



Sent via e-mail

Jeanine Worden
Associate General Counsel for Fair Housing
U.S. Department of Housing and Urban Development
451 7th Street S.W.
Washington, D.C. 20410

Re: Discrimination Against People with Disabilities in the Treatment of Disbursements from Special Needs Trusts in the HUD Housing Programs

Dear Ms. Worden,

As rents soar across the country and the market becomes increasingly competitive, it is critical to keep HUD housing programs accessible to people with disabilities. The National Housing Law Project and the Consortium for Constituents with Disabilities write today to urge HUD to adopt our regulatory recommendations related to the treatment of disbursements from Special Needs Trusts (SNTs) and to illustrate how HUD's current interpretation of its income rules is creating harmful outcomes for assisted families. HUD must amend 24 CFR Sec. 5.609(c) to clarify that disbursements of principal from SNTs are excluded from income if the source of the funds were otherwise excluded. This amendment will make HUD housing more affordable to people with disabilities and end the current practice of requiring families to choose between healthcare and housing.

Below, we explain our legal position. We also provide examples of lived experience that demonstrate the unfair and discriminatory treatment of people with disabilities as HUD continues to characterize disbursements of principal from otherwise-excluded funds as income.

Special Needs Trusts

Special Needs Trusts ("SNTs") are mainly "self-settled" trusts, which means they are funded by assets that belong to the trustee. Income from SNTs are excluded under Medicaid and SSI rules and are therefore a common tool used by trust attorneys to help people who experience disabilities gain access to life-saving benefits. The type of assets used to form an SNT commonly include lump sum inheritances or personal injury settlements. SNTs are only available to people with disabilities who cannot work.

Neither HUD, nor Congress, has tried to harmonize the income rules related to SNTs among housing and benefits programs. As a result, people with disabilities who form SNTs to qualify for Medicaid often risk losing their HUD-assisted housing. As explained in more detail below, several courts including the 1st Circuit Court of Appeals have recognized the bizarre and damaging consequence of HUD's interpretation of the income rules. HUD should reexamine how it defines income from SNTs and adopt the courts' interpretation.

HUD should follow the 1st Circuit Court of Appeals decision in *Decambre*

HUD should adopt the opinion in *Decambre v. Brookline HA*, which concerned how disbursements from a SNT should be handled by a housing authority for purposes of section 8 eligibility and rent-setting. In

that case, a voucher tenant received a lump sum personal injury settlement (not counted as income) and placed the settlement into a SNT. The housing authority subsequently counted regular disbursements of principal from the SNT as income. The Appeals Court highlighted the irrationality of the housing authority's position that disbursements of principal should ever be counted as income:

Gifts from others, if regular and predictable, are income, but one's own savings, investments or tort recoveries are not, and having them distributed back to the original owner – even if in small pieces, even if done regularly – is still no more than the return of the owner's own principal, which HUD nowhere counts as income. To treat the return of one's own principal as income does not exalt form over substance. Rather, it disregards both to establish a new rule that flies in the face of the usual meaning of the words of the regulation. Treating the return of one's own principal as income is contrary to and inconsistent with the applicable principles of the Section 8 vouchers housing program. And doing so subjects poor, disabled individuals to a Hobson's choice between assistance with shelter or with medical care and income for food, surely not one intended by Congress in establishing these programs.¹

A California court came to the same conclusion in *Finley v. Santa Monica Housing Authority*, an earlier case with similar facts. There, a disabled voucher tenant received a personal injury settlement that was placed in a SNT. The housing authority subsequently increased the tenant's portion of the rent based on disbursements made by the trustee to third parties on the tenant's behalf. The court agreed with the tenant that the disbursements did not count as income under HUD's income regulations.

In response to the *Finley* decision, in April 2012, Althea Forrester, then HUD Associate General Counsel, wrote a letter to the Santa Monica City Attorney stating that HUD disagreed with the court and that "HUD unequivocally currently interprets 24 CFR § 5.603(b)(2) as treating ANY distribution from [a housing choice voucher (HCV)] program tenant's nonrevocable Special Needs Trust (SNT) (or any type of nonrevocable trust account) as annual income subject to the regulatory exclusions in 24 CFR § 5.609(c)." This continues to be HUD's interpretation today. We respectfully disagree.

HUD's Income Rules for Purposes of Determining Tenant Share of Rent (TTP)

HUD's rules, put simply, include as income all amounts received by a family unless otherwise excluded in 24 CFR Sec. 5.609(c). The regulations call for a long list of income exclusions, including but not limited to lump sum additions to family assets such as inheritances and settlements for personal or property losses. There is no dispute that these funds are excluded from income.

HUD points to its asset regulations in defending its position that any SNTs disbursements are included in income. Sec. 5.603(b) defines net family assets as:

(1) Net cash value after deducting reasonable costs that would be incurred in disposing of real property, savings, stocks, bonds, and other forms of capital investment, excluding interests in Indian trust land and excluding equity accounts in HUD homeownership programs. The value of necessary items of personal property such as furniture and automobiles shall be excluded.

(2) In cases where a trust fund has been established and the trust is not revocable by, or under the control of, any member of the family or household, the value of the trust fund will not be

¹ See *Norasingh v. Lightbourne*, 229 Cal.App.4th 740, 744 (2014).

considered an asset so long as the fund continues to be held in trust. **Any income distributed from the trust fund shall be counted when determining annual income under § 5.609.**

HUD takes the last sentence to mean that any disbursement from an SNT, whether principal or interest, no matter what the source, shall count as income for purposes of its housing programs. However, HUD, in following the *asset* rules alone, stops short of complying with its *income* regulations in 24 CFR 5.609. HUD skips entirely the important step of analyzing the disbursements under its income rules. A plain reading of 5.609(a) defines income as any income that is received AND which is not excluded under 5.609(c). The income here is excluded under 5.609(c). A complete reading of the regulations results in the proper analysis, that the disbursements may be excluded under 5.609(c).

