SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Submitted by
Philip G. Gallagher

In the Matter of the Application of

TAWANA ROBINSON,

Petitioner-Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

--against--

JOHN G. MARTINEZ, as Chairperson and Member of the New York City Housing Authority, and the Members of the New York City Housing Authority, and the NEW YORK CITY HOUSING AUTHORITY,

Respondents-Appellants.

Index No. 401128/98
New York County

BRIEF OF AMICUS CURIAE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER-RESPONDENT TAWANA ROBINSON

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I. PRELIMINARY STATEMENT

The Brennan Center for Justice at New York University School of Law submits this brief in support of petitioner-respondent Tawana Robinson in order to highlight both the New York City Housing Authority's ("NYCHA's") practice of evading its own regulations by pressuring unrepresented tenants to enter into burdensome stipulations moments before administrative hearings and the substantial due process concerns presented by this practice.

Due process requires NYCHA to afford tenants an administrative hearing prior to terminating a tenancy but, as demonstrated by the record in this matter, NYCHA instead induces its tenants to waive this important right with no opportunity to consult counsel and while under substantial pressure. Although NYCHA has months to present proposed stipulations to tenants prior to the time of administrative hearings, NYCHA regularly lets the time pass and makes its offers of stipulation at the last second when tenants have no opportunity to consult counsel. Through this practice, NYCHA pressures tenants into accepting stipulations that impose conditions more burdensome than the tenants could otherwise receive.

The Brennan Center submits this brief to illuminate both the merits of Ms. Robinson's position in this appeal and the broader problems that NYCHA's practice creates for the many tenants who must proceed unrepresented before administrative bodies and whose appeals routinely come before this Court. Specifically, the Brennan Center urges the Court to refuse to enforce stipulations that NYCHA presents to tenants when there is no opportunity for the tenants to consult a lawyer and when those stipulations contain terms more burdensome than NYCHA's hearing officers could impose.

II. STATEMENT OF FACTS

As a result of earlier litigation brought by tenants contending that NYCHA's termination of tenancy procedures were constitutionally inadequate, NYCHA currently has in place detailed rules designed to protect tenants' due process rights during the termination of tenancy process.

See Termination Procedures (App. at 69) (stating that NYCHA enacted its current procedures in reaction to Escalera v. NYCHA, 425 F.2d 853 (2d Cir. 1970), and Tyson v. NYCHA, 369 F. Supp. 513 (S.D.N.Y. 1974)).

However, in case after case, NYCHA pressures unrepresented tenants into signing burdensome stipulations by suggesting they could be evicted were they to proceed with their requests for administrative hearings. And the stipulations that NYCHA obtains by misleading the tenants impose terms more harsh than those that NYCHA could ever hope to obtain from a hearing officer. For example, by the time of the administrative hearing on Ms. Robinson's initial notice of eviction, she had removed her son from her apartment. See Gans, J., Order at 20 (App. at 25); Kelly Aff. (App. at 171). Accordingly, NYCHA's termination procedures barred NYCHA from evicting her. Had she gone forward with her administrative hearing, the hearing officer could never have authorized her eviction and, at most, could have imposed one of two sanctions, either: 1) one-year's probation, which might include a prohibition against visits from her son; or 2) a permanent prohibition against her son residing in her apartment. See Termination Procedures ¶ 13 (App. at 71). By acceding to NYCHA's last-minute stipulation, however, Ms. Robinson agreed to terms significantly harsher than these possibilities.

