

Elder Care: Eligibility Requirements for Section 8 Housing Choice Program for Seniors and Disabled Clients

Navigating Calculation of Rent, Special Needs Trusts and Reasonable Accommodations

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Today's Program

Overview of Section 8 Program

Eligibility

Calculating Rent

Reasonable Accommodation for Persons with Disabilities

SNTs and Section 8

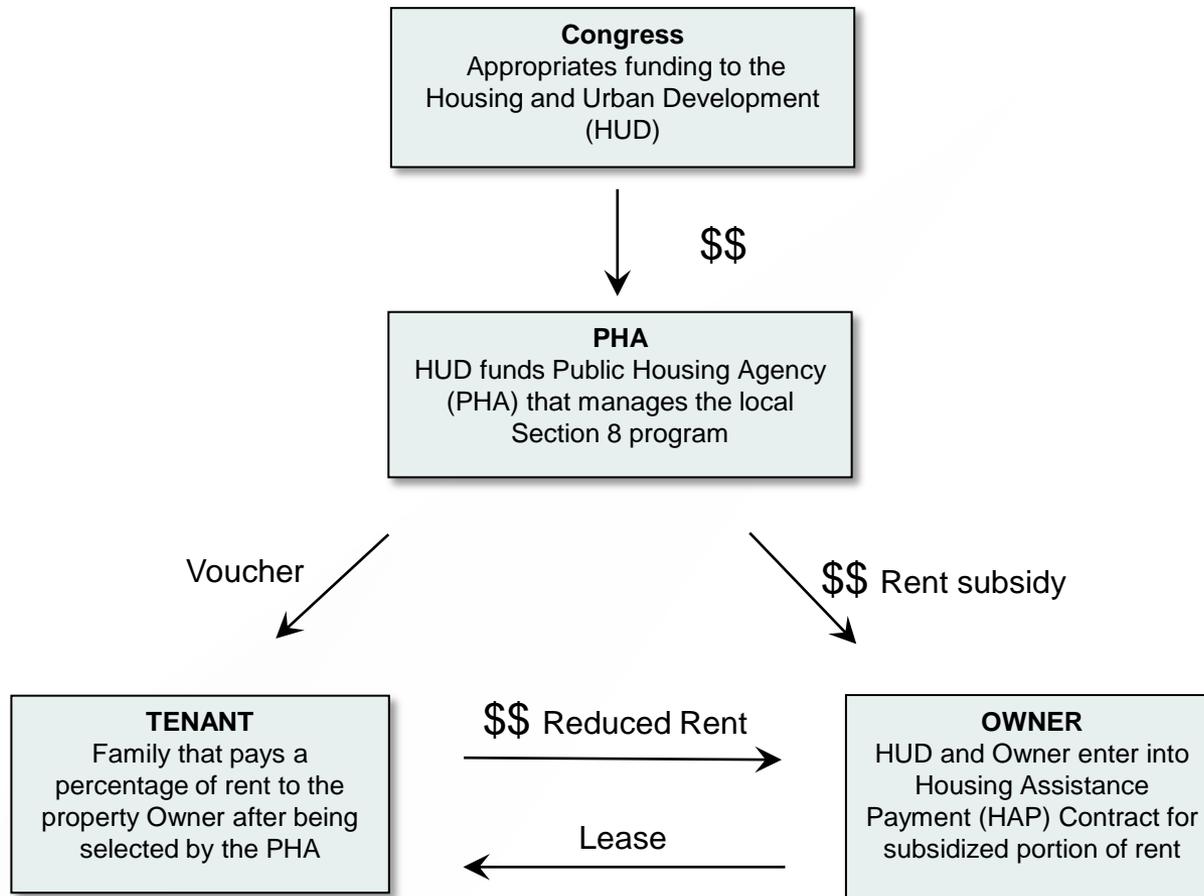
DeCambre Decision

SNT Buying a Home

Section 8 Terms to Know

- Area Median Income
- Extremely low income (30% of AMI)
- Annual Income
- Voucher
- Fair Market Rent
- Total Tenant Payment (TTP)
- Public Housing Agencies (PHA, aka MHA)

How Section 8 Works



Section 8 – Housing Benefits

- Rules issued by Housing and Urban Development (HUD)
- Administered by local Public Housing Agencies (PHA)
- Voucher Program vs. Project Based Assistance
- Not an entitlement benefit



Housing is the single greatest concern that disabled persons and their families face.

