 (D. Conn. 1993) (noting that Section 8 hearing procedures do not provide participants with the right to subpoena witnesses); 24 C.F.R. § 982.555 (e)(5)–(6).

<sup>95</sup> See 424 U.S. 319, 335 (1976).

<sup>96</sup> Section 8 Housing Assistance Payments Program; Existing Housing, 49 Fed. Reg. 12,215, 12,215–16 (Mar. 29, 1984).

<sup>97</sup> See *id.* at 12,228.

<sup>98</sup> See *id.*

<sup>99</sup> See 397 U.S. 254, 267–72 (1970).

<sup>100</sup> Section 8 Certificate Program, Moderate Rehabilitation Program and Housing Voucher Program, 55 Fed. Reg. 28,538, 28,541 (July 11, 1990).



process in an administrative proceeding for termination of housing subsidy. Participants have the right to cross examine any witness upon which a PHA relies. As with other informal hearings, formal rules of evidence normally do not apply, but participants can raise issues challenging the probative value of any evidence offered by the PHA.<sup>101</sup>

Thus, HUD incorporated the reasoning of *Mathews* in creating hearing procedures that would comport with procedural due process, and explicitly linked the situation of Section 8 voucher holders to that of welfare recipients in *Goldberg* in determining what procedures were required.<sup>102</sup>

### B. Cases Finding That an Exclusive Reliance on Uncorroborated Hearsay Violates Procedural Due Process

Many courts have found Section 8 subsidies to be a property interest protected by the Fourteenth Amendment, meaning that the due process protections outlined in *Goldberg* must apply to voucher termination hearings.<sup>103</sup> Courts have disagreed, however, as to whether the protections articulated in *Goldberg*, particularly the opportunity to confront and cross-examine witnesses, mean that a voucher termination cannot be based solely on hearsay evidence without violating due process.<sup>104</sup>

#### 1. Federal Court Interpretations

Some federal district courts have interpreted the HUD regulations and Supreme Court precedent to require that a Section 8 termination rest on more than just uncorroborated hearsay and to mean that tenants have the right to cross-examine any witnesses on whose statements the termination is based.<sup>105</sup> In one of the most frequently cited cases, the 1993 decision in *Edgecomb v. Housing Authority of the Town of Vernon*, the U.S. District Court for the District of Connecticut held that the de-

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<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See* Davis v. Mansfield Metro. Hous. Auth., 751 F.2d 180, 184–85 (6th Cir. 1984) (noting that “participation in a public housing program is a property interest protected by due process”); *see also* Escalera v. N.Y. City Hous. Auth., 425 F.2d 853, 861 (2d Cir. 1970) (“The government cannot deprive a private citizen of his continued tenancy, without affording him adequate procedural safeguards even if public housing could be deemed to be a privilege.” (citing *Goldberg*, 397 U.S. at 262–63)).

<sup>104</sup> *See, e.g.,* Gammons v. Mass. Dep’t of Hous. & Cmty. Dev., 502 F. Supp. 2d 161, 165–66 (D. Mass. 2007); *Edgecomb*, 824 F. Supp. at 315–17.

<sup>105</sup> *See Edgecomb*, 824 F. Supp. at 315–17.

fendant PHA's termination of the plaintiffs' Section 8 assistance violated HUD regulations where the hearing officer relied solely on hearsay evidence in the form of a police report and two newspaper articles.<sup>106</sup> The PHA had notified the plaintiffs of its intention to terminate their assistance after a family member was arrested and charged with conspiracy to sell cocaine, citing HUD regulations allowing PHAs to terminate where a family member has engaged in drug-related activities.<sup>107</sup> The hearing officer upheld the decision to terminate based on a police report and two newspaper articles that described the family member's arrest.<sup>108</sup>

The district court stated that whether the PHA's termination procedures complied with HUD regulations "must be judged in light of the due process requirements of *Goldberg* . . . ."<sup>109</sup> The court found that the plaintiffs' inability to confront the witnesses against them and the resulting termination decision based entirely on hearsay violated HUD regulations allowing parties to question any witnesses and requiring PHAs to prove allegations by a preponderance of the evidence.<sup>110</sup> The only live testimony on behalf of the PHA came from the Section 8 coordinator who had no personal knowledge of the circumstances of the family member's arrest, and the police report was based on discussions overheard on a wireless transmitter and information provided by a confidential informant.<sup>111</sup> Citing *Goldberg*, the court stated that although termination hearings were informal, the opportunity to confront and cross-examine witnesses was essential when their statements were the basis for the termination; because the police officers and the informant were not available at the hearing, the PHA had violated HUD regulations.<sup>112</sup>

The district court in *Edgecomb* took care to note that the 1971 holding by the Supreme Court in *Richardson v. Perales* did "not contradict

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 313. The family member, Tammy Edgecomb, had given her brother who did not live at the unit a ride to a store. *Id.* The brother sold cocaine to two men in the store parking lot, and Edgecomb was subsequently arrested and charged with conspiracy to sell cocaine. *Id.*

<sup>108</sup> *Id.* at 315. At the hearing, Tammy Edgecomb testified that "she would not have given her brother a ride if she had been aware of his purpose." *Id.* The plaintiffs' landlord and a parent aide testified that they had not seen evidence of drug-related activity at the unit. *Id.*

<sup>109</sup> *Id.* at 314.

<sup>110</sup> *See id.* at 315–16.

<sup>111</sup> *See Edgecomb*, 824 F. Supp. at 315.

<sup>112</sup> *Id.* at 316 (citing *Goldberg*, 397 U.S. at 269–70).

this conclusion.”<sup>113</sup> It distinguished that case, which held that a written physician’s report could support an adverse determination against a claimant for disability benefits despite its hearsay character and the claimant’s inability to cross-examine the physician, because there the claimant had a right to subpoena the physician but did not.<sup>114</sup> The court pointed out that Section 8 recipients do not have the right to subpoena, and that the recipients could further be distinguished because they had already been granted a benefit, unlike the claimant in *Perales* who was merely in the application process.<sup>115</sup>

Following the reasoning set forth in *Edgecomb*, several other federal courts have found that termination decisions violate HUD regulations and procedural due process when they are based on uncorroborated hearsay and the family is unable to confront or cross-examine witnesses.<sup>116</sup> In 1999, in *Litsey v. Housing Authority of Bardstown*, the U.S. District Court for the Western District of Kentucky reached a similar decision to that in *Edgecomb* when it found for a plaintiff who challenged the termination of her Section 8 voucher because she was not given the opportunity to confront and cross-examine her landlord, upon whose letters the decision was based.<sup>117</sup> The letters were relied on as evidence that an unauthorized person was residing with the plaintiff in her unit.<sup>118</sup> The district court found that the plaintiff had a right to question the landlord because his letters were essential to the hearing officer’s decision, and stated that the HUD regulations “mandate Plaintiff be able to question such a party” or else due process would be violated.<sup>119</sup>

In 2008, in *Stevenson v. Willis*, the U.S. District Court for the Northern District of Ohio, held that a plaintiff stated a claim for a violation of procedural due process rights where a PHA based its termination decision solely on hearsay without affording her the right to confront and cross-examine the witnesses whose statements provided the basis for the decision.<sup>120</sup> The PHA had terminated the voucher based on the landlord’s claim that the plaintiff had damaged the apartment, relying on a record summarizing a telephone conversation between a PHA em-

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<sup>113</sup> *Id.* (citing *Richardson v. Perales*, 402 U.S. 389, 404–05 (1971)).

<sup>114</sup> *Id.* (citing *Perales*, 402 U.S. at 404–05).

<sup>115</sup> *Id.* at 316.