A. Eviction is not an option when a third party has left the home.

Although its termination procedures permit NYCHA to terminate the tenancy of a tenant, like Ms. Robinson, for misconduct committed by a third party such as her son, "it is the Housing Authority's responsibility to prove that the [third party] occupied the premises at the time of the offense." See Termination Procedures ¶ 6(d) (App. at 70). And, even if NYCHA makes this showing, the rules entitle a tenant to avoid termination of her tenancy if she: 1) asserts that the third party "has left the tenant's apartment permanently;" and 2) presents evidence supporting this assertion. See id. Accordingly, "[a]bsent substantial evidence that the [third party] continued to reside with the [tenant at the time of the administrative hearing], her tenancy cannot be terminated under [NYCHA's] own procedures." Abney v. Popolizio, 182 A.D.2d 815, 817,

582 N.Y.S.2d 507 (2d Dep't 1992). See also Hagan v. Franco, 272 A.D.2d 143, 707 N.Y.S.2d 434 (1st Dep't 2000). Thus, NYCHA's termination procedures state that, if the third party has been removed from the household by the time of an administrative hearing, then eviction is not an option.

B. The three possible dispositions for NYCHA administrative hearings when an offending third party has left the home.

The only possible dispositions of NYCHA administrative hearings arising out of conduct of a third party who is no longer a member of a tenant's household are: 1) "eligible"; 2) "probation"; or "eligible subject to permanent exclusion of one or more persons in the household". See Termination Procedures ¶ 13 (App. at 71); see also Means v. Franco, 248 A.D.2d 262, 263, 670 N.Y.S.2d 435 (1st Dep't 1998). Each of these three dispositions permits the tenant to remain in the apartment, though they have particular consequences that differ in the following ways:

The first possible disposition, "eligible," means the tenant may remain in the apartment without any penalties or restrictions.

The second possible disposition, "probation," enhances the penalty for a future infraction. A violation of probation consists of

> an act of omission on the part of a tenant or a member of his/her household . . ., which constitutes a ground for termination of tenancy. . . . Such act or omission may be one which, had it been the first infraction by the tenant, may have resulted in an award of probation, but may now be sufficient to warrant immediate termination of tenancy.

Termination Procedures ¶ 16 (App. at 71). A hearing officer may also impose additional conditions as part of probation. For example, the hearing officer may require "continued absence" of a third party. If this condition is imposed upon a tenant, the rules require the tenant to make an effort to exclude that third party from the project's premises. Regardless of its

specific provisions, a term of probation cannot last longer than one year. See Termination Procedures ¶ 15 (App. at 71).

The third possible disposition, "permanent exclusion," means that the tenant can remain in her home as long as the third party is barred from residing in the home. See Termination Procedures ¶ 10 (App. at 71). Somewhat confusingly, the sanction of "permanent exclusion' requires only that the tenant prevent the third party from residing in the home; it does not actually prohibit the third party from visiting the home. See Rodriquez v. Blackburne, 193 A.D.2d 546, 598 N.Y.S.2d 198 (1st Dep't 1993).

When NYCHA institutes a termination proceeding against a tenant because of the actions of a third party who no longer resides in the tenant's home, the hearing officer must impose one of these three dispositions. NYCHA's rules make clear that these dispositions are alternative results, as well as being the only possible results, of an administrative hearing. The termination procedures state explicitly that: "it is mandatory that the disposition be: 'eligible'; 'probation' [for up to twelve months with various possible conditions, including the possibility of excluding the third party from the home]; or 'eligible subject to permanent exclusion [meaning the third party would be prohibited from residing in the home, but could still visit] of one or more persons in the household'." Termination Procedures ¶ 13 (App. at 71) (emphasis added).

C. Ms. Robinson's Stipulation.

By waiting until moments before Ms. Robinson's administrative hearing to pressure her into signing a stipulation, the NYCHA lawyer circumvented NYCHA's procedures and performed an end run around the hearing officer. Accordingly, NYCHA obtained a stipulation that imposed conditions on Ms. Robinson's continued tenancy that no hearing officer could have ordered. The stipulation provided for: 1) one-year's probation, Robinson stip. ¶ 5 (App. at 508); and 2) a permanent ban on visits by Ms. Robinson's son in the home or elsewhere on the project's premises, Robinson stip. ¶ 3 (App. at 507). Had she proceeded to a hearing, a hearing officer could not have imposed on Ms. Robinson the permanent ban on visits from her son which

NYCHA extracted from her. Likewise, a hearing officer could not have imposed probation in conjunction with a permanent ban against Ms. Robinson's son again living with her. By entering into an uncounseled deal with NYCHA's lawyer, Ms. Robinson unknowingly subjected herself to conditions more burdensome than she otherwise could have received.