Qualifying for Section 8

- Income limits: www.huduser.org
- Asset Test
- Transfer for less than fair market value
- Applying for Vouchers
 - Waiting lists
 - First-come vs. Lottery
 - May take years to get



What is Income

Annual Income

24 C.F.R. § 5.609(a)

- All amounts that are received by the family head, spouse or co-head, or any other family member, or
- All amounts anticipated in the 12 month period in advance of when the determination is made, and
- Which are not specifically excluded in §5.609(c)
- Annual income includes income from assets to which any member had access

Calculation of Rent: What is Income

- Wages and salaries
- Profit from a business
- Interest and dividends
- SSI, SSDI, annuities, pensions, 401K distributions
- Money in lieu of salary, such as unemployment benefits, disability

Income Exclusions

24 C.F.R. § 5.609(c)

Among the lengthy list of items excluded from income are:

All lump-sum additions to family assets, (c)(3)

- Inheritances
- Insurance payments
- Capital gains
- Settlement for personal or property losses

The cost of medical expenses for any family member, (c)(4)

Temporary, nonrecurring or sporadic income (c)(9)

Tenant Rent and Subsidy

How rent subsidy is calculated:

Determine the Total Tenant Payment (TTP)

- The “rent burden” that family can sustain.
- 30% of the annual income

Next determine subsidy the PHA will pay the landlord

- Fair Market Rent (FMR) for the size of unit minus TTP
 - $FMR - TTP = \text{Rent Subsidy}$

Tenant Rent Burden

Example:

- Fair market rent for 2 bedroom apartment in City suburb = \$811.00
- Tenant income = \$600/month
- TTP (30% x annual income) is \$180
- Section 8 subsidy (TTP-FMR) is \$631.00

Treatment of Trusts

24 C.F.R. §5.603(b)(definitions)

Definition of “Net Family Assets”

- Revocable Trusts
 - Treated as an asset if any family member can withdrawal.
- Irrevocable Trusts (...and those not controlled by a family member)
 - NOT an asset. But, “any income distributed from the trust fund shall be counted when determining annual income under §5.609”

Special Needs Trust and Section 8

- Regular recurring distributions are problematic
 - Cell Phone, Cable, Internet
- Common exclusions
 - Sporadic income/gifts
 - Medical expense
 - Benefit back-pay, settlements, lump-sum inheritance



Legal Basis for Reasonable Accommodations

Reliance on three bodies of law:

- **Fair Housing Act** (42 USC Sec. 3604): prohibits discrimination based on race, color, religion, sex, handicap, familial status, or national origin.
- **Rehabilitation Act** of 1973, Sec. 504: unlawful to discriminate against disabled people, “under any program, service, or activity receiving Federal financial assistance...” (Applies to Sec. 8 and other HUD programs)
- **Americans with Disabilities Act** of 1990: prohibits discrimination against persons with disabilities in government services, programs, and activities.

What is a Reasonable Accommodation?

- A change or alteration of a **rule, policy, practice, or service** necessary in order to allow the person with a disability an equal opportunity to enjoy the benefits of the housing program.
 - Can be rejected if unduly burdensome or imposes a hardship on the party making the accommodation
 - Creates undue financial or administrative burden on provider
 - If fundamentally alters provider operations
- Housing modifications
 - Tenant's expense: under Fair Housing Act
 - Provider's expense: 504 in subsidized housing

Reasonable Accommodation Strategies

“Get in and stay in,” Blaine Brockman

- Get in: qualify
- Stay in: make appropriate requests under the rules and guidelines for accommodation and modification to stay in an affordable unit

Reasonable Accommodation Strategies

- Understand definition of a “disabled household:” may be used to reduce countable household income. *e.g.*, unreimbursed medical expenses reduce income, attendant care and live-in aids income not counted
- Move up the waiting lists
- Live in a higher rent locale
- Utility allowance to reduce the rent payment (some persons with disabilities have higher utility costs as a result of their disability)
- Renting from a family member
- Funding for modifications to accommodate their disabilities

Olmstead v. L.C.

527 U.S. 581 (1999)

ADA violation where a state did not take steps to ensure institutionalized people with disabilities could live in the least restrictive setting that could accommodate their disabilities

Finley v. City of Santa Monica

2011 WL 7116184 (Cal. Super. Ct. May 25, 2011)

- Sheila Finley: 64 year old, with a disability
 - Annual income of \$10,260 (Social Security)
- Receives Section 8 rent assistance from Santa Monica Housing Authority (SMHA)
- Personal injury and workers' comp. settlement with former employer = \$47,800
- Court established SNT – 42 U.S.C. 1396p(d)(4)(A)
 - Finley promptly notifies the SMHA
- Trust funds are earning no interest
- Annual re-certification triggers the dispute

Finley v. City of Santa Monica

At issue: SNT distributions

- Over 6 months Trustee paid 3rd parties = \$3,886
 - Texaco
 - Exxon Mobil
 - AFLAC
 - Rocket Smog
 - Fantastic Sam
 - A+ Auto Repair
 - Time Warner
 - Trustee fee

Finley v. City of Santa Monica

- Distributions were regular and periodic payments from the trust and therefore annual income
- The trust itself was not countable
- Rent recalculation
 - Increase in TTP of \$101 per month, retroactive for one year
 - (\$14 was due to increase in FMR)

Finley v. City of Santa Monica

The Court confronted a “strange dichotomy”

- The lump sum was not countable, whether given to Finley directly or to the SNT under §5.609(c)(3)
- But, expenditures suddenly become income simply because they are made from the trust under §5.603(b)(2)

“If Finley were to . . . place the money under her mattress, she could use it for any purpose When [the money is] placed in a SNT . . . any distribution . . . is converted to annual income.”

