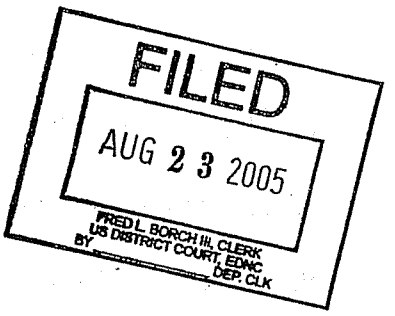
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:04-CV-240-FL(1)



MARTHA GRAHAM, AMANDA FORD, CHALONDA BUNDY, and GILDA BRISBON,	)	
Plaintiffs,	)	
v.	)	ORDER
RALEIGH HOUSING AUTHORITY, STEVE BEAM, Executive Director, and YVETTE BYRD, Director, Leased Housing Department, each in their official capacity,	)	
Defendants.	)	

This matter is before the court upon the parties' cross-motions for summary judgment, filed February 28, 2005. (DE #'s 12, 16). The parties filed a complete set of responsive briefs for each motion, and, in this posture, the matter is ripe for ruling. For the reasons that follow, defendants' motion is granted and plaintiffs' motion is denied.

STATEMENT OF THE CASE

Plaintiffs, who are recipients of Section 8 housing subsidies, commenced this action on April 7, 2004, pursuant to 42 U.S.C. § 1983, alleging that defendants' policy and practice of excluding from Section 8 households certain minor relatives, absent court order of adoption or custody, violates the United States Housing Act, 42 U.S.C. § 1437f and its implementing regulations. Plaintiffs also allege that defendants violated their federal and state due process rights by denying their requests to

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add certain minor relatives to their Section 8 households without providing plaintiffs with notice or opportunity for an informal administrative hearing.

Defendants filed a motion for summary judgment on February 28, 2005, arguing that the policy and practice challenged by plaintiffs, the terms and application of which are not in dispute, is consistent with applicable law and does not violate plaintiffs' due process rights. Plaintiffs also filed a motion for summary judgment on February 28, 2005, asserting that the material undisputed facts entitle plaintiffs to judgment as a matter of law. Each motion has been briefed thoroughly by the parties. On May 17, 2005, the court continued trial of this matter pending resolution of the cross-motions for summary judgment.

SUMMARY OF FACTS

The undisputed facts may be summarized as follows. Plaintiffs each currently receive rent subsidies through the Section 8 Tenant-Based Housing Choice Voucher Program, (herein "Section 8"), which is a federal program that enables low-income families to rent safe, sanitary and affordable housing in the existing private rental housing market, with the assistance of rent subsidies from local housing authorities. Defendant Raleigh Housing Authority, (herein "RHA"), is one such local housing authority that participates in the Section 8 program and receives funding for rental subsidies and operation of the program from the United States Department of Housing and Urban Development, (herein "HUD").

As part of the Section 8 program administered by RHA, Section 8 participants must request approval, through a change of status form, to add an individual within the household. Concerning the method of approving such a change of status, prior to April 2003, RHA had a policy and practice forbidding a Section 8 participant from adding a minor relative who is not the participant's natural

born child, unless the participant obtained a court order of adoption, guardianship, or other legal custody of the minor. In April 2003, RHA amended its policy and practice so as to exclude either a natural born child or grandchild from the court order requirement. (See Aff. of Steve Beam, ¶¶ 4-8, Ex. B).

Plaintiff Martha Graham began participating in the Section 8 program in 2002. On August 28, 2002, she submitted a change of status form to RHA indicating her desire to add her grandson as a family member in her Section 8 household. Plaintiff Graham had taken physical custody of her grandson approximately nine years earlier because his father was unavailable, and his mother was an alcoholic and unable to care for the child. Although plaintiff Graham provided RHA with copies of a petition for adoption, RHA denied plaintiff Graham's request to add her grandson, noting that she had not provided legal custody paperwork. In August 2003, plaintiff Graham again requested to add her grandson, but her request was denied for the same reason.

In December 2003, with the help of *pro bono* legal assistance, plaintiff Graham obtained a court order of legal custody, and notified RHA of the court order. Thereupon, RHA formally included plaintiff Graham's grandson within her Section 8 household. Inclusion of an additional minor child in plaintiff Graham's Section 8 household enabled plaintiff Graham to receive a $480 deduction in her adjusted income for purposes of her rent subsidy calculation.

Plaintiff Amanda Ford began participating in the Section 8 program in July 2000. In December 2000, plaintiff Ford obtained physical custody of her minor cousin because other family members were unavailable or unable to care for her. In early 2001, plaintiff Ford submitted a change of status form to RHA, requesting addition of her minor cousin to her Section 8 household. Plaintiff Ford provided the RHA with a notarized custody transfer document as well as other human

services documents evidencing the legitimate familial relationship with her minor cousin. From January 2001 through June 2002, RHA provided plaintiff Ford with a Section 8 voucher based upon a household including her minor cousin. Nevertheless, in April 2002, the RHA notified plaintiff Ford that, as of July 2002, the RHA would not recognize her minor cousin as a member of her household unless she obtained a court order giving her legal custody.