D. <u>NYCHA's practice of securing stipulations at the last minute.</u>

What happened to Ms. Robinson -- the last minute presentation of an unfair stipulation -- appears to be routine. When NYCHA institutes a termination of tenancy proceeding against a tenant because of the actions of a third party, the NYCHA attorney typically waits until the tenant appears for the administrative hearing before asking whether the third party has been removed from the apartment. When the tenant produces evidence that the third party does not reside in her apartment so that the hearing officer could not lawfully terminate the tenancy, the NYCHA attorney then presents a form stipulation for that tenant to sign. In many instances, the attorney provides the unrepresented tenant with what is, at best, a misleading explanation of her alternatives. A NYCHA attorney has described this practice:

> [The tenant] produced documentary evidence that [the third party] did not reside with her, thus, I explained to [the tenant] that she could enter into a stipulation with the Housing Authority in lieu of an administrative hearing where she faced possible termination of her tenancy and eviction.

Henits Aff. ¶ 6 (App. at 234). The tenant who faced this particular attorney describes the interaction in similar terms. She states that after she showed the attorney her evidence that the third party did not reside in her home, "he presented the document to be signed. He told me that if I signed it I could avoid the risk of losing my home. . . . It was never explained to me that since I showed evidence that [the third party] doesn't live there then under the rules I could not be evicted." Santiago Aff. ¶¶ 11, 13 (App. at 261).

Another tenant reported a similar experience with a NYCHA attorney. She stated that, after another resident of her building had told the NYCHA attorney that the third party did not,

and had not, resided in her home, "the [NYCHA attorney] told me that I should sign the agreement so [I] would not be evicted." Williams Aff. ¶¶ 22-28 (App. at 254-55). Similarly, in Ms. Robinson's case, the record shows that the NYCHA attorney "explained" the proposed stipulation to his unrepresented adversary when he approached her immediately before her administrative hearing. Robinson stip. (App. at 510).

Because, as with Ms. Robinson, NYCHA does not present these stipulations until immediately before an administrative hearing, the tenants must decide whether or not to sign them without the opportunity to consult counsel. Many non-profit law offices throughout New York City are available to assist tenants with this type of legal question, but NYCHA's course of conduct effectively deprives tenants of the opportunity to approach these offices for advice about the proposed stipulation.

Through its reliance on stipulations, NYCHA not only makes it difficult for tenants to consult with counsel, but also undermines the administrative hearing. NYCHA terminates its initial proceeding against a tenant once she signs a stipulation, so a hearing officer has no opportunity to review the stipulation or assess evidence related to the charge underlying the proceeding or that would mitigate NYCHA's request for termination of tenancy.

III. SUMMARY OF THE ARGUMENT

NYCHA violates the constitutional and regulatory due process rights of its tenants by presenting oppressive stipulations to tenants and doing so immediately prior to administrative hearings so that the tenants have no opportunity to consult with an attorney. Facing imminent administrative hearings, the unrepresented tenants simply accept the offered stipulations, based only on the explanations of those stipulations advanced by NYCHA's lawyers. As a result, tenants forego their right to administrative hearings and bind themselves to terms more burdensome than they could otherwise receive.

Out of concern for additional vulnerable tenants who daily face NYCHA's attorneys without assistance of counsel, the Brennan Center requests that this Court refuse to enforce stipulations that contain terms more burdensome than those hearing officers could impose when those stipulations are only presented to unrepresented tenants moments before their administrative hearings.

IV. ARGUMENT

A. NYCHA'S PRACTICE OF ENCOURAGING UNREPRESENTED TENANTS TO ENTER INTO STIPULATIONS UNDER THE DURESS OF IMPENDING TERMINATION HEARINGS VIOLATES THE TENANTS' RIGHT TO DUE PROCESS.