<sup>116</sup> See *Litsey v. Hous. Auth. of Bardstown*, No. 3:99CV-114-H, 1999 WL 33604017, at \*1, \*6 (W.D. Ky. Apr. 1, 1999).

<sup>117</sup> *Id.* at \*1–3, \*6.

<sup>118</sup> *Id.* at \*6.

<sup>119</sup> *Id.*

<sup>120</sup> 579 F. Supp. 2d 913, 919–20 (N.D. Ohio 2008).

ployee and the landlord, as well as an agreement between the plaintiff and the landlord.<sup>121</sup> Because the plaintiff disputed this claim, the court found *Goldberg* required that she have an opportunity to confront and cross-examine her landlord, and noted that hearsay statements from a potentially biased source had played a dispositive role in the termination decision.<sup>122</sup>

## 2. State Court Interpretations

Several state courts have also held that due process and the HUD regulations require the right to cross-examine any witnesses relied on by the PHA.<sup>123</sup> For example, in 2008, in *Costa v. Fall River Housing Authority*, the Massachusetts Appeals Court held that a PHA's termination of a plaintiff's Section 8 housing subsidy violated due process where it relied solely on a police report and a newspaper article without giving the plaintiff the opportunity to confront and cross-examine the declarants.<sup>124</sup> In *Costa*, the plaintiff was arrested on prostitution-related charges, and the PHA moved to terminate.<sup>125</sup> At the plaintiff's informal hearing, a grievance panel considered a police report containing statements that the plaintiff had offered to have sex with an undercover officer for a fee and that she regretted involvement in prostitution, along with a newspaper article that editorialized the incident.<sup>126</sup> The plaintiff denied the statements attributed to her in the police report and offered letters of support from her neighbors and doctors.<sup>127</sup> The panel terminated the plaintiff's subsidy, stating that its decision was based on "the preponderance of evidence of criminal activity," including the police report and the newspaper article.<sup>128</sup>

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<sup>121</sup> *Id.* at 916.

<sup>122</sup> *Id.* at 919–20.

<sup>123</sup> See *Costa v. Fall River Hous. Auth.*, 881 N.E.2d 800, 809 (Mass. App. Ct. 2008), *aff'd in part, rev'd in part*, 903 N.E.2d 1098 (Mass. 2009).

<sup>124</sup> *Id.* On review, the Supreme Judicial Court of Massachusetts disagreed with the appeals court and held that a PHA may terminate Section 8 benefits based solely on hearsay if it is reliable. See *infra* notes 145–155 and accompanying text.

<sup>125</sup> 881 N.E.2d at 803. The PHA sent the plaintiff a termination notice alleging that she had violated her obligation under the HUD regulations not to engage in criminal activity that "threatens the health, safety or right to peaceful enjoyment of other residents . . . ." *Id.*

<sup>126</sup> See *id.* at 804. The court noted that the newspaper article quoted a "[p]olice spokesman" discussing evidence the police were going to "try" to find against the plaintiff, and that the article's headline and subheading read, respectively, "Police close house of prostitution taking orders online" and "Cops say operation combined latest technology, oldest profession." *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

The appeals court held that the PHA's termination of the plaintiff's Section 8 voucher violated due process because it relied on hearsay evidence without giving the plaintiff the right to cross-examine the witnesses against her.<sup>129</sup> The court observed that HUD regulations guaranteed her the right "to question any witnesses" and that *Goldberg* gave her the right to confront and cross-examine adverse witnesses.<sup>130</sup> It stated that, in relying on the hearsay contained in the police report and newspaper article, the PHA denied the plaintiff those rights, because "in effect the police officer and the newspaper reporter testified in absentia and beyond the reach of cross-examination."<sup>131</sup> The court held that the right under HUD regulations to "question any witnesses" becomes meaningless if a PHA can rely on hearsay to terminate a voucher where there is no right to subpoena witnesses.<sup>132</sup> The appeals court was particularly concerned with the PHA's reliance on the newspaper article, which it found blatantly untrustworthy because of its provocative headline and conjecture about future evidence not yet collected.<sup>133</sup>

*C. Cases Finding That an Exclusive Reliance on Uncorroborated Hearsay  
Does Not Violate Procedural Due Process*

In contrast, other courts have interpreted the language in the HUD regulations along with the Supreme Court's holdings in *Goldberg* and *Perales* to mean that decisions can be based solely on hearsay and that families only have the right to cross-examine those witnesses physically present at the hearing.<sup>134</sup> In reaching their decisions, these courts most often rely on the reasoning in *Perales* that hearsay evidence can form a sufficient basis for an adverse administrative decision, and on the language of the HUD regulations stating that the rules of evidence do not apply in voucher termination hearings.<sup>135</sup>

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<sup>129</sup> *Id.* at 809.

<sup>130</sup> *Id.*

<sup>131</sup> *Costa*, 881 N.E.2d at 809.

<sup>132</sup> *Id.* at 809–10 (citing *Edgecomb*, 824 F. Supp. at 315–16).

<sup>133</sup> *Id.* at 810. The court concluded that "[r]eliance upon a press account for essential information will inevitably undermine judicial confidence in the integrity of an administrative decision." *Id.*

<sup>134</sup> See *Gammons*, 502 F. Supp. at 165–66.

<sup>135</sup> See *id.*

## 1. Federal Court Interpretations

In 2007, in *Gammons v. Massachusetts Department of Housing and Community Development*, the U.S. District Court for the District of Massachusetts held that it did not violate due process to base a Section 8 termination decision on a landlord's statements about an unauthorized visitor even though the plaintiff had been unable to cross-examine the landlord.<sup>136</sup> The court found that this was "not problematic" because according to the U.S. Supreme Court's holding in *Perales*, "it is well established that hearsay evidence is admissible in administrative proceedings, where relevant."<sup>137</sup>

Similarly, in 2007 in *Tomlinson v. Machin*, the U.S. District Court for the Middle District of Florida granted summary judgment for the defendant PHA where the plaintiff had not been able to cross-examine witnesses who were not in attendance at the hearing.<sup>138</sup> The district court stated that to find otherwise would require a "much more rigid evidentiary standard" than that imposed by HUD:

In a PHA informal hearing, the Hearing Officer is not meant to apply the rules of evidence applicable to judicial proceedings; thus, it is clear by the plain meaning of § 982.555(a)(5) that hearsay statements and copies of documents may be considered by the Hearing Officer in an informal PHA hearing without regard to the rules of evidence.<sup>139</sup>

## 2. State Court Interpretations

State courts have also concluded that due process and the HUD regulations do not require the right to cross-examine witnesses who are not physically present at the hearing.<sup>140</sup> For example, in 2006, in *Dowling v. Bangor Housing Authority*, the Supreme Judicial Court of Maine upheld a Section 8 voucher termination based on a PHA employee's handwritten notes of a conversation with the plaintiff's landlord's son concerning an illegal side deal where the plaintiff agreed to

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 165.

<sup>138</sup> No. 8:05-cv-1880-T-30MSS, 2007 WL 141192, at \*1, \*6 (M.D. Fla. Jan. 16, 2007).

<sup>139</sup> *Id.* at \*6. It appears the court made a typographical error as "§ 982.555(a)(5)" does not exist. See 24 C.F.R. § 982.555 (2009). Instead, the court was most likely referring to § 982.555(e)(5), which provides that families may present evidence and question any witnesses. *Id.* § 982.555(e)(5).

