



U.S. Department of Housing and Urban Development

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MEMORANDUM FOR:

[REDACTED] Director, [REDACTED] Multifamily Program Center,

ATTENTION:

[REDACTED] Asset Manager, [REDACTED] Multifamily Program Center,

FROM:

*Deb McKeone*  
Deb McKeone, Chief Counsel, Legal Division [REDACTED]

SUBJECT:

[REDACTED] Special Needs Trust

[REDACTED]  
Determination of Annual Income

This memorandum responds to your request for legal guidance with respect to the effect of the "[REDACTED] Special Needs Trust" (SSSNT) on income calculations for [REDACTED] trust beneficiary. [REDACTED] is a resident at the Section 811 project known as [REDACTED]. [REDACTED] parents established the trust for the benefit of [REDACTED]. The Trust instrument names [REDACTED] parents as co-Trustees. In the event they are unable to perform Trustee duties [REDACTED] siblings are named as successor Trustees. Housing/Asset Management concerns include the following: 1) whether income paid directly to the Trust Beneficiary or for the benefit of the beneficiary is counted as "income" for the purposes of rent calculation, 2) whether the parents acting as co-Trustees invalidates the trust; 3) whether automobile insurance procured for a van purchased for the benefit of the Trust Beneficiary is income for rent calculation purposes.

**Conclusion(s)**

- 1) The Section 811 statute [Title 42 U.S.C. Section 8013] and regulations [ Title 24 C.F.R. Sections 891.105; 24 C.F.R. 891.300 through 891.325] are silent with respect to the impact of a Special Needs Trust on annual income determination for purposes of rent/subsidy calculation. The Housing Handbook 4350.3 Chapter 5 addresses analysis of distributions from such trusts. Direct distributions from a Special Needs Trust may be excluded from annual income if the payment/income is "temporary, nonrecurring or sporadic. See 24 CFR 5.609(e)(9)\*. See also 24 CFR 5.609(e)(17) that excludes from a determination of annual income any amounts specifically excluded by any other Federal statute from consideration as income for purposes of determining eligibility or benefit under a category of assistance programs further defined in the regulations, and Federal Register Notices. Distributions made to or for the benefit of [REDACTED] must be separately evaluated to determine whether the income is paid to or for the benefit of [REDACTED].

whether a payment is temporary, nonrecurring or sporadic, and whether another Federal statute is relevant to a determination of the existence of income. Based upon the facts provided by [REDACTED] Asset Manager, and my conversation with the attorney for the SSSNT, [REDACTED] there has been no distribution to or for the benefit of [REDACTED] that would affect her present annual income calculation.

- 2) Parents are acceptable parties to establish a Special Needs Trust. Nebraska case law requires only that a settler of a trust be competent to enter into a contract and to dispose of legal title to his/her property. Parents may be both the settlers and co-trustees of the SSSNT but may not be sole beneficiaries as well as settlers and co-trustees. Jones, et al. v Shrigley, 150 Neb. 137, 33 NW2d 510 (1948).
- 3) [REDACTED] the attorney for the SSSNT, informed me that legal title to the van is held by the trust and thus the SSSNT is responsible for insuring the vehicle. The value of automobile insurance procured by the SSSNT for a vehicle owned by the trust is not income for the purpose of annual rent determination for [REDACTED]

### Analysis

A "trust" is a structured legal relationship whereby a property interest held by one party, the trustee, is at the request of another (the trust settlor), for the benefit of a third party, the beneficiary.

The [REDACTED] Special Needs Trust (SSNT) is a "special needs" trust (SNT) established to provide supplemental support for a disabled beneficiary, [REDACTED] who is receiving or may be eligible to receive government benefits. The SSSNT is an irrevocable trust established by [REDACTED] parents to ensure her eligibility for certain government benefits by expressly prohibiting distributions that might cause disqualification from certain programs such as Supplemental Security Income (SSI) and Medicaid. An irrevocable trust may not be terminated except in specific situations set forth in the trust statute. For the SSI program, and to a limited extent Medicaid, The Omnibus Budget and Reconciliation Act of 1993 sets forth Special Needs Trust requirements that will cause certain assets and income to be excluded as a resource and/or income for purposes of Supplemental Security Income eligibility. The language of the SSSNT follows the SSI and Medicaid statutory requirements.