NYCHA violates the due process rights of tenants by depriving them of the opportunity to consult with an attorney before signing stipulations that impose harsher punishments than any they could have received had they appeared before a hearing officer.

Procedural due process "is a principle basic to our society." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). The Supreme Court has long held that individuals who are entitled by statutes or regulations to receive various types of state-conferred benefits have a property interest in continued receipt of those benefits that is protected by procedural due process. See Goldberg v. Kelly, 397 U.S. 254 (1970). As many courts have recognized, procedures comporting with the Due Process Clause of the 14th Amendment must be provided when depriving a tenant of a property right in a continued public housing tenancy. See Department of Housing & Urban Development v. Rucker, 535 U.S. 125, 122 S. Ct. 1230, 1235 (2002); Escalera v. NYCHA, 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.").

The Supreme Court has emphasized that "'[d]ue process, unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances.'" Mathews, 424 U.S. at 334 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

Rather, it "'is flexible and calls for such procedural protections as the particular situation demands.'" Id. (quoting Morissey v. Brewer, 408 U.S. 471, 481 (1972)). In determining whether the particular process sought is constitutionally mandated, courts must look to three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. See also Landon v. Plasencia, 459 U.S. 21, 34 (1982); Signet Constr. Corp. v. Borg, 775 F.2d 486, 490-91 (2d Cir. 1985).

As the following analysis shows, all three of the prongs of the Mathews test weigh against NYCHA's practice of extracting stipulations from its tenants before they can consult with counsel and then subjecting tenants to termination of their tenancies based solely on these stipulations. This is hardly surprising, given that NYCHA's practice violates the very termination of tenancy procedures it enacted in order to protect tenants' due process rights.

1. The interests of tenants in access to continued housing and available lawyers is substantial.

When, as here, the private interest that will be affected involves subsistence benefits, the first Mathews factor weighs heavily in favor of granting the relief sought. See Isaacs v. Bowen, 865 F.2d 468, 476 (2d Cir. 1989) ("When . . . government benefits or entitlements are conditioned upon financial need, due process concerns are of correspondingly greater weight."). The private interest affected here is particularly great because termination of a public housing tenancy will often lead to the eviction of not only the tenant, but also the tenant's children. See Holiday v. Franco, 268 A.D.2d 138, 142, 709 N.Y.S.2d 523 (1st Dep't 2000) (recognizing that public housing is "tenancy of last resort"); Chase v. Binghamton Housing Auth., 91 A.D.2d 1147, 458 N.Y.S.2d 960, 962 (2d Dep't 1983) ("Low-rent housing is a basic human need.").

Eviction of Ms. Robinson, for instance, will also result in the eviction of her other son who still lives with her.

Of course, the inadequate procedure complained of here -- the presentation of stipulations at the last minute to unrepresented tenants when the tenants have no opportunity to consult an attorney or seek other assistance -- does not result in the immediate eviction of a tenant. However, the stipulations do result in the imposition of burdensome restrictions on a tenant's continued residence in her apartment and -- with troublesome frequency -- ultimately serve as the basis for renewed eviction proceedings and for eventual removal of the tenant.

NYCHA's stipulation practice also implicates tenants' right to access to counsel by pressuring tenants to enter into stipulations when there is no opportunity to consult with lawyers. As the legislature of New York has concluded, the "availability of civil legal services to poor persons is essential to the due administration of justice." 1983 N.Y. Laws c. 659, § 1. In particular, it is well recognized that the right to representation by an attorney when dealing with the government is a vital component of due process, see Goldberg v. Kelly, 397 U.S. 254, 270 (1970); Moore v. Ross, 502 F. Supp. 543, 551 (S.D.N.Y. 1980), and that the ability to consult with an attorney prior to entering into a contract is easily encompassed within this right, see Ressler v. Pierce, 692 F.2d 1212, 1220 (9th Cir. 1982) (requiring housing authority to provide tenants with list of legal services providers). See also In re Primus, 436 U.S. 447, 473 (1978) (noting important role of lawyers in providing information about "legal rights and remedies") (Marshall, J., concurring in judgment).

