

FILED 4/18/08

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NICK STEENOLSEN, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED STATES DEPARTMENT OF )  
HOUSING AND URBAN DEVELOPMENT; )  
ALPHONSO JACKSON; K.J. )  
BROCKINGTON; SEBASTIAN KING; )  
CITY OF SANTA MONICA; HOUSING )  
AUTHORITY OF SANTA MONICA; )  
PETER MEZZA; JANINE MANDEVILLE; )  
AND JODY GILBERT, )  
 )  
Defendants. )  
 )

CASE NO.: CV 07-5174 ABC (JCx)

**ORDER RE: FEDERAL DEFENDANTS'  
MOTION TO DISMISS**

Pending before the Court is Defendants United States Department of Housing and Urban Development, Alphonso Jackson, K.J. Brockington, and Sebastian King's (the "Federal Defendants'") Motion to Dismiss, filed on January 25, 2008. Plaintiff Nick Steenolsen ("Plaintiff") opposed on February 25, 2008 and the Federal Defendants replied on March 3, 2008. The Court finds this matter appropriate for resolution without oral argument and VACATES the April 14, 2008 hearing date, see Fed. R. Civ. Proc. 78; Local Rule 7-15, although the parties other than the Federal Defendants must still appear for the Scheduling Conference set for that date. For the reasons discussed below, the Court GRANTS the Federal Defendants' motion.

1 **I. INTRODUCTION**

2 In this case, Plaintiff asks the Court to reverse the denial of  
3 his application to receive a housing subsidy under the federal Section  
4 8 program, 42 U.S.C. § 1437f, as discriminatory based on his  
5 disability. In some cases it may be appropriate for the Court to  
6 intervene and prevent disability discrimination in the Section 8  
7 program. However, the Court finds no such discrimination in this  
8 case.

9 To rule in Plaintiff's favor, the Court would have to step into  
10 the shoes of either Congress or the Department of Housing and Urban  
11 Development ("HUD"), and change legislative and administrative rules  
12 to benefit, rather than hinder him. As sympathetic as the Court might  
13 be to Plaintiff's predicament, the Court's role is neither the  
14 declarer of legislative policy, nor the promulgator of regulations  
15 implementing that policy. Because Plaintiff's claims against the  
16 federal Defendants named in this case do not amount to actionable  
17 discrimination, the Court cannot provide the relief he seeks.  
18 Plaintiff is better served directing his complaints to those  
19 individuals who can effect the changes he seeks: his elected  
20 representatives in Congress and officials in HUD.

21 **II. FACTUAL BACKGROUND**

22 Plaintiff has brought the instant case challenging HUD's Section  
23 8 housing program as discriminatory based on disability. (First  
24 Amended Complaint ("FAC") ¶ 2.) Plaintiff was injured in a skiing  
25 accident in 2000, which left him quadriplegic. (Id. ¶ 6.) He cannot  
26 maintain employment. (Id. ¶ 11.) He requires complete assistance  
27 with all his needs and receives benefits under Supplemental Security  
28 Income ("SSI") and California's Medicaid program (called "Medi-Cal").

1 (Id.) In 2004, Plaintiff settled his personal injury action, and  
2 that money funded a special needs trust, established under California  
3 Probate Code sections 3600 et seq. and 42 U.S.C. section 1396(d)(A).

4 (Id.)

5 SSI and Medicaid restrict eligibility to individuals who meet  
6 certain asset, income, and resource caps and restrict an applicant's  
7 ability to transfer certain assets. (Id. ¶ 12.) Such restrictions  
8 include "below-market transfers," such as transferring assets to a  
9 revocable trust for the purpose of establishing eligibility for either  
10 program. (Id.) Medicaid rules passed in 1993 lifted these  
11 restrictions for certain transfers to special needs trusts established  
12 under 42 U.S.C. section 1396(d)(4)(A); a similar exemption was  
13 promulgated in 1999 under the Foster Care Independence Act of 1999, 42  
14 U.S.C. section 1382b. (Id.) Plaintiff's special needs trust complies  
15 with these regulations. (Id.)