Statutory and regulatory authorities for the Section 811 Capital Advance and Project Rental Assistance subsidies do not address matters related to a Special Needs Trust and its relevance to calculation of annual income. HUD regulations address inclusions and exclusions from determinations of annual income. Two categories of exclusions from calculation of annual income may be relevant to the SSSNT analysis, per Title 24 C.F.R. 5.609(c) (now Section 5.609(e)\* pursuant to Title 24 C.F.R. 891.105. Exclusions from calculation of annual income include, but are not limited to:

- 1) Temporary, non-recurring or sporadic income (including gifts) 24 C.F.R. 5.609(e)(9);
- 2) Amounts specifically excluded by any other Federal statute from consideration as income for purposes of determining eligibility or benefits under a category of assistance

programs that includes assistance under any program to which the exclusions set forth in 24 C.F.R. 5.609(e) apply.

\* Effective Date Note: At 74 FR 4841, Jan. 27, 2009, Sec. 5.609 was amended, effective Mar. 30, 2009. At 74 FR 13339, Mar. 27, 2009, this amendment was delayed until Sept. 30, 2009. See note at the end of this memorandum for details of amendment.

The HUD Handbook 4350.3 addresses the unique character of Special Needs Trusts and states as follows:

*A Special Needs Trust is a trust that may be created under some state laws, often by family members, for disabled persons who are not able to make financial decisions for themselves. Generally, the assets within the trust are not accessible to the beneficiary.*

- (1) *If the beneficiary does not have access to the income from the trust, then it is not counted as income;*
- (2) *If income from the trust is paid to the beneficiary regularly, those payments are counted as income.*

The [REDACTED] Special Needs Trust is an irrevocable Special Needs Trust (SNT) established by [REDACTED] parents to hold property for the benefit of [REDACTED]. The trust may not be rescinded by the parents/settlers, or accessed for personal benefit of the settlors. Distributions from the SSSNT to or for the benefit of [REDACTED] are within the discretion of the co-Trustees, the parents. [REDACTED] has no authority or control over the trust property. Whether the income distributed by the co-Trustees to or for the benefit of [REDACTED] is or will be counted in an annual income calculation depends upon the nature of the expenditure or distribution and the frequency. The Project Manager must also consider whether the distribution may be excluded if another Federal statute excludes such income for program eligibility determination based upon notification provided by HUD in the *Federal Register* and program Notices.

In response to your inquiry, I reviewed the Section 811 statutory authority at Title 42 U.S.C. 8013; Federal regulations 24 C.F.R. 891.105,; 24 C.F.R. 891.300 through section 891.325; 24 CFR 5.609, Housing Handbook 4350.3, Chapter 5; The Omnibus Budget and Reconciliation Act of 1993, The Nebraska Uniform Trust Code, Nebraska case law relevant to the capacity of settlors, the SSSNT Agreement, and e-mails between [REDACTED] and [REDACTED].

### Conclusion

The [REDACTED] Special Needs Trust document pursuant to Art. 2, is irrevocable trust. The SSSNT in Article 3 addresses distributions ("special needs" defined). Depending on the purpose and/or manner of payment a distribution may or may not rise to the definition of "income" subject to inclusion in annual income determinations. The SSSNT in Article 3.D.3. recites the mandatory language affirming the discretionary nature of the trust and provides that no part of the principal or undistributed income (capitalized interest) shall be considered "available" to the Beneficiary. The vehicle insurance payments made by the trust on behalf of

the trust as owner of the van did not flow to or through [REDACTED] and as such are not "income" attributable to [REDACTED] for the purpose of calculating annual income.

There is no indication that the competency of [REDACTED] parents is in question and as such they are competent to act as settlors of the SSSNT. Settlers may also be trustees or co-trustees. The trust is not invalid due to the dual role of the settlors also acting as co-Trustees.

I hope this discussion is helpful to you in working with property managers on matters involving Special Needs Trust arrangements. If you have further question on this subject please feel free to contact me [REDACTED] For your information and review I include as an attachment the text of the revisions to the 2009 federal regulations, effective 9/30/2009 referenced above.