Because NYCHA's stipulation practice deprives tenants of two vital interests -- access to affordable housing and the opportunity to consult with a lawyer when facing the government -- the first Mathews criterion weighs heavily in favor a finding that NYCHA's stipulation practice violates tenants' right to due process.

2. The risk of an erroneous outcome because of NYCHA's last-minute presentation of a burdensome stipulation is high.

The second criterion under Mathews -- the risk of erroneous decisions and the value of additional safeguards -- also weighs heavily in favor of prohibiting NYCHA's reliance on stipulations presented at the last minute. The risk of an erroneous result is high when a represented party urges a pro se party to agree to terms on a take-it-or-leave-it basis, without providing any opportunity to the recipient to consult with counsel.

For purposes of the Mathews analysis, NYCHA's practice of entering into stipulations with tenants constitutes a government decision because, by using this tool, NYCHA effectively decides the outcome of the proceeding. In fact, by their very terms, the stipulations state that they should be accorded the same force and effect as if entered by a hearing officer. Robinson stip. ¶ 19 (App. at 508). By offering stipulations on occasions at which a tenant could not be evicted, as here, NYCHA circumvents the administrative hearing mandated by its rules through which it normally imposes conditions on a tenancy. Additionally, by failing to give tenants an opportunity to consult with counsel or an opportunity to negotiate the terms of the stipulation, NYCHA effectively imposes its desired result upon tenants and determines the outcome of the proceeding. This use of stipulations increases the risk of an erroneous result -- the tenant accedes to terms that are against the tenant's interests and that are substantially more burdensome than the possible outcome of any administrative hearing.

New York courts have repeatedly recognized that that the assistance of counsel is a fundamental safeguard of the stipulation process. When determining the enforceability of a stipulation such as that underlying this proceeding, the courts inquire into whether the party entering into the agreement had the assistance of counsel. When a party has entered into such a stipulation without the benefit of counsel, courts have on many occasions refused to enforce the stipulations. See 144 Woodruff Corp. v. LaCrete, 154 Misc. 2d 301, 585 N.Y.S.2d 956 (Civil Court, Kings County 1992) ("A party's lack of representation at the time of entry into the

stipulation is a significant factor to be considered in determining whether good cause exists to vacate the stipulation.") See also Thelma Realty Co. v. Harvey, 737 N.Y.S.2d 500 (App. Term, 2d Dep't 2001); Dearie v. Hunter, 676 N.Y.S.2d 896 (Civil Court, N.Y. County 1998), aff'd 183 Misc. 2d 336, 705 N.Y.S.2d 519 (App. Term, 1st Dep't 2000). On the other hand, when a party has had counsel available to explain options and the terms of a proposed stipulation, courts have rarely set aside the resulting stipulations. See, e.g., Gordon v. Thomas, 213 A.D.2d 848, 623 N.Y.S.2d 409 (3d Dep't 1995); Burkart v. Burkart, 182 A.D.2d 798, 582 N.Y.S.2d 783 (2d Dep't 1993); Perone v. Nicklas, 99 A.D.2d 484, 470 N.Y.S.2d 656 (2d Dep't 1984).[1]

Preventing NYCHA from benefiting when unrepresented tenants are pressured to sign stipulations at the doors to the hearing room would also lessen the likelihood of NYCHA attorneys actually engaging in improper overreaching in the first place when dealing with unrepresented tenants. In this matter, for instance, the record indicates that NYCHA's attorney "explained" the stipulation to Ms. Robinson. Robinson stip. (App. at 510). Other evidence in the record demonstrates that NYCHA attorneys regularly mislead tenants when explaining stipulations to tenants. For example, one NYCHA attorney has sworn that he advised an unrepresented tenant that she faced eviction, even after she had shown him evidence that would constitute a complete defense to her eviction proceeding. Henits Aff. ¶ 6 (App. at 234). The unrepresented tenant confirmed this account of their interaction. Santiago Aff. ¶¶ 11, 13 (App. at 261). An affidavit from another tenant whom NYCHA attempted to evict based on the conduct of a non-resident similarly shows that NYCHA extracts stipulations from unrepresented tenants by threatening eviction, even when NYCHA is actually unable to obtain eviction. Williams Aff. ¶¶ 9-14, 19, 21-26 (App. at 251-54).