In February 2003, with the help of *pro bono* legal assistance, plaintiff Ford obtained a court order of legal custody, and notified RHA of the court order. Thereafter, RHA again included plaintiff Ford's minor cousin within her Section 8 household. Inclusion of an additional minor child in plaintiff Ford's Section 8 household enabled plaintiff Ford to receive a $480 deduction in her adjusted income for purposes of her rent subsidy calculation.

Plaintiff Chalonda Bundy was participating in the Section 8 program in July 2003. At that time, she received physical custody of her minor nephew because the child's mother was homeless and the whereabouts of the child's father were unknown. In September 2003, plaintiff Bundy submitted a change of status form to RHA, requesting addition of her minor nephew to her Section 8 household.

Although plaintiff Bundy provided RHA with a notarized statement from the child's mother designating plaintiff Bundy as custodian, RHA denied plaintiff Bundy's request to add her nephew, noting that she had not provided legal custody paperwork. To date, plaintiff Bundy has been unable to secure *pro bono* legal assistance to obtain a court order of custody, and RHA has refused to include her minor nephew in her Section 8 household calculation. As a result, plaintiff Bundy has not been able to receive a $480 deduction in her adjusted income for purposes of her rent subsidy calculation, and has not been able to obtain a subsidy based upon a three-bedroom unit.

Plaintiff Gilda Brisbon was participating in the Section 8 program in July 2003. At that time, she received physical custody of her minor nephew because the child's mother was incapacitated due to alcoholism and the whereabouts of the child's father were unknown. In September 2003, plaintiff Brisbon submitted a change of status form to RHA, requesting addition of her minor nephew to her Section 8 household.

Although plaintiff Brisbon provided RHA with a notarized statement from the child's mother designating plaintiff Brisbon as custodian, RHA denied plaintiff Brisbon's request to add her nephew, noting that she had not provided legal custody paperwork. To date, plaintiff Brisbon has been unable to secure *pro bono* legal assistance to obtain a court order of custody, and RHA has refused to include her minor nephew in her Section 8 household calculation. As a result, plaintiff Brisbon has not been able to receive a $480 deduction in her adjusted income for purposes of her rent subsidy calculation, and has not been able to obtain a subsidy based upon a three-bedroom unit.

Defendants assert several reasons for their policy and practice requiring a court custody or adoption order. Specifically, defendants assert that the policy "adds solemnity to the custody arrangement and evidences a serious intent on the part of the participant and the parent to transfer custody." (Aff. of Steve Beam, ¶9). In addition, among other reasons,

> The policy and practice is designed to prevent Section 8 participants from temporarily moving a minor family member who is not the participant's natural born child or grandchild into the household simply to obtain a larger unit or to increase the amount of rental subsidy received by the participant.
>
> * * *
>
> Because Section 8 participants rent units in the private sector and the [RHA] is not on site at these units, the [RHA] cannot effectively monitor whether a Section 8 participant is abusing the program as described above. Accordingly, the [RHA] has adopted this proactive policy in an attempt to prevent such potential abuses.

(Aff. of Steve Beam, ¶¶ 10, 13). Finally, defendants assert that the policy is not unduly burdensome, as evidenced by the fact that plaintiffs Graham and Ford obtained Section 8 assistance by complying with the policy. (Id., ¶¶ 14, 15).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate, under Rule 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In making a determination on a summary judgment motion, the court views the evidence in the light most favorable to the non-moving party, according that party the benefit of all reasonable inferences. Bailey v. Blue Cross & Blue Shield of Virginia, 67 F.3d 53, 56 (4th Cir.1995).

DISCUSSION

I. Section 1983 Claim

In their complaint and briefs in support of summary judgment, plaintiffs claim that defendants' undisputed policy and practice of excluding certain minor relatives, except where a court adoption or custody order is provided, violates the United States Housing Act, 42 U.S.C. § 1437f, and its implementing regulations. Defendants, by contrast, argue that, under an appropriate deferential standard of analysis, their policy and practice does not violate the United States Housing Act or any of its implementing regulations.

"[V]iolations of federal housing laws by state agencies implementing these laws are actionable under section 1983 by Section 8 participants." Clark v. Alexander, 85 F.3d 146, 150 (4th Cir. 1996). In reviewing a particular policy or practice of a local housing authority, "it is appropriate for [the court] to show some deference to a state agency interpreting regulations under the authority of a federally created program." Ritter v. Cecil County Office of Hous. & Community Dev., 33 F.3d 323, 327-328 (4th Cir. 1994).