In addition, even if reading the asset regulations alone, the term “income” in 5.603(b) should be defined as it is in the trust context. Trust principal is not income. Rather, only the income derived from the trust, such as interest, is considered income for purposes of a SNT.²

The HOTMA Proposed and Final Rule

In its proposed HOTMA rule, HUD solicited comments on whether withdrawals from an account should be counted as income, even if the initial lump sum payment is not counted. The unequivocal answer is “no.” HUD, however, did not draft a proposed rule that reflects this position. Instead, HUD chose to propose a rule that exempts *some* distributions from a non-revocable trust, distributions “specifically provided to cover the cost of medical expenses for a minor.”³ This exemption, while important, is too narrow because it does not clarify how to treat non-revocable trusts that are not created for medical needs of a minor. For example, there are many cases where SNTs are created with money recovered in civil litigation and used for future needs to avoid the loss of medical assistance eligibility. In the final HOTMA rule, HUD must direct PHAs to exclude withdrawals of principal from an account that originally fell into any of HUD’s exclusions from income.

Families with a member who experiences a disability are continuously harmed by HUD’s misguided interpretation of the income rules

The result of HUD’s rule is that families with a member who experiences a disability are treated differently than families without a member who experiences a disability, to the harm of the former. As the Court stated in *Finley*, the PHA’s position

“...creates a strange dichotomy. If Finley were to take her personal injury settlement and place the money under her mattress, she could use it for any purpose and it would be excluded from annual income for purposes of calculating her TTP See Sec. 5.609(c). When these same settlement funds are place[d] in a SNT to which Finley does not have access, while they are not initially a new family asset, and their value is not included in the calculation of annual income, any distribution of the funds to Finley is converted to annual income. See Sec. 5.603(b)(2).”

² HOTMA amended the definition of income to include the “...recurring gifts and receipts, actual income from assets, and profit or loss from a business.” Housing Through Modernization Action of 2016, Pub. L. No. 114-201, tit I, Sec. 102, 130 STAT. 782, 788 (2016) (codified at 42 U.S.C. §§ 1437a(b)(4)-(5)).

³ See e.g. CA Dep’t of Social Services, Manual of Policies and Procedures § 30-700.1.

Additionally, HUD has an obligation to consider how its policies impact housing access for individuals with a disability.⁴ The way that HUD interprets its income and asset regulations creates a barrier to affordability for families with a member who experiences a disability. As described below, by treating all disbursements of principal from SNTs as income, families across the country are unable to access decent, safe, sanitary, affordable housing.

HUD's interpretation of its regulations works in opposition of HUD's goal of supporting underserved communities and ensuring access to affordable housing.⁵ For example, an advocate with the Public Law Center in California recently represented an elderly and disabled Section 202 resident. The client is 80-years old and has serious health issues. Due to his health concerns, the client's mother long-ago established a SNT to allow the client to use his inheritance to pay for necessities. The housing authority alleged that disbursements from the trust, which the client had been receiving for years, were income. The housing authority came after the client for subsidy overpayment. The client unsuccessfully challenged the overpayment and then appealed to HUD, who also denied a request for relief, leaving the senior and disabled client at risk of eviction and homelessness. To settle the case, the client entered into a repayment plan for over \$10,000 out of fear of losing his deeply affordable housing. It will likely take the client 11 years to repay the entire amount.

In another instance, Pine Tree Legal Assistance worked with a disabled voucher holder, near Portland, Oregon, who nearly lost their voucher due to the inclusion of the disbursements from an SNT in their income calculation. This client is a long-term voucher participant and is on a fixed-income, with monthly SSI payments being the only source of income. The client received an inheritance that was placed in a SNT. Because the SNT disbursements are excluded for purposes of SSI, the client thought the income was likewise excluded from HUD housing programs. After many years of holding the voucher without incident, the PHA suddenly increased the client's monthly rent by \$100 due to an alleged PHA overpayment, putting the client at risk of housing instability. With the help of legal services, the client contested the new rent. The PHA's general counsel requested additional guidance from HUD. Unfortunately, HUD's analysis focused on whether the disbursements were sporadic or regular, rather than analyzing the disbursements under its income rules. The client was not successful and is at great risk of losing his housing due to the rent increase.

There are many more stories like these from across the country. We urge HUD to revise the regulations to clarify that any disbursements of principal from SNTs are excluded from income if the trust funds are otherwise excluded under 24 CFR 5.609(c). Otherwise, families who are forced to place their income in SNTs due to disability are unfairly disadvantaged by the HUD rules. Thank you for your consideration. Please contact Deborah Thrope (dthrope@nhlp.org) or Bridgett Simmons (bsimmons@nhlp.org) with questions.

Sincerely,

Deborah Thrope & Bridgett Simmons
National Housing Law Project

⁴ See Fair Housing Amendments Act, 42 U.S.C. § 3601, *et seq.* (2022); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2022); Rehabilitation Act of 1973 § 5, 29 U.S.C. § 794 (2022).

⁵ Department of Hous. and Urban Dev., Fiscal Year 2022-2026 Strategic Plan 20-23 (Mar. 28, 2022) (listing advancing equity and combating discrimination in HUD-funded programs as one of the strategies the agency will use to advance housing justice).

Allie Cannington
The Kelsey
allie@thekelsey.org

Carlean Ponder
The Arc
ponder@thearc.org

Greg Robinson
Autistic Self Advocacy Network
grobison@autisticadvocacy.org

Cc: Dimitria McCain
Sasha Samberg-Champion
Doug Rice