16 California has also enacted its own statutory scheme in Probate  
17 Code sections 3600 et seq. to govern these trusts. (Id. ¶ 13.)  
18 California's provisions require the trustee of the special needs trust  
19 to post bond and file periodic accountings to demonstrate proper  
20 management and administration of the trust funds. (Id.)

21 HUD regulations only count trust income for the purpose of  
22 determining the applicant's annual income, rather than distributions  
23 of trust principal, under 24 C.F.R. § 5.603(b)(2). (Id. ¶ 14.)  
24 Plaintiff alleges that all the income from his trust is folded back  
25 into the principal and any distributions are taken from the principal,  
26 so Plaintiff believes that these distributions should not have been  
27 counted under HUD regulations, even though Defendants counted these  
28

1 distributions as income.<sup>1</sup> (Id.)

2 In 2005, Plaintiff was evicted from his apartment when his  
3 landlord went out of business. (Id. ¶ 15.) Plaintiff finally located  
4 an apartment that met his physical needs, but the unit required a  
5 Section 8 certificate. (Id. ¶ 16.) Plaintiff applied for Section 8  
6 assistance, but received a letter in May 2005 advising him that he was  
7 ineligible because he exceeded income limits. (Id.) The letter  
8 provided little other information, so he contacted Janine Mandeville  
9 of the Santa Monica Housing Authority on July 29, 2005. (Id.)  
10 Mandeville told Plaintiff that they were trying to interpret the  
11 regulations with respect to the trust, and she assured Plaintiff that  
12 no final decision had yet been made. (Id.) Mandeville referred  
13 Plaintiff to her supervisor, Jody Gilbert. (Id.) Mandeville and  
14 Gilbert then advised Plaintiff that they had heard from personnel in  
15 the HUD field office, who concluded that the distributions from  
16 Plaintiff's trust were countable under section 5.609, but that they  
17 were waiting for confirmation from Sebastian King, an employee at the  
18 Los Angeles Field Office of HUD. (Id.)

19 Plaintiff initiated contact with King shortly thereafter. (Id.)  
20 In a phone call on August 17, 2005, King requested that Plaintiff send  
21 him information on which Plaintiff relied in claiming that his trust

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22  
23 <sup>1</sup>The Court is skeptical of Plaintiff's characterization of 24  
24 C.F.R. section 5.603(b)(2). That provision states, "[i]n cases where  
25 a trust fund has been established and the trust is not revocable by,  
26 or under the control of, any member of the family or household, the  
27 value of the trust fund will not be considered an asset so long as the  
28 fund continues to be held in trust. Any income distributed from the  
trust fund shall be counted when determining income under § 5.609." The Court reads this provision not as distinguishing trust "income" from trust "principal" per se, but as recognizing that distributions from the trust should be counted as "income," while the assets still remaining in the trust should not be included in determining income.

1 was excludable from the Section 8 income calculations. (Id. ¶ 17.)  
2 Plaintiff sent him selections from Chapter 5 of HUD's Section 8  
3 Handbook, which Plaintiff alleges King did not recognize. (Id.) King  
4 explained to Plaintiff that Section 8 falls within two different  
5 programs under HUD, although both programs rely on the same statutes  
6 and regulations. (Id.) Plaintiff alleges that Defendants applied  
7 these rules in a discriminatory way against Plaintiff, but that no one  
8 in the Santa Monica Housing Authority or at HUD seemed to understand  
9 that issue at that point. (Id.)

10 Plaintiff then contacted the Washington, D.C. office of HUD,  
11 where personnel requested that he provide two items: (1) a copy of his  
12 special needs trust; and (2) a written response to two questions: a)  
13 whether Plaintiff can access trust funds; and b) whether the trust  
14 could pay for housing. (Id. ¶ 18.) Plaintiff sent a two-page  
15 memorandum responding to this request. (Id.) HUD contacted Plaintiff  
16 a few days later indicating that the portions of the HUD Section 8  
17 Handbook on which he relied applied to project-based assistance under  
18 the Multifamily Housing Program. (Id.) Plaintiff was seeking tenant-  
19 based assistance under the Public and Indian Housing Program and HUD  
20 informed Plaintiff that the two programs interpreted the same  
21 regulations differently. (Id.)