The Fourth Circuit follows a two-step analysis for reviewing state agency interpretations of federal laws. "First, the court should determine whether the state agency action is inconsistent with the federal housing provisions." Clark, 85 F.3d at 152 (citing Ritter, 33 F.3d at 328). Second, "[i]f there is no inconsistency, the court should afford the state agency's action reasonable deference, meaning that the action should be upheld unless it is found to be arbitrary or capricious." Id. (citing Ritter, 33 F.3d at 328). Under the arbitrary and capricious standard, the court should defer to an agency's "reasonable interpretation" of a federal law, and the court "cannot substitute a different view, even if [the court] thought it more reasonable." Ritter, 33 F.3d at 329 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

In this case, the parties point to several statutory provisions and regulations that are relevant to the analysis of RHA's policy and practice of excluding minor cousins, nephews and grandchildren, absent court order. The court will first address whether defendants' policy is inconsistent with these laws, and, if not, then turn to whether the policy is arbitrary and capricious.

A. Consistency

The United States Housing Act provides, in relevant part, for a rental subsidy for low income individuals in the form of a "monthly assistance payment," which is determined as follows:

> For a family receiving tenant-based assistance, if the rent for the family (including the amount allowed for tenant-paid utilities) does not exceed the applicable payment standard established under paragraph (1), the monthly assistance payment for the family shall be equal to the amount by which the rent (including the amount allowed for tenant-paid utilities) exceeds the greatest of the following amounts, rounded to the nearest dollar:
>
> (i) 30 percent of the monthly adjusted income of the family. . . .

42 U.S.C. § 1437f(o)(2) (emphasis added). The statute further defines adjusted income based, in part, upon the presence of minor children in a family:

> The term "adjusted income" means, with respect to a family, the amount (as determined by the public housing agency) of the income of the members of the family residing in a dwelling unit or the persons on a lease, after any income exclusions as follows:
>
> (A) Mandatory exclusions. In determining adjusted income, a public housing agency shall exclude from the annual income of a family the following amounts:
>
> * * *
>
> (iv) $ 480 for each member of the family residing in the household (other than the head of the household or his or her spouse) who is less than 18 years of age or is attending school or vocational training on a full-time basis, or who is 18 years of age or older and is a person with disabilities.

42 U.S.C. § 1437a(b)(5) (emphasis added).

"[T]here is no specific definition of 'family' in the federal housing statutes or regulations." Clark, 85 F.3d at 153. Rather, several provisions bear upon the composition of a family, without providing an exhaustive definition. For instance, one statutory states:

> (A) The term 'families' includes families consisting of a single person in the case of (i) an elderly person, (ii) a disabled person, (iii) a displaced person, (iv) the remaining member of a tenant family, and (v) any other single persons.
> (B) The term 'families' includes with children and, in the cases of elderly families, near-elderly families, and disabled families, means families whose heads (or their spouses), or whose sole members, are elderly, near-elderly, or persons with disabilities, respectively. . . .

42 U.S.C. § 1437a(b)(3). Similarly, regulations implementing the United States Housing Act state that the term "'family' includes but is not limited to:"

> (1) A family with or without children (the temporary absence of a child from the home due to placement in foster care shall not be considered in determining family composition and family size);
> (2) An elderly family;
> (3) A near-elderly family;
> (4) A disabled family;
> (5) A displaced family;
> (6) The remaining member of a tenant family; and
> (7) A single person who is not an elderly or displaced person, or a person with disabilities, or the remaining member of a tenant family.

24 C.F.R. § 5.403. Another regulation states:

> (1) A 'family' may be a single person or a group of persons.
> (2) A 'family' includes a family with a child or children.
> (3) A group of persons consisting of two or more elderly persons or disabled persons living together, or one or more elderly or disabled persons living with one or more live-in aides is a family. The PHA [Public Housing Authority] determines if any other group of persons qualifies as a 'family'.
> (4) A single person family may be:
> (i) An elderly person.
> (ii) A displaced person.
> (iii) A disabled person.
> (iv) Any other single person.
> (5) A child who is temporarily away from the home because of placement in foster care is considered a member of the family.

24 C.F.R. § 982.201(c). Finally, a regulation discusses the role of the family and the Public Housing Authority (or "PHA") in determining the composition of a family in a unit covered by a Section 8 voucher:

> (1) The family must use the assisted unit for residence by the family. The unit must be the family's only residence.
> (2) The composition of the assisted family residing in the unit must be approved by the PHA. The family must promptly inform the PHA of the birth, adoption or court-awarded custody of a child. The family must request PHA approval to add any other family member as an occupant of the unit. No other person [i.e., nobody but

> members of the assisted family] may reside in the unit (except for a foster child or live-in aide as provided in paragraph (h)(4) of this section).
> (3) The family must promptly notify the PHA if any family member no longer resides in the unit.
> (4) If the PHA has given approval, a foster child or a live-in-aide may reside in the unit. The PHA has the discretion to adopt reasonable policies concerning residence by a foster child or a live-in-aide, and defining when PHA consent may be given or denied. . . .