<sup>140</sup> See *Dowling v. Bangor Hous. Auth.*, 910 A.2d 376, 381, 384 (Me. 2006).

pay more than the agreed upon rent to the landlord.<sup>141</sup> The tenant argued that the PHA improperly considered this evidence because it consisted only of hearsay and, therefore, was not sufficient to support a termination decision.<sup>142</sup> The court rejected this argument, first holding that even if the tenant did have a right to cross-examine the landlord's son, she had waived that right by not objecting at the hearing.<sup>143</sup> It then pointed to 24 C.F.R. § 982.555(e)(5), which provides that evidence can be considered without regard to the rules of evidence, and held that consideration of hearsay evidence was therefore permissible.<sup>144</sup>

In 2009, in *Costa*, the Supreme Judicial Court of Massachusetts reversed, in part, the Massachusetts Appeals Court's earlier decision, holding that the HUD regulations and due process did not prohibit a PHA from basing a termination decision either solely or partly on hearsay evidence, so long as that evidence was reliable.<sup>145</sup> The court observed that the Appeals Court opinion could be read to preclude the use of any hearsay in a Section 8 termination hearing.<sup>146</sup> It stated, however, that it could discern nothing in the HUD regulations at 24 C.F.R. § 982.555(e)(5) that "precludes or even addresses hearsay evidence" and that their "clear import" was that the right to "question" any witnesses only applied to those who actually appeared and testified at a termination hearing.<sup>147</sup> As for procedural due process requirements, the court disagreed that *Goldberg* gave recipients a right to cross-examine witnesses whom the PHA relied on in making the termination decision; instead, it stated that reliability of evidence rather than cross-examination was the "touchstone" of due process.<sup>148</sup>

To determine what due process required, the court then applied the three factors laid out by the Supreme Court in *Mathews*: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest and probable value of additional or substitute procedural safeguards; and (3) the governmental interest.<sup>149</sup> The court stated that the private interest involved, defined as the right to housing assistance, was not fundamental because it was merely based

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<sup>141</sup> See *id.* at 378–79, 381.

<sup>142</sup> See *id.* at 381.

<sup>143</sup> See *id.*

<sup>144</sup> *Id.* at 384 (citing 24 C.F.R. § 982.555(e)(5)).

<sup>145</sup> See 903 N.E.2d at 1108; *supra* notes 124–133 and accompanying text.

<sup>146</sup> See *Costa*, 903 N.E.2d at 1108.

<sup>147</sup> *Id.* at 1108–09.

<sup>148</sup> *Id.* at 1109 (citing *Commonwealth v. Given*, 808 N.E.2d 788, 794 n.9 (Mass. 2004) (quotation omitted)).

<sup>149</sup> *Id.*

on the state's decision to provide such assistance.<sup>150</sup> It then stated that the risk of erroneous deprivation from termination based on hearsay would "vary widely with the nature of the hearsay."<sup>151</sup> As for the governmental interest, the court noted that the public had an interest in timely enforcement of Section 8 program rules to prevent threats to the public fisc and public safety, and that enforcement might be delayed or prevented if a PHA could rely only on live testimony.<sup>152</sup> It also observed that the public had an interest in affordable administration of the program and that costs could rise substantially if live testimony and cross-examination were required.<sup>153</sup> It added, however, that these additional procedures could benefit the public by helping assure a just outcome.<sup>154</sup> The court then concluded that after balancing these factors, due process allowed a PHA to base Section 8 termination decisions on hearsay evidence, as long as it was reliable.<sup>155</sup>

#### D. *Basco v. Machin and the Current Unsettled State of the Law*

Recently, a U.S. court of appeals had the chance to determine for the first time whether the HUD regulations and procedural due process permit a Section 8 voucher termination based solely on uncorroborated hearsay evidence.<sup>156</sup> In 2008, in *Basco v. Machin*, the U.S. Court of Appeals for the Eleventh Circuit discussed in dicta potential procedural due process difficulties where a termination decision is based solely on hearsay, but failed to decide the issue.<sup>157</sup> The case is a good example of the continuing unsettled state of the law in this area, as other courts

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<sup>150</sup> *Id.* at 1109–10.

<sup>151</sup> *Id.* at 1110.

<sup>152</sup> *Costa*, 903 N.E.2d at 1110.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* The Supreme Judicial Court provided no further explanation of how it had balanced the three factors against each other. *Id.* It stated that in reaching its conclusion, it declined to follow the decision in *Edgecomb*, noting the hearsay there had no indicia of reliability and that the court had not applied the *Mathews* balancing test. *Id.* at 1110 n.18. Applying its conclusion to the facts in *Costa*, the court determined the police report was reliable because it contained a detailed factual account based on firsthand observation, whereas the newspaper article was not because it relied on an unidentified source. *Id.* at 1111. The court could not, however, determine if and to what extent the PHA had based its termination decision on the newspaper article, and remanded to the housing court for further proceedings regarding this and other defects with the hearing decision. *Id.* at 1112–15.

<sup>156</sup> See *Basco v. Machin*, 514 F.3d 1177, 1181–83 (11th Cir. 2008); Brief of Appellants, *Basco*, 514 F.3d 1177 (No. 07-11368).

<sup>157</sup> See *Basco*, 514 F.3d at 1181–83.



have struggled to interpret its dicta in subsequent decisions.<sup>158</sup> Its discussion of the hearsay issue has, however, also opened the door for a future decision creating a clear, unifying standard of evidence in these cases.<sup>159</sup>

## 1. Facts and District Court Decision

In *Basco*, the local PHA terminated a family's voucher due to the presence of an unauthorized resident.<sup>160</sup> The tenants appealed from the district court's grant of summary judgment to the defendant PHA, alleging deprivations of their right to procedural due process under 24 C.F.R. 982.555(e)(5) and (6) and 42 U.S.C. § 1983 because the PHA denied them the opportunity to confront and cross-examine the witnesses against them.<sup>161</sup> At the termination hearing the only evidence presented by the housing authority consisted of copies of two police reports.<sup>162</sup> The first report, from February 2005, stated that Mr. Basco had given a sworn statement indicating that his stepdaughter had run away with an "Emanuel Jones" who was staying at the Basco unit, and noted that Emanuel's address was the same as that of the Bascos' unit.<sup>163</sup> The second report was from July 2005 and listed an "Elonzel Jones" as an eyewitness to an alleged battery and noted his address as that of the Bascos' unit.<sup>164</sup>

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<sup>158</sup> See *id.*; *Ervin v. Hous. Auth. of Birmingham Dist.*, 281 F. App'x 938, 939 (11th Cir. 2008).

<sup>159</sup> See *Basco*, 514 F.3d at 1181–83; Lawyer, *supra* note 14, at 195 (noting that although the *Basco* court did not decide the hearsay issue, it still addressed it in an authoritative manner, and "strongly stated" that the reliance on hearsay testimony in the case was suspect because there was no opportunity for cross-examination).

<sup>160</sup> *Basco*, 514 F.3d at 1178–79; see 24 C.F.R. § 982.551(h)(2) (2009).

<sup>161</sup> *Basco*, 514 F.3d at 1180; see 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ."); 24 C.F.R. § 982.555(e)(5)–(6) (2009).

<sup>162</sup> *Basco*, 514 F.3d at 1180.

<sup>163</sup> *Id.* at 1179. The court pointed out that Mr. Basco's alleged sworn statement "was not contained in or attached to the report." *Id.* It later noted that although it did not need to reach the issue of whether it was "independently problematic" if the hearing officer relied on the report's description of a sworn statement, "we are troubled by the PHA's failure to explain the absence from the police report of the actual statement." *Id.* at 1183 n.8.