[1] Likewise, NYCHA's stipulation practice omits another important safeguard of enforceable stipulations -- judicial oversight. See, e.g., Burkart v. Burkart, 182 A.D.2d 798, 582 N.Y.S.2d 783 (2d Dep't 1993) (enforcing stipulation entered in open court); Breitman Iron Works, Inc. v. T.L. Rubsmen & Co., Inc., 55 A.D.2d 632, 390 N.Y.S.2d 165 (2d Dep't 1976) (same); Joseph v. Nationwide Ins. Co., Index No. 1450TSN00, 2002 WL 31748591 (Civil Court, N.Y. County 2002) (enforcing stipulation that court had explained to unrepresented party).

When they threaten impossible legal results and explain legal documents to unrepresented tenants, NYCHA's lawyers violate their ethical obligations. "A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel." DR 7-104. See also N.Y. County Lawyers' Ass'n, Eth. Op. 708 (1995). By explaining legal documents and recommending a course of action to unrepresented tenants, NYCHA's lawyers ignore their ethical responsibilities and take advantage of unrepresented parties. See generally Gemayel v. Seaman, 72 N.Y.2d 701, 706 (1988) (rendering an opinion on a legal matter to an individual constitutes legal advice); Sussman v. Grado, 192 Misc. 2d 628, 632, 746 N.Y.S.2d 548, 552 (Dist. Court, Nassau County 2002) (same).

Research confirms that the opportunity to consult with counsel is vital to accurate judicial outcomes. A recent study compared the results achieved by represented and unrepresented tenants in New York City's housing court and found that represented tenants were significantly more likely to achieve a successful outcome. Carol Seron, et al., The Impact of Legal Counsel on Outcome for Poor Tenants in New York City's Housing Court, 35 L. & Soc'y 419 (2001). The study also found that tenants who were able to consult with a lawyer, even if they ultimately did not secure representation, were more likely to achieve a successful judicial result. Id.[2] The Marrero Commission, convened by former Chief Judge Sol Wachtler, reached similar conclusions, finding that "[t]he mere presence of counsel for the tenants shifts the balance in the Housing Court and significantly enhances poor litigants' chances of . . . avoiding homelessness." 144 Woodruff Corp. v. Lacrete, 154 Misc. 2d 301, 585 N.Y.S.2d 956 (Civil Court, Kings County 1992) (quoting and discussing report of Marrero Commission). See also Maurice Emsellem & Monica Halas, Representation of Claimants at Unemployment Compensation Proceedings: Identifying Models and Proposed Solutions, 29 U. Mich. J.L. Reform 289, 309-11 (1995)

[2] The study also concluded that the availability of lawyers increased judicial efficiency by significantly reducing the frequency of post-judgment motions, including motions to vacate burdensome stipulations. Id.

(finding that administrative hearings suffer a "substantial risk of error where [plaintiffs] are not represented").

Providing tenants an opportunity to consult with counsel before pressuring them to sign oppressive stipulations permits tenants to make informed decisions, lessens the risk of attorney overreaching, and promotes fair outcomes. For all these reasons, the second Mathews criterion weighs heavily in favor of directing NYCHA to cease its current stipulation practice.