24 C.F.R. § 982.551(h) (emphasis added)

In their briefs, plaintiffs contend that defendants' policy of excluding minor cousins, nephews or grandchildren, absent court order, is inconsistent with the above-cited statutory provisions and regulations. Specifically, plaintiffs contend that the statutory provisions and regulations define "family" in a manner that requires inclusion of minor nephews, cousins and grandchildren. (See Pls' Mem. in Sup. of S.J., pp. 7-10).

The court finds this argument without merit. The plain language of the statutory provisions and regulations belies such a reading. For instance, although the Housing Act requires a $ 480 deduction from adjusted income for each minor "member of the family," see 42 U.S.C. § 1437a(b)(5)(A)(iv), as the Fourth Circuit recognized, the statute provides no meaningful definition of "family." See Clark, 85 F.3d at 153. Indeed, the definitions provided are circular, and do not address any distinction between relatives who are more or less distant in blood relation from the Section 8 adult. See 42 U.S.C. § 1437a(b)(3) ("The term 'families' includes families consisting of a single person . . . The term 'families' includes with children.") (emphasis added).

The regulations provide no further specificity on the relevant question of whether minor cousins, nephews and grandchildren are included in the definition of "family." See 24 C.F.R. § 5.403 ("'family' includes but is not limited to: A family with or without children;" 24 C.F.R. § 982.201(c) "A 'family' includes a family with a child or children."). Where these definitions do not

even address the question of whether nephews, cousins, or grandchildren shall be included in the definition of family, defendants' policy, which treats such individuals differently, is not "inconsistent" with the statutory provisions or regulations. Clark, 85 F.3d at 152. If anything, where the regulations explicitly mention "child" or "children" without mentioning nephews, cousins, or grandchildren, see e.g., 24 C.F.R. § 982.201(c)(2), it is consistent with these regulations to exclude such individuals.

Next, even assuming, *arguendo*, that the statutory term "family" is broad enough to allow inclusion of nephews, cousins, and grandchildren, it does not follow that defendants' policy is inconsistent with the statute or regulations. This is because the statute and regulations give local housing authorities discretion to determine whether individuals, however related, qualify for benefits as a "family." 24 C.F.R. § 982.201(c)(3) ("The PHA [Public Housing Authority] determines if any other group of persons qualifies as a 'family'"). Indeed, the first sentence of 24 C.F.R. § 982.551(h)(2) provides that "[t]he composition of the assisted family residing in the unit must be approved by the PHA." 24 C.F.R. § 982.551(h)(2). Accordingly, while the statutory definition may be broad enough to include any "group of persons" in a family, 24 C.F.R. § 982.201(c)(1), whether a particular family member must be included in benefits calculations is left to the discretion of the administrator.

In addition, the statute and regulations bestow discretion on the administrator to determine a method for qualifying individuals as a family. As an initial matter, the statute does not indicate how a local housing authority "determines if any other group of persons qualifies as a 'family.'" 24 C.F.R. § 982.201(c)(3). The regulations, by contrast, provide some guidelines, but only to a limited degree.

For instance, 24 C.F.R. § 982.551(h)(2), provides that "[t]he family must promptly inform the PHA of the birth, adoption or court-awarded custody of a child." 24 C.F.R. § 982.551(h)(2). By contrast, "the family must request PHA approval to add any other family member as an occupant of the unit." 24 C.F.R. § 982.551(h)(2) (emphasis added). The regulation does not state, however, which standards the PHA is to use in approving "other family member[s] as an occupant of the unit." See 24 C.F.R. § 982.551(h)(2). At the very least, "[t]he family must supply any information that the PHA or HUD determines is necessary in the administration of the program." 24 C.F.R. § 982.551(b).

In light of these provisions, defendants' requirement of a court order of custody or adoption is not "inconsistent" with the statute or regulations. Clark, 85 F.3d at 152. In particular, the regulations do not expressly exclude or discourage a requirement of a court order. See 24 C.F.R. § 982.551(h)(2). Nor do the regulations provide an exclusive list of methods for approving individuals as members of a family. See id. Rather, the regulations provide broad language leaving the method of approval to the administrator. See id. Therefore, plaintiffs have failed to show that defendants' policy is inconsistent with provisions in the Housing Act and related regulations.

B. Reasonableness

The court's next inquiry concerns whether defendants' policy is "reasonable," as opposed to "arbitrary and capricious." Ritter, 33 F.3d at 328, 329. Plaintiffs argue that defendants' policy is unreasonable for several reasons, which the court will address in turn.

First, plaintiffs contend that the policy is unreasonable because it is prohibitively expensive and burdensome for Section 8 participants to obtain a court adoption or custody order. (Pl's Mem. in Sup. S.J., pp. 11-14). Specifically, plaintiffs point out that it is necessary to retain legal counsel

in order to seek an adoption or custody order from a court, and that Section 8 participants, as a general rule, do not have income to afford such services. Only plaintiffs Ford and Graham "were lucky to obtain pro bono legal assistance," which is not readily available to most Section 8 participants. (Pls' Mem. in Sup. S.J., p. 12). In addition, plaintiffs point out the long period of time that it takes to obtain such a court order, from six months to over one year. (See id.).