<sup>164</sup> *Id.* at 1179. The reports contained not only different spellings of the alleged unauthorized resident Jones's name, but also different birth dates and races. Brief of Appellants, *supra* note 156. One report listed "Emanuel Lewis Jones" as a "white male" with a birth date of "XX/XX/1990," whereas the other report listed "Elonzel L. Jones" as a "black male" with a birth date of "Sep-07-1989." *Id.*

Using reasoning similar to that in the *Gammons* and *Tomlinson* cases, the U.S. District Court for the Middle District of Florida had granted summary judgment in favor of the defendant PHA.<sup>165</sup> The district court rejected the plaintiffs' claims that procedural due process rights under the HUD regulations had been violated due to the fact that Mrs. Basco did not have the opportunity to confront and cross-examine the creators of the police reports; the court noted that she was given the opportunity to "question any witnesses in attendance at the hearing."<sup>166</sup> The court asserted that the plaintiffs were trying to add to the requirements of 24 C.F.R. § 982.555(e)(5), stating that the family "may question any witnesses" by demanding the right to cross-examine "any witnesses" whether they were present at the hearing or not.<sup>167</sup> Applying the reasoning of the *Tomlinson* decision, the district court was not persuaded by the plaintiffs' argument that they should have a right to cross-examine the parties who made the hearsay statements because that would be a "much more rigid evidentiary standard" than that required by HUD or PHA regulations, and it was "clear by the plain meaning" of section 982.555(e)(5) that hearsay could be considered without regard to the rules of evidence.<sup>168</sup>

## 2. Reversal by the Circuit Court

The U.S. Court of Appeals for the Eleventh Circuit reversed the district court's decision, although not because of the hearsay issue.<sup>169</sup> The court first held that the PHA has the burden of persuasion and must first present sufficient evidence to establish a *prima facie* case that an unauthorized person resided at the assisted unit for the length of time required to violate the rules.<sup>170</sup> It next considered whether due

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<sup>165</sup> See *Basco v. Machin*, No. 806CV260T24MSS, 2007 WL 433404, at \*7–9 (M.D. Fla. Feb. 6, 2007), *rev'd*, *Basco*, 514 F.3d at 1177.

<sup>166</sup> *Id.* at \*5.

<sup>167</sup> *Id.* at \*5, \*7.

<sup>168</sup> *Id.* at \*7 (citing *Tomlinson*, 2007 WL 141192, at \*6).

<sup>169</sup> See *Basco*, 514 F.3d at 1178, 1183.

<sup>170</sup> *Id.* at 1182. The PHA in this case, the Health and Social Services Department of Hillsborough County, Florida, had interpreted the HUD regulations concerning unauthorized visitors to place the burden of proof on the tenant. See *id.* at 1178–79. The PHA's Administrative Plan stated:

Any person not included on the HUD 50058 who has been in the unit more than 15 consecutive days without PHA approval, or a total of 30 days in a 12 month period, will be considered to be living in the unit as an unauthorized household member. . . . *The burden of proof that the individual is a visitor rests on the family.* In the absence of such proof the individual will be considered an

process allowed the PHA's burden of persuasion to be met solely by the two hearsay police reports.<sup>171</sup> The court observed in dicta that hearsay could be sufficient to support an adverse finding if certain factors assuring its underlying reliability and probative value were met.<sup>172</sup> The court stated that this reliability and probative force depended on four factors: (1) the out-of-court declarant's bias and interest in the result of the case; (2) the opposing party's ability to obtain the information contained in the hearsay before the hearing and subsequently subpoena the declarant; (3) the information's consistency on its face; and (4) the recognition by courts of the information's inherent reliability.<sup>173</sup>

The Eleventh Circuit observed that these factors were based on those articulated by the Supreme Court in *Perales*, and contrasted the facts of that case with those in *Basco*.<sup>174</sup> The court emphasized that in *Perales*, the Supreme Court took care to point out that it was applying a lesser standard than it would if it were considering the use of hearsay in benefit termination hearings where *Goldberg* concerns would apply.<sup>175</sup> In considering the two police reports, the court noted that the second factor used to evaluate hearsay evidence—the opposing party's ability to subpoena the declarant—“counsels against basing an adverse administrative determination on those hearsay statements” because the Bascos could not subpoena the police officers, Emanuel, or Elonzel for cross-examination.<sup>176</sup> The court, however, reasoned it did not need to decide whether that deficiency made the hearing officer's reliance on the police reports a violation of due process.<sup>177</sup> Instead, the court found the two reports legally insufficient to establish the PHA's prima facie case because they did not prove that Emanuel and Elonzel were the same person, and therefore did not support the determination that an unauthorized person stayed at the Basco's unit for the required length of time.<sup>178</sup>

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unauthorized member of the household and the PHA will terminate assistance since prior approval was not requested for the addition.

*Id.* at 1179 (emphasis added).

<sup>171</sup> *Id.* at 1182.

<sup>172</sup> *See id.* (citing *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 270 (5th Cir. 1979)).

<sup>173</sup> *Id.* (citing *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000)).

<sup>174</sup> *Id.* at 1182–83 (citing *Perales*, 402 U.S. at 402, 406–07).

<sup>175</sup> *Basco*, 514 F.3d at 1182–83.

<sup>176</sup> *Id.* at 1183.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

### 3. Subsequent Interpretations

Since the U.S. Court of Appeals for the Eleventh Circuit issued its decision in *Basco*, courts have cited its dicta in support of their decisions concerning Section 8 voucher terminations based on hearsay, finding both for and against voucher recipients.<sup>179</sup> Five months after *Basco*, the Eleventh Circuit considered a very similar set of facts and again vacated the district court's entry of summary judgment in favor of the defendant PHA, remanding to the district court for further consideration in light of its decision in *Basco*.<sup>180</sup> In 2008, in *Ervin v. Housing Authority of the Birmingham District*, the U.S. Court of Appeals for the Eleventh Circuit considered a plaintiff's claim that her voucher termination hearing violated her right to due process because the hearing officer relied solely on hearsay without adequate indicia of reliability and shifted the burden of proof to her.<sup>181</sup> The evidence supporting the termination consisted of a PHA employee's testimony describing a letter from the police to the plaintiff's landlord concerning illegal narcotics found in the unit, a neighbor's testimony, and the PHA lawyer's description of a conversation with the police department regarding an arrest and search at the plaintiff's residence.<sup>182</sup>

The court stated that although hearsay could constitute substantial evidence in administrative proceedings, it could not conclude on the record before it that "factors that assure the underlying reliability and probative value of the evidence" were present.<sup>183</sup> In fact, it observed that the evidence had even less reliability and probative value than the two unauthenticated police reports in *Basco*.<sup>184</sup> Therefore, the court decided to vacate and remand to the district court with instructions to consider whether those factors assuring reliability and probative value necessarily were present.<sup>185</sup>

On the other hand, in 2008 in *Thomas v. Hernando County Housing Authority*, the U.S. District Court for the Middle District of Florida granted the defendant PHA's motion for summary judgment where the termination decision was based in part on a hearsay letter from the plaintiff's landlord regarding an unauthorized resident.<sup>186</sup> The court

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<sup>179</sup> See *Ervin*, 281 F. App'x at 939.

<sup>180</sup> See *id.*

<sup>181</sup> *Id.* at 941.

<sup>182</sup> *Id.* at 939–40.

<sup>183</sup> *Id.* at 942.

<sup>184</sup> *Id.*

<sup>185</sup> *Ervin*, 281 F. App'x at 942.