22 Plaintiff contacted HUD Assistant General Counsel Althea  
23 Forrester and sent her a ten-page letter summarizing his position.  
24 (Id. ¶ 19.) Forrester referred Plaintiff to the senior program  
25 manager for the Office of Public and Indian Housing, to whom Plaintiff  
26 sent another letter, including a copy of his previous ten-page letter.  
27 (Id. ¶ 20.) Personnel in this office suggested that Plaintiff might  
28 obtain a waiver of the tenant-based eligibility requirements, but that

1 he should contact the Director of the Office of Public and Indian  
2 Housing. (Id.) Plaintiff did so, and was referred back to the Los  
3 Angeles Field Office for HUD. (Id. ¶ 22.) In February 2007,  
4 Plaintiff contacted Cecelia Ross in the Los Angeles office, but was  
5 told by Defendant K.J. Brockington that Ross no longer worked there.  
6 (Id. ¶¶ 23-24.) Brockington responded substantively to Plaintiff's  
7 request for a waiver, denied it, and stated that she believed the  
8 matter was closed. (Id. ¶ 24.) She referred Plaintiff back to King  
9 for any additional questions. (Id.)

10 Plaintiff sent another letter to King, asking more questions  
11 about HUD's position and asking about the possibility of an appeal.  
12 (Id. ¶ 25.) Brockington responded to the letter indicating that the  
13 matter was closed and, although Plaintiff sent a reply letter, he  
14 received no response to it. (Id.)

### 15 **III. LEGAL STANDARD**

16 Dismissal is appropriate under Rule 12(b)(1) when the court lacks  
17 subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1).  
18 In deciding a 12(b)(1) motion, a court is not limited to the  
19 allegations in the complaint but may also consider extrinsic evidence.  
20 Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). Although  
21 lack of subject matter jurisdiction is an affirmative defense, the  
22 burden of proof in a 12(b)(1) motion is on the party asserting  
23 jurisdiction, and the court will presume a lack of jurisdiction until  
24 the pleader proves otherwise. Kokkonen v. Guardian Life Ins. Co. of  
25 America, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994);  
26 Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th  
27 Cir.1989).

28 A Rule 12(b)(6) motion tests the legal sufficiency of the claims

1 asserted in the complaint. See Fed. R. Civ. Pro. 12(b)(6). In ruling  
2 on a Rule 12(b)(6) motion to dismiss, the Court must accept as true  
3 all material allegations in the complaint, as well as reasonable  
4 inferences to be drawn from them. See Pareto v. F.D.I.C., 139 F.3d  
5 696, 699 (9th Cir. 1998). The complaint must be read in the light  
6 most favorable to plaintiff. See id. However, the Court need not  
7 accept as true any unreasonable inferences, unwarranted deductions of  
8 fact, or conclusory legal allegations cast in the form of factual  
9 allegations. See, e.g., Western Mining Council v. Watt, 643 F.2d 618,  
10 624 (9th Cir. 1981). In short, a complaint need not contain detailed  
11 factual allegations, but it must allege facts sufficient to raise a  
12 right to relief that rises above the level of mere speculation and is  
13 plausible on its face. See Bell Atl. Corp. v. Twombly, 127 S. Ct.  
14 1955, 1965, 1969 (2007).

15 Moreover, in ruling on a 12(b)(6) motion, a court generally  
16 cannot consider material outside of the complaint (e.g., those facts  
17 presented in briefs, affidavits, or discovery materials). See Branch  
18 v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). A court may, however,  
19 consider exhibits submitted with the complaint. See id. at 453-54.  
20 Also, a court may consider documents which are not physically attached  
21 to the complaint but "whose contents are alleged in [the] complaint  
22 and whose authenticity no party questions." Id. at 454. Further, it  
23 is proper for the court to consider matters subject to judicial notice  
24 pursuant to Federal Rule of Evidence 201. See Mir, M.D. v. Little Co.  
25 of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988).