Accepting as true all of plaintiffs' facts regarding burden or expense, this does not establish that defendants' policy is unreasonable. However burdensome court orders of adoption and custody may be for Section 8 participants, the regulations affirm that such court orders of custody or adoption are within reasonable reach of Section 8 participants. Specifically, pertaining to the approval of family composition, the regulations already expressly mention "court-awarded custody" or "adoption" as a piece of information that can be provided by a Section 8 recipient upon addition of a child. See 24 C.F.R. § 982.551(h)(2). Therefore, it is not "arbitrary" for defendants to look to that same type of information as a requirement for approving the addition of an "other family member" as an occupant of the unit. Id. Rather, it is reasonable to make use of a method for approving family composition that is already contemplated, albeit not in the same context or manner, in the regulations.

Plaintiffs next argue that defendant's policy is unreasonable because other equally effective, and less burdensome, alternatives for verifying family status exist. (Pls' Mem. in Sup. S.J., pp. 14-18). For instance, plaintiffs argue that defendant could require, instead, "a notarized Educational Consent form," or other "third-party verifications" from an "employer, school or county social services agency," stating that a child is a blood relative in the physical custody of a Section 8 participant, and in custody of such participant. (Id., pp. 14, 17). Furthermore, plaintiffs point out

that such third-party verifications routinely provide verification to defendants of "household income and a family member's student status." (Pl's Mem. in Sup. S.J., pp. 15, 16).

Plaintiffs' argument is flawed for two primary reasons. First, it assumes that verification of a minor family member's status at the moment of the family addition should be the only goal of the RHA's policy. Verification at the time of the addition is not, however, the only goal of the RHA's policy. Rather, the RHA seeks to add "solemnity to the custody arrangement" and obtain "evidenc[e] [of] a serious intent on the part of the participant and the parent to transfer custody." (Aff. of Steve Beam, ¶9). In this way, the policy and practice "is designed to prevent Section 8 participants from temporarily moving a minor family member who is not the participant's natural born child or grandchild into the household simply to obtain a larger unit or to increase the amount of rental subsidy received by the participant." (Aff. of Steve Beam, ¶10) (emphasis added).

While other methods of verification may be able to confirm custody at a specific moment of time, a court order is more permanently binding and may not be reversed without an additional court order. (See e.g., Pls' Mem. in Sup. S.J., p. 14 (noting that reversing custody order would require much more effort than reversing other, less-binding, arrangements)). Thus, a court order is better suited to ensuring custody on a permanent basis where continued monitoring of a Section 8 household is not possible, because the RHA "is not on site at these units." (Aff. of Steve Beam, ¶13).

Second, even assuming, *arguendo*, that other verification methods are equally effective in providing permanent verification of the custody arrangement, the presence of such alternatives does not make defendants' policy unreasonable. Under the arbitrary and capricious standard, the agency's approach "need not be the best or most direct approach to the problem," but only a reasonable one.

Richmond Tenants Organization [RTO], Inc. v. Richmond Redevelopment and Housing Authority, 751 F. Supp. 1204, 1213 (E.D. Va. 1990). This rule is especially important in a case such as this where the housing agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." Chevron U.S.A., Inc., 467 U.S. at 845. In this case, even if the court finds plaintiffs' recommended alternatives "more reasonable," the court does not find RHA's policy "arbitrary and capricious," in view of the difficulty of assuring strict compliance with the Section 8 voucher program, and in the context of a local housing agency that has limited resources to award benefits and to administer and enforce the program. Ritter, 33 F.3d at 329; Clark, 85 F.3d at 152.

Next, plaintiffs argue that defendants' policy is unreasonable and arbitrary because, in other contexts or jurisdictions, housing authorities and agencies have permitted other types of information to verify family status. For instance, plaintiffs point to the fact that the RHA allows other evidence to be submitted in order to add a minor family member in a "Public Housing" household, but doesn't allow such evidence in the Section 8 program. (Pls' Mem., p. 18). Contrary to plaintiffs' argument, however, this fact only further confirms the specific justifications offered by RHA for its policy. Specifically, one principal concern of RHA in enacting its Section 8 policy was that:

> Section 8 participants rent units in the private sector and the [RHA] is not on site at these units, the [RHA] cannot effectively monitor whether a Section 8 participant is abusing the program as described above.

(Aff. of Steve Beam, ¶13). The public housing program, by contrast, operates according to different rules, and in a context in which the housing authority is on site and can more effectively police the units. (See Defs' Mem. in Resp., p. 14). Therefore, defendants' policy in the public housing context is not determinative of defendants' policy in the Section 8 context.

Next, plaintiffs point to two letters by HUD Attorney Advisors in California, dated 1986 and 1997. The first is in response to "an administrative complaint from Inland Counties Legal Services concerning" the local housing authority's policy of requiring legal guardianship in unspecified circumstances, in which the Attorney Advisor states that such policy is not reasonable. (Pls' Mem. in Sup. S.J., p. 15, Ex. 11). The second letter states that a guardianship authorization signed by a grandmother is sufficient to establish a child as a dependent of the grandmother's household. (Pls' Mem. in Sup. S.J., p. 15, Ex. 12).