<sup>186</sup> No. 8:07-cv-1902-T-33EAJ, 2008 WL 4844761, at \*3, \*10 (M.D. Fla. Nov. 6, 2008).

emphasized that this case was distinguishable from *Basco* because both hearsay and non-hearsay evidence were considered in reaching the decision, and stated that there was no indication that the plaintiff had ever tried to have the landlord testify at the hearing.<sup>187</sup>

Similarly, in 2008, in *Williams v. Housing Authority of the City of Raleigh*, the U.S. District Court for the Eastern District of North Carolina held that a voucher termination hearing did not violate the plaintiff's due process rights where the decision was based in part on three written statements by the plaintiff's landlord, who was not present at the hearing.<sup>188</sup> The court distinguished this situation from *Basco* because the PHA had relied on more than just the hearsay evidence in making its decision.<sup>189</sup> The court added that the plaintiff could have asked to continue the hearing so that she could cross-examine her landlord, whereas in *Basco* the hearing officer had not given the plaintiff the option of continuing the hearing.<sup>190</sup>

Two courts also reached differing conclusions in 2009 memorandum opinions after consideration of the *Basco* decision.<sup>191</sup> The U.S. District Court for the District of Minnesota in its 2009 opinion in *Loving v. Brainerd Housing and Redevelopment Authority* relied on *Basco*, *Edgecomb*, and *Williams* in denying a PHA's summary judgment motion where the plaintiffs claimed their voucher terminations violated their due process rights because the terminations were based solely on unauthenticated hearsay.<sup>192</sup> The court noted that *Basco* recently had discussed due process limitations on the extent to which termination decisions could rest on hearsay evidence and laid out factors that would help assure the evidence's reliability and probative value.<sup>193</sup> It then pointed to the *Edgecomb* court's determination that the opportunity to confront and cross-examine witnesses was essential where the witnesses' declarations formed the basis for the termination; the court cited *Williams* as providing support for the *Edgecomb* holding because that case had distin-

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<sup>187</sup> *Id.* at \*10.

<sup>188</sup> See 595 F. Supp. 2d 627, 629–31 (E.D.N.C. 2008).

<sup>189</sup> See *id.* at 632. Although the court was not bound by Eleventh Circuit precedent, the plaintiff's reliance on *Basco* and the court's efforts to distinguish the case suggests the persuasiveness of *Basco*'s discussion of the hearsay issue in other jurisdictions.

<sup>190</sup> See *id.* at 632–33.

<sup>191</sup> See *infra* notes 192–203 and accompanying text.

<sup>192</sup> See Civil No. 08-1349 (JRT/RLE), 2009 WL 294289, at \*6–9 (D. Minn. Feb. 5, 2009). The hearsay evidence consisted of search warrants, supporting affidavits and evidence receipts for items allegedly discovered during the searches. *Id.* at \*1–\*2, \*6–\*7.

<sup>193</sup> *Id.* at \*6.

guished *Basco* when a decision was based on more than hearsay alone.<sup>194</sup> Based on the principles established in these three cases, the court denied the PHA's motion to dismiss the plaintiffs' challenge to the use of hearsay evidence, as the record was insufficient to allow a review of the hearsay documents under *Basco* or consider the extent to which the hearing officer based the termination on the hearsay evidence.<sup>195</sup>

In contrast, in 2009, the U.S. District Court for the District of Columbia, in *Robinson v. District of Columbia Housing Authority*, granted a PHA's summary judgment motion on a similar set of facts.<sup>196</sup> The plaintiff claimed the termination of her voucher violated due process and HUD regulations where the PHA relied on hearsay evidence and did not provide her with an opportunity to cross-examine those who gave evidence against her, among other allegations.<sup>197</sup> The plaintiff argued that under the holdings in *Basco*, as well as *Edgecomb* and *Litsey*, the PHA improperly relied on a note written by a police officer who arrested an alleged unauthorized resident at her address.<sup>198</sup> The district court quickly disposed of the holdings in *Basco* and *Litsey* as unpersuasive because they had found the hearsay evidence insufficient in substance and clarity, rather than reliability.<sup>199</sup> It also noted that *Basco* had not reached the issue of whether due process was in fact violated.<sup>200</sup> The court also distinguished *Edgecomb* because there the termination was based solely on hearsay evidence, whereas the present plaintiff's termination was based on other evidence as well.<sup>201</sup> It further determined that the plaintiff's reliance on *Edgecomb* in asserting her right to cross-examine those who had given evidence against her was unpersuasive.<sup>202</sup> The court stated that *Edgecomb* "seemingly applies *Goldberg* too broadly" by stating that tenants must be allowed to confront and cross-examine any "persons" who supplied information against them, rather than just "witnesses."<sup>203</sup>

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at \*6–7.

<sup>196</sup> See Civil Action No. 08-766(RBW), 2009 WL 2993736, at \*1–3, \*14 (D.D.C. Sept. 18, 2009).

<sup>197</sup> See *id.* at \*3, \*14.

<sup>198</sup> *Id.* at \*2, \*4.

<sup>199</sup> *Id.* at \*6.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at \*5–\*6.

<sup>202</sup> See *Robinson*, 2009 WL 2993736, at \*9.

<sup>203</sup> *Id.*

### III. THE EXCLUSIVE RELIANCE ON UNCORROBORATED HEARSAY EVIDENCE IN SECTION 8 VOUCHER TERMINATION HEARINGS VIOLATES PROCEDURAL DUE PROCESS

Conflicting federal and state court interpretations have created much uncertainty as to whether a PHA's exclusive reliance on hearsay evidence in a voucher termination hearing violates a tenant's procedural due process rights under the Fourteenth Amendment.<sup>204</sup> This Part argues that the straightforward balancing test articulated in 1976 by the U.S. Supreme Court in *Mathews v. Eldridge* offers the best approach to finding a clear, comprehensive standard for the level of procedure required in Section 8 voucher termination hearings.<sup>205</sup> It would replace the confusingly divergent approaches taken by the state and federal courts thus far, which seem to be based on an imprecise application of select U.S. Supreme Court cases or reliance on particular sections of the HUD regulations.<sup>206</sup> This Part contends that the line of cases requiring hearing procedures closely resembling those set forth by the U.S. Supreme Court in its 1970 decision in *Goldberg v. Kelly* is most consistent with the type of procedure that would be required after applying the *Mathews* balancing test to Section 8 voucher terminations.<sup>207</sup> Those federal and state cases that have held there are no restrictions on the use of hearsay in voucher termination hearings based on the HUD regulations or the Supreme Court's 1971 decision in *Richardson v. Perales* are flawed because their holdings are inconsistent with the procedures that are required under *Mathews*.<sup>208</sup>

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<sup>204</sup> See *Gammons v. Mass. Dep't of Hous. & Cmty. Dev.*, 502 F. Supp. 2d 161, 165–66 (D. Mass. 2007); *Costa v. Fall River Hous. Auth.*, 881 N.E.2d 800, 809 (Mass. App. Ct. 2008), *aff'd in part, rev'd in part*, 903 N.E.2d 1098 (Mass. 2009); see also Lawyer, *supra* note 14, at 194 (arguing that an “underlying problem” for advocates and voucher holders is the absence of judicial precedent, due in part to the fact that federal district courts are free to contradict each other).

<sup>205</sup> See 424 U.S. 319, 333–35 (1976). Curiously, although the Supreme Court clearly established the *Mathews* test as the means for determining what due process requires in a given administrative context and the HUD regulations have also incorporated its analysis, only the Massachusetts Supreme Judicial Court in *Costa v. Fall River Housing Authority* applied the *Mathews* factors to the use of hearsay in voucher terminations. See 903 N.E.2d at 1109–10. *Edgecomb v. Housing Authority of the Town of Vernon*, a 1993 Connecticut federal district court case, discusses *Mathews*, but only in the context of notice requirements, not hearsay. See 824 F. Supp. 312, 315 (D. Conn. 1993).

<sup>206</sup> See *Mathews*, 424 U.S. at 333–35; *Gammons*, 502 F. Supp. 2d at 165–66; *Costa*, 881 N.E.2d at 809.

<sup>207</sup> See *Mathews*, 424 U.S. at 333–35; *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); see, e.g., *Costa*, 881 N.E.2d at 809.

