

December XX, 2015

The Honorable Julian Castro
Secretary
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Subject: Housing Programs and Special Needs Trusts

Dear Secretary Castro:

The undersigned organizations are writing out of concern that public housing authorities (PHAs) and other rental assistance program administrators are interpreting national HUD policy to be that *all* distributions from special needs trusts are income for HUD rental assistance programs.¹ We believe that HUD rules, in light of special needs trust law and policy, require that distributions from special needs trusts not be counted as income.

Federal policies and mandates seek to ensure that persons with disabilities live in the least restrictive, most integrated setting possible. Counting distributions from special needs trusts as income conflicts with that policy. Moreover, doing so contradicts HUD's long-standing regulation requiring exclusion of amounts specifically excluded by any other Federal program that has the same exclusions as HUD.

HUD housing programs and Medicaid are means-tested; Medicaid, however, has both asset and income tests, while HUD housing programs have only an income test. By excluding assets placed in special needs trusts, Congress made Medicaid eligibility for persons with disabilities more like the HUD housing programs in that assets would not be an impediment to eligibility. As such, HUD should treat special needs trust distributions as Medicaid does, disregarding them except to the extent they are distributed *to* the beneficiary.

Clear guidance from HUD is needed to prevent further actions inconsistent with community integration and to reduce administrative uncertainty at the local determination level. Treating special needs trust distributions in this way would benefit a particularly disadvantaged group of people, while streamlining eligibility determinations for parallel programs.

Persons with Disabilities Want to Be Part of their Communities

Individuals with disabilities face impoverishment due to the high cost of long-term services and supports. Most hope to receive services and supports at home, and be active in their community. Many fear institutionalization, which is often a real threat. This is so despite the landmark Supreme Court case *Olmstead v. L.C.*, [527 U.S. 581](#) (1999) in

¹ These concerns, respecting eligibility determinations and rent calculations of certain PHAs and other HUD rental assistance providers, is in part based on a 2007 regional HUD advisory letter available at <http://bit.ly/1Nh9d2n>

which the Supreme Court held that the congressional mandate in the Americans with Disabilities Act – that individuals with disabilities not be swept into unwanted institutional settings – applied to how states managed other joint federal-state programs, in that case Medicaid.

Moving away from institutional care has allowed more Medicaid beneficiaries with disabilities to remain in their communities. Those who have special needs trusts and benefit from SSI and/or Medicaid home and community-based services (HCBS) are also often beneficiaries of housing-based assistance.

To promote integration, the Administration for Community Living (ACL) encourages states to rely on HUD housing programs. Section 811 and the Section 8 Housing Choice voucher program assist persons with disabilities in their quest to live successfully in the community with Medicaid as a main payor for State-provided supports under their waiver authorities.² In particular, the joint initiatives of ACL and HUD rely heavily on the Section 8 Housing Choice voucher programs to successfully support persons with disabilities.

Special Needs Trusts Are Consistent With the Goals of Community Integration

Congress authorized the use of special needs trusts in 1993 to ensure that individuals with disabilities with disqualifying assets could receive assistance for their long-term services and supports from means-tested programs like Medicaid, so long as certain conditions were met.³

As a practical matter, special needs trusts eliminate the Medicaid asset test for persons with a disability under age 65 and allow them to qualify based on their income levels only. However, these trusts are highly restrictive and incorrect administration of them will result in means-tested benefit ineligibility.

HUD housing programs also follow an income-only approach to qualification. As such, HUD should treat special needs trust distributions as the Medicaid program does, disregarding them except to the extent they are distributed *to* the beneficiary.⁴ This would promote both better housing and health outcomes for a particularly vulnerable population.

Adopt Social Security Administration Guidance as Part of 24 CFR § 5.609(c)(17)

HUD policy, set out in 24 CFR § 5.609(c)(17), requires exclusion of income excluded by other public benefits programs:

“Amounts specifically excluded by any other Federal statute from consideration as income for purposes of determining eligibility or benefits under a category of

² See http://acl.gov/About_ACL/FederalInitiatives/Housing.aspx.

³ [42 U.S.C. § 1396p\(d\)\(4\)\(A\) and \(C\)](#)

⁴ The HUD advisory letter referenced above, ECF No. 10-4, failed to appreciate that HUD would normally disregard (except to the extent they generated or were presumed to generate income) the resources most often distributed from modest special needs trusts. The fact that it is being distributed from an SNT should hardly make a difference.

assistance programs that includes assistance under any program to which the exclusions set forth in [24 CFR § 5.609\(c\)](#) apply.”

For instance, Section 5.609 excludes reparation payments, as does Medicaid. 42 U.S.C. § 1396a(r)(1)(A). Special needs trust income is excluded by Federal statute, 42 U.S.C. § 1396p(d)(4)(A) and (C), and should therefore be excluded from HUD's income test on that basis.

The Social Security Administration has issued clear guidance as to what does and does not constitute income when there are expenditures made out of a trust that are not considered a resource for SSI or Medicaid purposes.⁵ This guidance provides predictability and best practices for special needs trust beneficiaries who wish to live in the community with housing-based assistance. Except for rules respecting shelter, which are uniquely HUD's domain, HUD should adopt this as a sub-category of income exclusion for purposes of § 5.609(c)(17).

Conclusion

Medicaid eligibility is increasingly, as a matter of federal and state policy, used as the linchpin for community services for disabled individuals, including many who are developmentally disabled. For many, this means using a special needs trust and relying on a trustee to purchase items or services directly to pay for his or her supplemental needs, actions that would not create income for the Medicaid recipient. HUD should issue new guidance following POMS SI 01120.2011 to ensure that PHAs and other HUD rental assistance providers apply consistent rules for SNT distributions across the country.

Thank you for your consideration of this issue. Please contact David Goldfarb (dgoldfarb@naela.org) if you have any questions. We are committed to working in collaboration with HUD, the ACL, and other interested stakeholders to bring about this change.

Sincerely,

XYZ

CC:

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⁵ [Program Operations Manual System \(POMS\) SI 01120.2011.](#)