The court finds that these letters are insufficient to establish that defendants' policy, under the circumstances of this case, is unreasonable. Although the first letter indicates an opinion that requiring legal guardianship is unreasonable, the letter does not specify the circumstances under which such policy was applied, such as for a grandchild, nephew, cousin or other relation. (See Pls' Mem. in Sup. S.J., p. 15, Ex. 11). The second letter, likewise, does not address whether a guardianship authorization could be required in the context of an addition of a nephew, cousin, or other relation. (See id., Ex. 12). Furthermore, even if the letters offer an opinion on the status of grandchildren, plaintiffs offer no authority for the proposition that either letter is an interpretation of law on behalf of HUD or the RHA, which would be binding on the court in reviewing defendants' policy.

Next, plaintiffs argue that the case at bar is analogous to Richmond Tenants Organization [RTO], Inc. v. Richmond Redevelopment and Housing Authority, 751 F. Supp. 1204 (E.D. Va. 1990) (herein "RTO"). In RTO, tenants in a public housing project challenged several provisions in a new standard rental lease promulgated by the local public housing authority. 751 F.Supp. at 1205. Specifically, plaintiffs claimed that certain provisions violated the statutory provision in 42

U.S.C. § 1437d which mandates that public housing leases contain no "unreasonable" terms. Id. at 1212 (citing 42 U.S.C. § 1437d(l)(1)). Reviewing each challenged term of the lease, the court found most terms reasonably related to a legitimate housing concern of reducing crime in the housing project. See id. at 1206. Nevertheless, the court found two provisions unreasonable because they were overly broad. First, analyzing a provision restricting illegal use of drugs or alcohol "on or off premises," the court held that it was unreasonable to prohibit such conduct "off premises," stating that the prohibition is "overbroad and unreasonably punishes behavior widely tolerated elsewhere in society." Id. at 1214. Next, analyzing a ban on "weapons of any type," the court held that the prohibition was overly broad and should be rewritten to prohibit "guns, firearms, nunchucks or similar instruments, blackjacks and explosive devices." Id. at 1214.

Plaintiffs claim that RTO is important to the case at hand because the court stated that "in the absence of any evidence that this wording is necessary, the Court finds that the ['weapons of any type' provision] is overly broad and therefore unreasonable." Id. at 1207 (emphasis added). In turn, plaintiff argues, defendant should be required to bring forth "competent evidence showing the existence of a real housing problem . . . or that their policy and practice is actually necessary and narrowly tailored to address any such problem." (Pls' Mem. in Opp. to Defs' Mot., p. 9) (emphasis added). Plaintiffs' argument is without merit.

As an initial matter, plaintiffs have inaccurately represented the standard of review applied in RTO. In summarizing its holding, the court stated in terms consistent with this court's approach here:

> "[L]ease terms [must] be rationally related to a legitimate housing purpose. In applying this test, the crucible of reasonableness will be defined by the particular problems and concerns confronting the local housing authority. Lease provisions which are arbitrary and capricious, or excessively overbroad or under-inclusive, will

> be invalidated. . . . However, this Court will not substitute its own judgment for that of the housing authority. So long as the lease terms are reasonably related to a housing problem, they will be permitted."

751 F.Supp. at 1205-06. In terms of the type of evidence required, the court stated:

> In applying this test, the Court will look to the actual motives of the commissioners to determine what RRHA interest is addressed by the lease term. The Court will then examine the proposed term to see if it is reasonably related to the concern the commissioners sought to address. . . .
> The lease provision need not be the best or most direct approach to the problem. There is no requirement that the PHA scientifically or rigorously study the problem or the various alternatives.

Id. at 1213 (emphasis added). Contrary to plaintiffs' argument, RTO does not require that a housing policy be "narrowly tailored" to specific evidence of a housing problem. A reading of the entire opinion shows that the court in RTO applied a much more deferential standard, upholding the vast majority of the challenged lease conditions. See id. at 1209-1214. Those two provisions struck as overbroad, moreover, were rewritten simply to make them more specific to the issue of crime in the housing project. See id. at 1214.

Moreover, this case is distinguishable from RTO in several respects. First, the court is not tasked with evaluating conditions of a public housing lease under the statutory standard set out in 42 U.S.C. § 1437d. Rather, the court is reviewing a housing policy under the general "arbitrary and capricious" standard for administrative review. See Ritter 33 F.3d at 329. Next, unlike RTO, this case does not concern specific prohibitory provisions of a lease, but rather the policy by which defendants' may properly administer and enforce their entitlement program. Here, defendants have not attempted to regulate conduct outside of the scope of housing regulations, but have instead instituted a policy directly bearing upon internal Section 8 qualification procedures. As noted before, this is an area where the regulations bestow upon a local housing authority broad discretion. See

24 C.F.R. § 982.201(c)(3); 24 C.F.R. § 982.551(h)(2); see Ritter, 33 F.3d at 329 ("Congress intended to rely heavily on state and local public housing agencies for individual decisions in administrating the [Section 8] program."). Therefore, the court finds that RTO does not mandate a different outcome in this case.