<sup>208</sup> See *Richardson v. Perales*, 402 U.S. 389, 390 (1971); see, e.g., *Gammons*, 502 F. Supp. 2d at 165–66.

First, this Part applies each of the three factors of the *Mathews* test to the context of Section 8 voucher terminations, and under that test argues that terminations based exclusively on uncorroborated hearsay evidence violate due process and that families must have the right to cross-examine witnesses in this type of situation.<sup>209</sup> Second, this Part urges that HUD should amend its regulations governing the use of evidence in voucher termination hearings to provide specific guidance on the use of hearsay evidence and clarify the nature of a family's right to confront and cross-examine adversarial witnesses.<sup>210</sup>

A. *Under Mathews v. Eldridge, Terminations Based Exclusively on Uncorroborated Hearsay Evidence Violate Procedural Due Process*

Although the HUD regulations make clear that PHAs need not strictly follow the rules of evidence in voucher termination hearings, many courts have recognized that, despite these relaxed standards, the exclusive reliance on hearsay evidence can still violate a family's constitutional rights.<sup>211</sup> These courts have most often reached their decisions by analogizing the situation of a Section 8 voucher recipient to that of the welfare recipients in *Goldberg*, and thus find that extensive procedural due process is required, including the right to cross-examine witnesses if decisions are based on hearsay evidence alone.<sup>212</sup> These courts tend to interpret the HUD regulations as requiring that a family be able to question any witnesses relied on by the PHA, whether present at the hearing or not.<sup>213</sup> On the other hand, some courts have found that the exclusive reliance on hearsay does not violate a family's constitutional rights.<sup>214</sup> These courts often reach their decisions by emphasizing the language of the HUD regulations stating that evidence may be considered without regard to admissibility under the rules of evidence applied in judicial proceedings.<sup>215</sup> They also claim to find support in the holding of *Perales*, which provided that a decision could be based solely on hearsay evidence, and thereby find that hearsay alone can form a sufficient basis to terminate a voucher.<sup>216</sup> Because hearsay alone is suffi-

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<sup>209</sup> See *infra* notes 211–255 and accompanying text.

<sup>210</sup> See *infra* notes 256–271 and accompanying text.

<sup>211</sup> See *Edgecomb*, 824 F. Supp. at 315; see also Kuehnle, *supra* note 21, at 835–36.

<sup>212</sup> See *Edgecomb*, 824 F. Supp. at 315–17; *Costa*, 881 N.E.2d at 809.

<sup>213</sup> See *Edgecomb*, 824 F. Supp. at 315–17; *Costa*, 881 N.E.2d at 809.

<sup>214</sup> See *Gammons*, 502 F. Supp. 2d at 165–66; *Dowling v. Bangor Hous. Auth.*, 910 A.2d 376, 384 (Me. 2006).

<sup>215</sup> See *Dowling*, 910 A.2d at 384; 24 C.F.R. § 982.555(e)(5) (2009).

<sup>216</sup> See *Gammons*, 502 F. Supp. 2d at 165–66.



cient, these courts do not interpret the HUD regulations as requiring that families be able to question witnesses not present at the hearing.<sup>217</sup>

Both of these approaches ultimately are unpersuasive because they fail to apply the Supreme Court's *Mathews* balancing test.<sup>218</sup> The Supreme Court has provided this test to enable courts to determine exactly what procedural due process the Fourteenth Amendment requires for a particular kind of deprivation of public benefits.<sup>219</sup> In *Mathews*, the Court held that "identification of the specific dictates of due process" required consideration of three factors: (1) the private interest that is affected; (2) the risk of an erroneous deprivation under current procedures and the probable value of any additional or substitute procedures; and (3) the government's interest, including the function it is performing and potential fiscal and administrative burdens involved in additional or substitute procedures.<sup>220</sup> This test should also be applied in the voucher termination context.

### 1. The Private Interest Affected by the Official Action

Applying the first factor of the *Mathews* balancing test, the private interest of families in maintaining their vouchers is very high, much higher than that of the disability benefit recipient in *Mathews* who was found not to have a right to an evidentiary hearing like the one outlined in *Goldberg*.<sup>221</sup> The Court in *Mathews* emphasized the contrast between the welfare recipients in *Goldberg* who lived "on the very margin of subsistence" and that of disability recipients whose eligibility for benefits had nothing to do with financial need.<sup>222</sup> The Court in *Goldberg* noted that highly influential in its decision was the fact that welfare recipients facing termination of their benefits could lose "the very means by which to live" and that welfare provided the means to obtain essentials such as "housing."<sup>223</sup> Thus, it appears clear that the *Goldberg* Court would categorize a housing voucher, which often is the only assistance separating a family from homelessness, as one of the means by which a recipient sur-

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<sup>217</sup> See *Dowling*, 910 A.2d at 384.

<sup>218</sup> See *Mathews*, 424 U.S. at 335; Kuehnle, *supra* note 21, at 865–68 (noting that *Mathews* marked a turning point after the *Goldberg* and *Perales* decisions, and established that balancing is required to determine what due process is to be afforded at an administrative hearing).

<sup>219</sup> See *Mathews*, 424 U.S. at 335.

<sup>220</sup> *Id.*

<sup>221</sup> See *id.*; *Goldberg*, 397 U.S. at 264.

<sup>222</sup> See *Mathews*, 424 U.S. at 340.

<sup>223</sup> See 397 U.S. at 264.

vives, just as it did welfare—especially in light of the fact that the Court specifically mentioned housing in its decision.<sup>224</sup> In contrast, the Supreme Court in *Mathews* and *Perales* emphasized that the level of due process required in *Goldberg* was not owed to a claimant for Social Security disability benefits because the potential loss was significantly less grave—a claimant has not even started to receive the benefits yet, and unlike welfare benefits, disability benefits are not based on financial need.<sup>225</sup>

For families to be eligible for a Section 8 voucher, they must qualify as low-income; seventy-five percent of new vouchers given out each year are to families who subsist at incomes at or below thirty percent of the median income in their area.<sup>226</sup> The private interest in maintaining a voucher is much higher for voucher recipients than for disability-benefit recipients because a voucher is not an entitlement and a family may have a very difficult time ever getting another one.<sup>227</sup> Under HUD regulations, a PHA has the discretion to deny a family's application if a member was ever previously terminated from the voucher program.<sup>228</sup> Furthermore, even if the family's application is not denied, they may be placed on a waiting list for several years due to funding shortages.<sup>229</sup> By contrast, because Social Security is an entitlement program, if a recipi-

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<sup>224</sup> See *id.* A recent study found that poor families who did not receive housing voucher assistance were four times more likely to have lived in a shelter or on the streets than comparable families who had vouchers during a five-year period. See SARD, *supra* note 12, at 10. Housing vouchers have been found to be “critically important” for preventing family homelessness and for helping families in the shelter system find permanent housing. *Id.*

<sup>225</sup> See *Mathews*, 424 U.S. at 340; *Perales*, 402 U.S. at 406–07.

<sup>226</sup> CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 1, at 2–3.

<sup>227</sup> *Id.* at 1; see Dunn et al., *supra* note 13, at 148 (citing *Mathews* and arguing that the “incomparable difficulty” of obtaining a housing voucher requires even greater procedural safeguards than were outlined in *Goldberg*). Although the Massachusetts Supreme Judicial Court in *Costa* applied the first *Mathews* factor to voucher terminations, it summarily dismissed the private interest, which it defined as a right to public housing, as only of personal importance and not fundamental, as its source was merely the state's undertaking to provide housing. See *Costa*, 903 N.E.2d at 1109–10. In evaluating the private interest, however, the Court in *Mathews* looked not at fundamentality but at the degree of potential deprivation of the benefit, as measured by the value to the private recipient of the public benefit based on the recipient's financial need. See 424 U.S. at 340–41. The court in *Costa* did not examine the degree of potential deprivation and did not compare it to that of welfare recipients as the *Mathews* Court itself had done. See *id.*; *Costa*, 903 N.E.2d at 1109–10.