3. NYCHA's interest in offering last-minute, coercive settlements is extremely low.

The government's interest -- the third criterion of the Mathews test -- also weighs in favor of prohibiting NYCHA from surprising unrepresented tenants with an oppressive stipulation minutes before an administrative hearing. NYCHA of course has an important and vital interest in protecting tenants from the harmful activities of other tenants. However, NYCHA has in place termination of tenancy procedures that serve this role while protecting the due process rights of its tenants. NYCHA's reliance on stipulations like the one Ms. Robinson signed serves only to speed along NYCHA's termination process at the expense of the tenants' constitutionally protected rights as well as the proper functioning of NYCHA's own procedures. The mere interest in efficiency does not outweigh "the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards." Goldberg, 397 U.S. at 266. See also Continental Training Servs., Inc. v. Cavazon, 893 F.2d 877, 893 (7th Cir. 1990); cf. New York v. Richardson, 473 F.2d 923, 932 (2d Cir. 1973) (stating that "governmental efficiency" is not a justification for unconstitutional acts). More than mere efficiency, accuracy of administrative proceedings is itself a substantial governmental interest. See Lassister v. Department of Social Servs., 452 U.S. 18, 27-28 (1981).

Moreover, if this Court were to decline to enforce stipulations containing burdensome terms that are only presented to tenants when there is no opportunity to consult a lawyer, such a result would not prevent NYCHA from acting in a flexible manner with tenants. NYCHA would

remain free to offer stipulations that accommodate the interests of both parties; it would merely have to afford tenants a reasonable opportunity to review proposed stipulations with attorneys prior to signing and prohibit its own attorneys from making false representations or providing legal advice to tenants. These changes can be easily accomplished. For instance, NYCHA's regulations already require project managers to meet with tenants before commencing termination of tenancy proceedings. See Termination Procedures ¶ 2 (App. at 69). This meeting offers at least one appropriate time for NYCHA to discuss settlement with a tenant if NYCHA's manager learns that a third party no longer resides in a tenant's apartment. Offering stipulations to tenants at this time would allow the tenants sufficient opportunity to seek out and consult with counsel about the proposed stipulation. Unfortunately, NYCHA failed to hold this mandatory meeting before commencing the termination process against Ms. Robinson. Gans, J., Order at 11-14 (App. at 16-19).

Additionally, NYCHA has more than sufficient opportunity to send a proposed stipulation to a tenant after it discovers actions prompting a termination of tenancy proceeding. For example, over six months passed from the date of the arrest of Ms. Robinson's son before NYCHA set a date for an administrative hearing. Hearing Notice at 1-2 (App. at 168-69). Likewise, over five months passed between the time the NYCHA inspector discovered Ms. Robinson's son in her apartment and when NYCHA set a date for a second administrative hearing. Hearing Notice at 1-2 (App. at 176-77). NYCHA's process for initiating termination procedures provides it more than ample opportunity to propose a stipulation to an unrepresented tenant before pressuring its tenants immediately before an administrative hearing.

Additionally, because NYCHA's own regulations require the liberal granting of adjournments, Termination Procedures ¶ 5 (App. at 70), NYCHA could adjourn a termination proceeding if it chooses to wait until the day of a hearing to present unrepresented tenants with stipulations. This practice would allow NYCHA to fulfill its responsibility to use adjournments "to assure that there be no doubt that the tenant is afforded every due process right." Id.

NYCHA's interest in continuing its current practice is also low because NYCHA has no legitimate interest in obtaining punishments through stipulations that it could not achieve at an administrative hearing. As discussed above, NYCHA cannot impose two penalties upon a tenant in a termination proceeding because of the action of a non-resident third party. For example, had Ms. Robinson proceeded with her initial termination of tenancy proceeding, the most severe penalty which the hearing officer could have imposed was: 1) "permanent exclusion" of her son from living in -- but not visiting -- her apartment; or 2) one year of probation, during which Ms. Robinson could be required to use her best efforts to prevent her son from visiting her apartment of project. Instead, because she agreed to NYCHA's form stipulation, she received: 1) one year's probation; 2) a permanent ban on her son residing in her apartment; and 3) a permanent ban on her son visiting her apartment. As a government actor bound to uphold both the Due Process Clause of the Constitution and the termination procedures to which it agreed in response to litigation, NYCHA has no legitimate interest in obtaining these unjust results. The third Mathews factor therefore weighs in favor of prohibiting NYCHA's coercive use of overreaching stipulations.