Finley v. City of Santa Monica

Opinion:

The Court's resolved the tension between §5.609(c)(3) and §5.603(b)(2) to give the “plain meaning” to both

- The lump sum making up the trust principal is excluded
- Only principal was distributed (the funds did not earn interest)
- The distributed principal originated from excludable income source
- Therefore, the distributions are excluded also

The court did not address the issue of “periodic” payments

DeCambre v. Brookline

Housing

U.S. District Court, D. Massachusetts, NO. 14-13425-WGY

Why is this case important?

- Very few court opinions on SNT's and Section 8
 - Specifically analyzes and rejects oft-cited *Finley*
 - Thorough opinion (40 pages, a lot of *dicta*)
- Deference to HUD and the housing authority
 - Significant reliance on HUD advisories and guidebooks
 - Likely to have great weight in with housing authorities
 - May embolden more entrenched agencies
- Might advance the trend towards suspicion of first party SNT

DeCambre v. Brookline Housing Authority

- Brookline: Kimberly DeCambre no longer qualified for Section 8 because \$60,000 had been distributed to her from her SNT that year
- In 2015 the District Court agreed

DeCambre v. Brookline

The First Circuit reversed, 826 F.3d 1 (June, 2016).

HUD regulations are unclear. 24 C.F.R. Sec. 5.603(b):

“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 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 . . .**”

DeCambre v. Brookline

5.609 Annual income does not include the following:

(3) Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains and settlement for personal or property losses

DeCambre v. Brookline

But a lump sum payment that is excluded from income if given to the tenant directly doesn't become income simply because it was first put into a trust.

First Circuit holding: Only distributions from a trust of income made from the investment of the trust funds constitutes income.

DeCambre's distributions were 100% principal.



NAELA Public Policy Committee

Working with HUD to make DeCambre HUD Policy nationwide

Election in January put a “permanent” hold on implementation

ABLE Act and Housing

- ABLE is like a 529 college savings account, but for disabled people. The law is set forth in IRC section 529A.
- Money can grow tax-free, and be used for many different things, not just education.
- Particularly helpful for those receiving SSI benefits

ABLE - SSI Reduction Avoided

- Ordinarily, if an SSI's recipients' housing or food is paid for by others, the SSI check is reduced by the amount of the contribution, up to 1/3 of the full amount of the monthly SSI.
- If an ABLE account pays for the food and housing, no 1/3 reduction

Purchasing a Home

Special Needs Trusts can purchase a house/condo

- Considerations:
 - Ownership (Beneficiary vs. Trust)
 - Sustainability
 - Consider property taxes, home owners insurance, upkeep and maintenance; accessibility and in-home supports for the beneficiary; the safety of the beneficiary



SNT Home Ownership

Outright purchase of principal residence is ISM

- 1/3 penalty in the month of purchase
- Same penalty even if home is held in the trust
- No effect on benefits as long as principal residence
- 20 CFR §§416.1210(a), 416.1212

If home is owned by SNT:

- SSA considers beneficiary to have “equitable ownership under a trust”
- SI 01120.200(F)(1),
- 1/3 ISM reduction month of purchase
- Beneficiary can live rent free without reduction or penalty
- SI 01120.200(F)(2)

SNT being Section 8 Landlord to Beneficiary

- Excellent way to obtain more funding for beneficiary's SNT
- SNT Trustee qualifies as Section 8 landlord
 - Beneficiary pays 30% of income for rent
 - HUD pays balance of fair market rent
- Beneficiary has more money for additional special needs
- Not easy, but doable with some work
- Can allow for roommates who pay rent and share services

Sources of Law and Regulations

- Housing and Community Development Act (“Section 8), 42 U.S.C. § 1437
- HUD 811 Program, 42 U.S.C. § 8013
- Fair Housing Amendments Act, 42 U.S.C. § 3604
- Rehabilitation Act (“Section 504”), 29 U.S.C. §794
- Americans with Disabilities Act of 1990, 42 U.S.C. 12101, et seq.
- Tax Reform Act – (Low Income Housing Tax Credits), IRC § 42

Sources-Continued

Code of Federal Regulations

24 C.F.R. § 5, Federal housing regulations (including important definitions)

24 C.F.R. § 982, Tenant Based Voucher Section 8 regulations

24 C.F.R. § 983, Project Based Voucher Section 8 regulations

24 C.F.R. § 891, HUD Section 811 Regulations

Collaborative, Inc (TAC)

On-line Resources

HUD Occupancy Requirements of Multifamily Housing Programs

Handbook 4350.3

HUD Housing Choice Voucher (Section 8) Guidebook – Handbook 7420.10g

HUD Supportive Housing for Persons with Disabilities – Handbook 4571.2

Section 8 Made Simple – by the Technical Assistance

Take Away on Section 8

- Consider ALL public assistance programs
- Don't be afraid of the HUD regulations
- Make requests for accommodations and modifications in policies
- Consider the "appearance" of distributions from SNTs
- Expect more requests for trust expenditures

Questions & Answers

Thank You



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