<sup>228</sup> See 24 C.F.R. § 982.552(c)(1) (2008) (“The PHA may at any time deny program assistance for an applicant . . . [i]f a PHA has ever terminated assistance under the program for any member of the family.”).

<sup>229</sup> Cf. CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 1, at 1.

ent of disability benefits loses them, he may reapply right away as long as he can show he is eligible.<sup>230</sup>

Applying the first factor of the *Mathews* analysis to the voucher termination context shows that there are significant similarities between Section 8 voucher recipients and the welfare recipients in *Goldberg*.<sup>231</sup> The private interest at stake in the voucher termination context is also clearly distinguishable from that of Social Security disability claimants in *Perales*, and thus the reasoning in that case supporting adverse administrative decisions based solely on hearsay evidence should not apply in the case of voucher hearings.<sup>232</sup>

## 2. The Risk of Erroneous Deprivation Through Current Procedures and the Probable Value of Additional Safeguards

Applying the second factor of the *Mathews* test, the risk of erroneous deprivation in the Section 8 voucher termination context is high, and certainly higher than it was for the recipient in *Mathews*.<sup>233</sup> The Court in *Mathews* noted that the disability benefit hearings at issue centered on evidence that is “sharply focused” and “easily documented” because such evidence is based on standard, routine, unbiased reports completed by trained experts.<sup>234</sup> In *Perales*, the Court was influenced by the fact that the hearsay evidence relied on in disability benefit hearings consists of medical reports that are created by experts in a routine and unbiased fashion after a thorough examination.<sup>235</sup> This kind of evidence stands in stark contrast to that often relied upon in voucher termination hearings, which could be a call from a neighbor or landlord who may have a host of personal biases against the tenant, or a hastily created police report which does not involve the level of care or expertise applied by a physician in creating a medical report.<sup>236</sup>

The kinds of evidence commonly relied on in voucher termination hearings—phone calls and letters from landlords or neighbors, and police reports and newspaper articles containing hearsay statements—hardly classify as standard, routine, or unbiased.<sup>237</sup> This evidence is of-

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<sup>230</sup> See *id.* (noting that housing is not an entitlement benefit and not everyone who qualifies receives assistance).

<sup>231</sup> See *Mathews*, 424 U.S. at 335; *Goldberg*, 397 U.S. at 264.

<sup>232</sup> See 402 U.S. at 406–07.

<sup>233</sup> See 424 U.S. at 343–44.

<sup>234</sup> *Id.*

<sup>235</sup> See 402 U.S. at 406–07.

<sup>236</sup> See *id.*; *Basco*, 514 F.3d at 1179–80 (relying on two unauthenticated police reports).

<sup>237</sup> See *Perales*, 402 U.S. at 404.

ten inconsistent, as with the police reports at issue in the U.S. Court of Appeals for the Eleventh Circuit's decision in *Basco v. Machin* in 2008, where names and other major identifying details conflicted.<sup>238</sup> Thus, the risk of erroneously terminating a family from the voucher program would be greatly decreased by requiring additional procedural safeguards, specifically by allowing families to confront and cross-examine the declarants of statements used against them and relied on by the hearing officer.<sup>239</sup>

Significantly, the Court emphasized throughout its decision in *Perales* that the claimant had the opportunity to subpoena the physicians who submitted evidence, but chose not to exercise that right prior to his hearing.<sup>240</sup> At a voucher termination hearing, however, there is no right for a family to subpoena the witnesses against it.<sup>241</sup> This difference alone should make it almost impossible to apply the reasoning of *Perales* in voucher termination hearings, although courts have continued to rely on *Perales*.<sup>242</sup> Future courts should view these sharp distinctions between the voucher context and that of a Social Security disability claimant as precluding the rule in *Perales*, which permits the exclusive reliance on hearsay, from applying in voucher termination hearing cases, and further find that this difference requires heightened procedures in voucher termination hearings.<sup>243</sup>

On the other hand, where a decision rests in part on hearsay evidence and in part on other corroborating non-hearsay evidence, the value of additional procedures—here the ability to cross-examine the hearsay declarant—decreases.<sup>244</sup> The risk of an erroneous deprivation is lower because the hearsay is not forming the sole basis for the decision; rather, it is considered in combination with more reliable evidence.<sup>245</sup> Thus, the *Mathews* test would appear to permit procedures for voucher termination hearings where hearsay is admissible without

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<sup>238</sup> See *Basco*, 514 F.3d at 1179.

<sup>239</sup> See *Mathews*, 424 U.S. at 343–44; *Perales*, 402 U.S. at 404.

<sup>240</sup> See 402 U.S. at 402, 407, 410.

<sup>241</sup> See *Edgecomb*, 824 F. Supp. at 316; 24 C.F.R. § 982.555(e)(5) (2008).

<sup>242</sup> See *Gammons*, 502 F. Supp. 2d at 165–66.

<sup>243</sup> See *Mathews*, 424 U.S. at 343–44; *Perales*, 402 U.S. at 402. The Massachusetts Supreme Judicial Court in *Costa* asserted that the risk of erroneous deprivation would “vary widely with the nature of the hearsay,” and concluded that under *Mathews* due process requirements could be met by a voucher termination decision based on hearsay as long as the hearsay had substantial indicia of reliability. See 903 N.E.2d at 1110. Although citing *Perales*, the court did not address the subpoena issue. See *id.*

<sup>244</sup> See *Mathews*, 424 U.S. at 343–44.

<sup>245</sup> *Id.*

cross-examination as long as it does not form the sole basis for a termination decision.<sup>246</sup>

### 3. The Government's Interest

The government's interest in the voucher termination context, the third factor of the *Mathews* test, is not as strong as the private interest combined with the risk of erroneous deprivation.<sup>247</sup> Although the government does need to conserve fiscal and administrative resources, that interest is counterbalanced by the government's competing interest in ensuring that it runs its program fairly and effectively and fulfills its mission of helping low-income families afford safe, decent, and sanitary housing.<sup>248</sup> The cost of ensuring that a neighbor, landlord, or other declarants attend a hearing is certainly less than erroneously causing a family to face homelessness as a result of unreliable evidence.<sup>249</sup> There is thus a strong interest for the government as well as for voucher recipients that vouchers not be terminated improperly.<sup>250</sup> Also, making hearings more reliable eventually will reduce the government's fiscal and administrative burdens because there likely will be fewer families in state and federal courts arguing that termination decisions violated their due process rights.<sup>251</sup>

PHAs might argue that not being able to rely on any hearsay evidence would place an impossible fiscal and administrative burden on them to support their termination decisions.<sup>252</sup> Requiring the right to confront and cross-examine, however, would not have to mean that hearsay could never be admitted—only that a decision could not be based exclusively on uncorroborated hearsay evidence without affording this right.<sup>253</sup> This strikes the proper balance between the government interest and the private interest, and is not unduly burdensome on PHAs because hearsay could be considered without requiring cross-examination as long as there was some other corroborating evidence,

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 335, 347.

<sup>248</sup> *See id.* at 347–48; 24 C.F.R. § 982.1(a)(1) (2009).

<sup>249</sup> *See Mathews*, 424 U.S. at 347–48.

<sup>250</sup> *See id.*; *see also Goldberg*, 397 U.S. at 264–66.