B. The Court should affirm the order vacating NYCHA's termination of Ms. Robinson's tenancy and clarify the respects in which NYCHA's current practice is unconstitutional.

For the reasons discussed above, in addition to those set forth by Justice Gans, this Court should affirm the order vacating NYCHA's decision to terminate Ms. Robinson's tenancy. In addition, the Court should address the broader questions presented by NYCHA's continuing misconduct when it deals with Ms. Robinson and other unrepresented tenants.

Because of NYCHA's impermissibly harsh treatment of its tenants, the courts have repeatedly vacated NYCHA's decisions to terminate tenancies. See, e.g., Hagan v. Franco, 272 A.D.2d 143, 707 N.Y.S.2d 434 (1st Dep't 2000); Sanders v. Franco, 269 A.D.2d 118, 702 N.Y.S.2d 58 (1st Dep't 2000); Vega v. Franco, 277 A.D.2d 131, 717 N.Y.S.2d 61 (1st Dep't 2000); Cardona v. Franco, 267 A.D.2d 53, 699 N.Y.S.2d 383 (1st Dep't 1999); Williams v.

Franco, 262 A.D.2d 45, 691 N.Y.S.2d 462 (1st Dep't 1999); Johnson v. NYCHA, 266 A.D.2d 102, 698 N.Y.S.2d 474 (1st Dep't 1999); Stroman v. Franco, 253 A.D.2d 398, 676 N.Y.S.2d 591 (1st Dep't 1998); 144 Woodruff Corp. v. Lacrete, 154 Misc. 2d 301, 585 N.Y.S.2d 956 (Civil Court, Kings County 1992). Even though overreaching conduct of NYCHA and its attorneys similar to that at issue in this matter was also present in many of these cited cases, the courts have failed to address the broader problems created by NYCHA's practices. Instead, because these decisions were decided on the narrowest possible grounds, NYCHA has remained free to take advantage of so many additional tenants who, in extremely similar circumstances and for extremely similar reasons, are unable to secure counsel.

Although courts may normally presume that government agencies "will not persist in taking actions which violate the rights of . . . tenants," Tyson, 369 F. Supp. at 516, NYCHA has repeatedly disproved this assumption. The law is clear that NYCHA may not act in a manner calculated to deprive its tenants of the opportunity to consult with an attorney or to appear before a hearing officer, yet NYCHA continues this conduct. Legal services attorneys have helped some tenants fight these unjust evictions with routine success in the cases in which they have become involved. However, NYCHA's persistent attempts to evict tenants through stipulations give rise to an increased risk that tenants -- unable to retain counsel -- will lose their homes because of NYCHA's actions. See Escalera, 425 F.2d at 866 (discussing importance of fair procedures before NYCHA). And the need for those tenants who do obtain counsel to bring lengthy appeals of their evictions imposes an unnecessary and entirely avoidable burden on the scarce resources of both the state court system and legal services programs.

Accordingly, the Court should address the larger implications of NYCHA's actions by making clear that the constitutional promise of due process requires at a minimum the following: 1) stipulations presented by NYCHA to tenants should be accompanied by adequate notice and opportunity to consult a lawyer; 2) NYCHA attorneys should not tell tenants they will be evicted

when no such threat exists; and 3) NYCHA attorneys should not provide legal advice to unrepresented tenants, including explaining legal documents and procedures.

V. CONCLUSION

For all the preceding reasons, the Brennan Center respectfully urges this Court to affirm the lower court's decision to vacate NYCHA's decision to terminate Ms. Robinson's tenancy on the grounds that a NYCHA stipulation is presumptively unenforceable when: 1) NYCHA presents a stipulation to an unrepresented tenant so soon before an administrative hearing that she does not have time to consult with a lawyer before deciding whether to sign; and 2) the stipulation contains terms more burdensome than those a hearing officer could impose on the tenant.

Respectfully submitted,

GIBBONS, DEL DEO, DOLAN,
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By:_____

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