Next, plaintiffs argue that defendants' policy and practice creates an "irrebuttable presumption" against adding their minor relatives, analogous to that struck down in James v. New York City Housing Authority, 622 F. Supp. 1356 (S.D.N.Y. 1985). In James, the local housing authority had a policy of requiring applicants previously living together to live apart for at least six months before they could apply for public housing benefits on their own. The housing authority admitted no exceptions to the rule. James, 622 F. Supp. at 1357. The court held that the housing authority's policy was contrary to housing regulations because it did not afford "individual consideration of the feasibility of establishing six-months . . . of stable family composition," before awarding public housing eligibility. Id. at 1362.

Plaintiffs contend that defendants' policy should be struck down like the policy in James, because it prevents "individual consideration" of factors bearing on the custodial relationship. Specifically, plaintiffs' contend that defendants' policy prevents consideration of "the exact nature of the blood relationship between the minor and the Section 8 participant," "the individual circumstances of Plaintiffs' request to add the minor relative to the household," or any other "reliable verification of the family relationship" (Pls' Mem. in Sup. S.J., pp. 17, 21, 27, 28).

Plaintiffs' reliance upon James, however, is misplaced. As an initial matter, the case at bar is distinguishable from James. Unlike James, this case does not involve initial eligibility for public housing, but rather additions of minor relatives under the Section 8 program. Moreover, unlike

plaintiffs in James who had no opportunity to present individual circumstances, Section 8 applicants who seek to comply with defendants' policy have the opportunity to present much of this information to a court in obtaining a custody order or adoption decree. (See e.g., Pls' Mot. in Sup. S.J., Ex. 1(a), Att. 4 (petition for adoption by plaintiff Graham); Ex. 1(b), Att. 2 (consent order of custody for plaintiff Ford)). In other words, by requiring a court order of custody or adoption, defendants' policy places consideration of individual familial factors in an adjudicative, fact-finding, forum that routinely considers questions of adoption and custody. Although plaintiffs contend that RHA should make such individualized determinations on its own, defendants' policy provides a reasonable alternative.

In summary, the court finds that defendants' policy of excluding minor nephews, cousins, and grandchildren from a Section 8 household, absent court order of custody or adoption, is reasonable and not arbitrary and capricious. Accordingly, plaintiffs' section 1983 claim challenging this policy fails as a matter of law.

II. Procedural Due Process Claims

In their remaining two claims, plaintiffs contend that defendants deprived them of property without due process of law, under the United States and North Carolina Constitutions, by failing to afford plaintiffs notice and an opportunity for an informal hearing prior to denying their request to add a minor cousin, nephew or grandchild to their Section 8 household. Defendants, by contrast, argue that the Constitution does not entitle plaintiffs to notice and opportunity for an informal hearing in the circumstances presented.

To establish a claim based upon a procedural due process violation, a plaintiff must show "(1) that it had a property interest; (2) of which the [defendant] deprived it; (3) without due process

of law." Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 436 (4th Cir. 2002); see Brock v. Roadway Express, Inc., 481 U.S. 252, 260 (1987) (a plaintiff must "identify a property or liberty interest entitled to due process protections"); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-539 (1985) (same); Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972) (same). In this case, defendants argue that plaintiffs have failed to establish that they had a property interest which defendants deprived. The court agrees.

The Supreme Court "has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process." Roth, 408 U.S. at 576 (citing Goldberg v. Kelly, 397 U.S. 254 (1970)). Nevertheless, "to have a property interest in a benefit, a person must have a 'legitimate claim of entitlement to it.'" Tri-County Paving, 281 F.3d at 436 (citing Roth, 408 U.S. at 577). "A mere 'abstract need or desire for it' or 'a unilateral expectation of it' is insufficient." Id.

In this case, plaintiffs first argue that they "have a property interest in the receipt of Section 8 housing assistance to which they have been awarded." (Pls' Mem. in Opp. to Defs' Mot., p. 14). This claimed property interest, however, is of no help to plaintiffs under the circumstances of this case. Here, it is undisputed that plaintiffs already are receiving Section 8 housing benefits. (See Compl., ¶¶ 9-12). Therefore, unlike the situation recognized in Roth, defendants have not deprived plaintiffs "an interest in continued receipt of those benefits." Roth, 408 U.S. 564, 577; see Goldberg, 397 U.S. at 261-263 (finding due process requirements "applicable to the termination of welfare benefits) (emphasis added); see also Baldwin v. Hous. Auth. of the City of Camden, 278 F. Supp. 2d 365, 379 (D.N.J. 2003) (recognizing extension of due process rights for "initial determination of

ineligibility to participate in the Section 8 program" but not for determinations made, such as allowances for particular units, after participant is found eligible).