<sup>251</sup> *See Mathews*, 424 U.S. at 347–48; Dunn et al., *supra* note 13, at 147 (noting that PHAs may be persuaded to strengthen procedural protections in hearings because it would increase efficiency and reduce their exposure to due process litigation).

<sup>252</sup> *See Mathews*, 424 U.S. at 347–48; *Tomlinson v. Machin*, No. 8:05-CV-1880-T-30MSS, 2007 WL 141192, at \*1, \*6 (M.D. Fla. Jan. 16, 2007).

<sup>253</sup> *See Edgecomb*, 824 F. Supp. at 315–16.

not necessarily from the hearsay declarant.<sup>254</sup> Thus, despite the fact that the HUD regulations state that evidence may be considered without reference to the normal evidentiary rules, the application of the *Mathews* test to voucher termination hearings counsels that an evidentiary hearing like the one required in *Goldberg* is required by due process, including the right of families to confront and cross-examine any witnesses against them where a decision is based entirely on hearsay evidence.<sup>255</sup>

### B. Proposed Amendment of HUD Regulations

In addition to courts adopting a standard that clearly states that the exclusive reliance on uncorroborated hearsay evidence is insufficient to support a voucher termination, an amendment to the HUD regulations governing evidence in voucher termination hearings would dramatically reduce current confusion and help ensure that PHAs consistently respect families' constitutional rights.<sup>256</sup> The regulations currently state: "The PHA and the family must be given the opportunity to present evidence, and may question any witnesses."<sup>257</sup> The phrase "may question any witnesses" allows for two vastly different interpretations: First, that the family only has a right to question any witnesses who are physically present at the hearing. And second, that the family has a right to question any witnesses on whose statements the PHA relies, and thus if these witnesses are not physically present for questioning, then the PHA cannot rely on their statements to support a termination.<sup>258</sup> The regulation's vague language is problematic because it allows PHAs to circumvent a family's constitutional right to confront and cross-examine witnesses against them merely by not producing the witnesses, or hearsay declarants, at the hearing.<sup>259</sup>

PHAs and courts have determined that the HUD regulations should not be interpreted as requiring PHAs to produce witnesses on whose statements they want to rely at the hearing; rather, such regulations simply mean that if PHAs call witnesses at the hearing, the family

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<sup>254</sup> See *Mathews*, 424 U.S. at 347–48. In *Costa*, the Supreme Judicial Court of Massachusetts applied the third factor and found that requiring live testimony and cross-examination could substantially raise the cost of administering the Section 8 program; however, as already noted, the court's balancing of these costs against the voucher recipient's private interest was skewed as it dismissed the private interest as not fundamental. See 903 N.E.2d at 1109–10.

<sup>255</sup> See *Mathews*, 424 U.S. at 335; *Goldberg*, 397 U.S. at 267–68, 270–71; 24 C.F.R. § 982.555(e)(5) (2009).

<sup>256</sup> See 24 C.F.R. § 982.555(e)(5).

<sup>257</sup> *Id.*

<sup>258</sup> See *id.*; *Gammons*, 502 F. Supp. 2d at 165–66; *Costa*, 881 N.E.2d at 809.

<sup>259</sup> See *Tomlinson*, 2007 WL 141192, at \*6.

has the right to question them.<sup>260</sup> This PHA practice, however, violates families' constitutional right to due process under the Supreme Court's test in *Mathews*, as discussed above.<sup>261</sup> Furthermore, the language of the HUD regulations so clearly tracks that of the procedural requirements for hearings laid out in *Goldberg*, it seems evident that the regulations should be interpreted as granting the same type of rights as those outlined in that decision.<sup>262</sup>

In *Goldberg*, the Supreme Court did not say that welfare recipients must be given an opportunity to confront and cross-examine any witnesses the welfare department chooses to produce at the hearing, but rather "the witnesses relied on by the department."<sup>263</sup> When a PHA attempts to base a termination decision entirely on hearsay evidence, clearly those declarants are "relied on."<sup>264</sup>

This interpretation of the HUD regulations is also supported by HUD officials' own comments when they revised Section 8 voucher regulations in 1990.<sup>265</sup> The officials wrote, "[u]nder this rule, PHAs must adopt written informal pre-termination hearing procedures for participants, which *fully meet* the requirements of *Goldberg v. Kelly*."<sup>266</sup> HUD went on to state, "Participants have the right to cross examine any witness upon which a PHA relies."<sup>267</sup> Thus, HUD's regulations should be interpreted to mean that "any witnesses" applies to anyone upon whose statements a termination decision relies.<sup>268</sup>

The fact that some courts and PHAs do not interpret the regulations this way suggests that HUD should seriously consider amending them to clarify that a family must be allowed to question any witnesses whose statements are relied upon in making the termination decision, whether or not the PHAs choose to invite them to the hearing.<sup>269</sup> HUD could ac-

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<sup>260</sup> *Id.*

<sup>261</sup> See 424 U.S. at 335; *supra* notes 211–255 and accompanying text.

<sup>262</sup> See 397 U.S. at 267–68, 270–71; 24 C.F.R. § 982.555(e)(5). As appellants in *Basco* pointed out, HUD promulgated these regulations to comply with *Goldberg*, including the requirement of a right to confront and cross-examine witnesses. Brief of Appellants, *supra* note 156. Therefore, they argued, it is "reasonable to assume that HUD would not consciously have drafted the regulation to allow the PHA to evade and thwart this essential right by choosing to not present *any* witnesses at a termination hearing." *Id.*

<sup>263</sup> See 397 U.S. at 270.

<sup>264</sup> See *id.*

<sup>265</sup> See Section 8 Certificate Program, Moderate Rehabilitation Program and Housing Voucher Program, 55 Fed. Reg. 28,538, 28,541 (July 11, 1990).

<sup>266</sup> *Id.* (emphasis added).

<sup>267</sup> *Id.*

<sup>268</sup> See *id.*; 24 C.F.R. § 982.555(e)(5) (2008).

<sup>269</sup> See 24 C.F.R. § 982.555(e)(5); *Tomlinson*, 2007 WL 141192, at \*6.

comply with this by amending the regulation at section 982.555(e)(5) to read:

The PHA and the family must be given the opportunity to present evidence, and to question any witnesses. The family must be allowed to question witnesses relied on by the PHA in making its decision, and if any of these witnesses are not available for questioning at the hearing, the hearing officer may not base the decision exclusively on evidence from those witnesses.<sup>270</sup>

This would provide much-needed clarity and thus help ensure that PHAs and courts applying the HUD regulations afford families constitutionally adequate procedures at every termination hearing.<sup>271</sup>

### CONCLUSION

The Section 8 Housing Choice Voucher Program provides necessary housing assistance to over two million low-income families in the United States. Each year, many families have their vouchers terminated by the public housing agencies that administer the Section 8 program based solely on uncorroborated hearsay evidence. Courts have arrived at widely differing conclusions as to whether the HUD regulations governing the Section 8 voucher program and procedural due process rights under the Fourteenth Amendment permit a voucher termination based exclusively on hearsay, and whether families have the right to confront and cross-examine the witnesses who made the hearsay statements if they are not in attendance at the termination hearing. Applying the balancing test laid out by the U.S. Supreme Court in *Mathews v. Eldridge*, it is evident that Section 8 voucher terminations may not be based exclusively on uncorroborated hearsay evidence unless families are afforded the opportunity to confront and cross-examine the witnesses against them. Courts should adopt this standard for voucher termination hearings, and HUD should amend its regulations to make these requirements explicit. This will protect the procedural due process rights of families in the Section 8 voucher program, ensuring that they are not terminated erroneously and thus do not face homelessness or other hardship on the basis of uncorroborated evidence.

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<sup>270</sup> See 24 C.F.R. § 982.555(e)(5).

<sup>271</sup> See *id.*