Attachment: 24 CFR 5.609  
[REDACTED]

## §5.611

to a redetermination at the end of the shorter period.

[61 FR 54496, Oct. 18, 1996, as amended at 65 FR 16716, Mar. 29, 2000; 67 FR 47432, July 18, 2002; 76 FR 77743, Dec. 30, 2005]

**EFFECTIVE DATE NOTE:** At 74 FR 4841, Jan. 27, 2009, §5.609 was amended as follows, effective Mar. 30, 2009. At 74 FR 13339, Mar. 27, 2009, this amendment was delayed until Sept. 30, 2009.

- a. Revise paragraph (a);
  - b. Remove existing paragraph (d);
  - c. Redesignate existing paragraphs (b) and (c) as paragraphs (d) and (e), respectively;
  - d. In newly designated paragraph (d)(3), revise the reference to "paragraph (b)(2) of this section" to read "paragraph (d)(2) of this section";
  - e. In newly designated paragraph (d)(4), revise the parenthetical reading "(except as provided in paragraph (c)(14) of this section)" to read "(except as provided in paragraph (e)(14) of this section)";
  - f. In newly designated paragraph (d)(5), revise the reference to "paragraph (c)(3) of this section" to read "paragraph (e)(3) of this section";
  - g. In newly designated paragraph (d)(6)(B), revise the reference to "paragraph (c) of this section" to read "paragraph (e) of this section";
  - h. In newly designated paragraph (d)(8), revise the reference to "paragraph (c)(7) of this section" to read "paragraph (e)(7) of this section";
  - i. In newly designated paragraph (e)(6), revise the reference to "paragraph (b)(9) of this section" to read "paragraph (d)(9) of this section";
  - j. In newly designated paragraph (e)(17), revise the reference to "24 CFR 5.609(c)" to read "24 CFR 5.609(e)"; and
  - k. Add new paragraphs (b) and (c).
- For the convenience of the user, the added and revised text is set forth as follows:

**§ 5.609 Annual income.**

- (a) *Annual income* means all amounts, monetary or not, which:
- (1) Go to, or on behalf of, the family head or spouse (even if temporarily absent) or to any other family member; and
  - (2) Are based on, at the time of admission, reexamination, or recertification:
    - (i) Actual income being received (projected forward for a 12-month period); or
    - (ii) Past actual income received or earned within the last 12 months of the determination date, as HUD may prescribe in applicable administrative instructions when:
      - (A) The family reports little or no income; and
      - (B) The processing entity is unable to determine annual income due to fluctuations in income (e.g., seasonal or cyclical income);

(3) Which are not specifically excluded in paragraph (e) of this section.

(4) Annual income also means amounts derived (during the 12-month period) from assets to which any member of the family has access.

(b) *Historical amounts.* If the processing entity is unable to determine annual income using current information because the family reports little to no income or because income fluctuates, the processing entity may average past actual income received or earned within the last 12 months before the determination date to calculate annual income. The processing entity may also request the family to provide documentation of current income. If the family can provide acceptable documentation dated either within the 60-day period preceding the determination date or the 60-day period following the request date, the processing entity may use this documentation to determine annual income.

(c) *Rejection of documentation.* The processing entity may reject any income documentation for such reason as HUD may prescribe in applicable administrative instructions.

\* \* \* \* \*

**§ 5.611 Adjusted income.**

Adjusted income means annual income (as determined by the responsible entity, defined in §5.100 and §5.603) of the members of the family residing or intending to reside in the dwelling unit, after making the following deductions:

(a) *Mandatory deductions.* In determining adjusted income, the responsible entity must deduct the following amounts from annual income:

- (1) \$480 for each dependent;
- (2) \$400 for any elderly family or disabled family;
- (3) The sum of the following, to the extent the sum exceeds three percent of annual income:
  - (i) Unreimbursed medical expenses of any elderly family or disabled family; and
  - (ii) Unreimbursed reasonable attendant care and auxiliary apparatus expenses for each member of the family who is a person with disabilities, to the extent necessary to enable any member of the family (including the member who is a person with disabilities) to be employed. This deduction may not exceed the earned income received by family members who are 18 years of age.