Plaintiffs appear to argue, however, that they have a property right in the receipt of additional assistance upon their request, to add a minor nephew, cousin, or grandchild to their household, even without submission of a court adoption or custody order. (See Compl., ¶31; 108). Plaintiffs point out that the current HUD regulations guarantee an informal hearing in the case of any determination of family income or family size, as it bears upon computation of the housing assistance payment and unit size. (Pls' Mem. in Sup. S.J., p. 29 (citing 24 C.F.R. § 982.555)). In turn, plaintiffs argue, these regulations are consistent with due process requirements in the context of government entitlements. (See id.).

Assuming, *arguendo*, that the HUD regulations are consistent with due process requirements, plaintiffs have failed to show that defendants' policy and practice amounts to a determination within the scope of 24 C.F.R. § 982.555. That regulation provides, in relevant part:

> (a) When hearing is required. – (1) A PHA must give a participant family an opportunity for an informal hearing to consider whether the following PHA decisions relating to the individual circumstances of a participant family are in accordance with the law, HUD regulations and PHA policies:
>
> (i) A determination of the family's annual or adjusted income, and the use of such income to compute the housing assistance payment.
> (ii) A determination of the appropriate utility allowance (if any) for tenant-paid utilities from the PHA utility allowance schedule.
> (iii) A determination of the family unit size under the PHA subsidy standards.
> (iv) A determination that a certificate program family is residing in a unit with a larger number of bedrooms than appropriate for the family unit size under the PHA subsidy standards, or the PHA determination to deny the family's request for an exception from the standards.
> (v) A determination to terminate assistance for a participant family because of the family's action or failure to act (see § 982.552).

(vi) A determination to terminate assistance because the participant family has been absent from the assisted unit for longer than the maximum period permitted under PHA policy and HUD rules.

* * *

(b) When hearing is not required. The PHA is not required to provide a participant family an opportunity for an informal hearing for any of the following:

(1) Discretionary administrative determinations by the PHA.

(2) General policy issues or class grievances.

(3) Establishment of the PHA schedule of utility allowances for families in the program.

(4) A PHA determination not to approve an extension or suspension of a voucher term.

(5) A PHA determination not to approve a unit or tenancy. . . .

24 C.F.R. § 982.555.

In this case, plaintiffs contend that defendants' policy and practice "amounts to a determination of the family's annual or adjusted income" or a "determination of family unit size." (Compl., ¶108; Pls' Mem. in Sup. S.J. p. 29). To reach this conclusion, plaintiffs reason that a denial of a request to add a child is effectively equivalent to a denial of a $480 deduction from adjusted income, or to a denial of a change in unit size. (See id.).

This argument lacks merit. Here, "[p]laintiffs do not contest that they and all other Section 8 participants must first request approval from Defendants before adding a minor relative not their son or daughter, to their household." (Pls' Mem. in Sup. S.J., p. 23). It is the procedure for approving or disapproving a minor relative addition that plaintiffs challenge here, and such a determination of who properly is in a family is antecedent to any determination of "annual or adjusted income," or "unit size." See 42 U.S.C. § 1437a(b)(5) (providing $ 480 deduction in adjusted income for each member of the family) (emphasis added); 24 C.F.R. § 982.551(h) (stating that "[t]he family must request PHA approval to add any other family member as an occupant of the

unit."); 24 C.F.R. § 982.4(a)(2) (stating that "family unit size" means "the appropriate number of bedrooms for a family") (emphasis added).

In addition, the requests that plaintiffs made to defendants, and the disputes that arose out of these requests, did not involve the simple calculation of income or unit size, but rather involved a disagreement over the materials required by defendants for adding minor relatives. (See e.g., Compl., ¶¶ 44-45 (plaintiff Graham); 61-63 (plaintiff Ford); 77-84 (plaintiff Bundy); 95-97 (plaintiff Brisbon)). Thus the adverse determinations by defendants amount to "general policy issues or class grievances," or "discretionary administrative determinations," which are expressly excluded from the requirement for a hearing under the regulations. 24 C.F.R. § 982.555(b). Indeed, a hearing under the circumstances would be futile, given that any evidence submitted by plaintiffs tending to show custodial arrangements, apart from a court order of custody or adoption, would not meet defendants' stated policy. (See Aff. of Steve Beam, ¶8).

In sum, plaintiffs have failed to establish that defendants deprived them of a property interest by denying plaintiffs' requests to add a minor family member, absent court order of custody or adoption. Accordingly, plaintiffs' procedural due process claims fail as a matter of law.

CONCLUSION

Based upon the foregoing, defendants' motion for summary judgment (DE #12) is GRANTED, and plaintiffs' motion for summary judgment (DE #16) is DENIED. Plaintiffs' claims fail as a matter of law and are DISMISSED. The clerk is directed to close the case file.

SO ORDERED, this 23rd day of August, 2005.

LOUISE W. FLANAGAN
Chief United States District Judge