#### 26 IV. DISCUSSION

27 The Federal Defendants move to dismiss all the claims Plaintiff  
28 asserts against them as follows: (1) Plaintiffs' fifth and sixth

1 claims for damages and injunctive relief against HUD under the Fair  
2 Housing Amendments Act must be dismissed based on sovereign immunity;  
3 (2) Plaintiffs' seventh claim for damages under section 504 of the  
4 Rehabilitation Act must be dismissed based on sovereign immunity; (3)  
5 even absent sovereign immunity, all of Plaintiffs' claims against HUD  
6 must be dismissed for failing to state a claim; and (4) all of  
7 Plaintiffs' claims against individual Federal Defendants King and  
8 Sebastian must be dismissed based on qualified immunity.

9 **A. The Section 8 Housing Choice Voucher Program**

10 The United States Housing Act was first passed in 1937, and since  
11 that time, the federal government has worked with individual states to  
12 provide assistance in providing public housing. The Housing Choice  
13 Voucher Program, or "Section 8," provides voucher-based assistance  
14 where the participant selects a housing unit and receives a subsidy to  
15 offset the cost of that unit. 42 U.S.C. § 1437f(o). In this program,  
16 HUD provides funds to local public housing agencies ("PHAs"), such as  
17 the Santa Monica Housing Authority, that then administer the program  
18 by accepting and processing applications and entering into contractual  
19 agreements with dwelling owners. 24 C.F.R. § 982.1(a)(1)-(2). Once a  
20 PHA determines that a family is eligible for assistance and the family  
21 has located a housing unit, the PHA makes payments to the unit's owner  
22 on the family's behalf. Id. This subsidy allows the family to pay  
23 only up to 30 percent of its monthly adjusted gross income for rent  
24 and utilities. Id. § 982.1(a)(4).

25 Section 8 assistance may be project-based or tenant-based. Id. §  
26 982.1(b)(1). A project-based program provides rental assistance for  
27 families in specific housing developments while tenant-based  
28 assistance allows a family to live in any unit and obtain a subsidy to



offset part of the rent for that unit. Id. When a tenant-based assisted family moves, the contract between the owner and PHA terminates, but the family may receive tenant-based assistance in a new unit so long as the family otherwise complies with the other terms of the program. Id. § 982.1(b)(2).

To be eligible for the Housing Choice Voucher Program (which is tenant-based assistance), an applicant must satisfy three main requirements: (1) he or she must be a "family," which includes certain individuals; (2) he or she must fall below the income maximum; and (3) he or she must be a citizen or have eligible immigration status. 24 C.F.R. § 982.201(a). Plaintiff objects to (and focuses the FAC on) the second requirement and how HUD calculates income eligibility.

**B. Plaintiff's Fifth and Sixth Claims under the Fair Housing Amendments Act**

Plaintiff brings his fifth and sixth claims for damages and injunctive relief under the Fair Housing Amendments Act ("FHAA"). The FHAA makes it "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C § 3601. Although originally passed in 1968 as the Fair Housing Act, the FHAA was amended in 1988 to extend protections to individuals with physical disabilities. Now the FHAA makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." Id. § 3604(f)(1). This discrimination includes "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling." Id. § 3604(f)(3)(B).

1           1.   Sovereign Immunity for Money Damages

2           The Federal Defendants claim that the FHAA does not waive HUD's  
3 sovereign immunity from suits for damages and Plaintiff's fifth and  
4 sixth claims for money damages under the FHAA must be dismissed. The  
5 government, its agencies, and government officials in their official  
6 capacity all enjoy sovereign immunity unless immunity is expressly  
7 waived by statute. See Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th  
8 Cir. 1985) ("It is well settled that the United States is a sovereign,  
9 and, as such, is immune from suit unless it has expressly waived such  
10 immunity and consented to be sued. . . . [A] suit against [public  
11 officials] in their official capacity is essentially a suit against  
12 the United States.").<sup>2</sup> Waiver "must be unequivocally expressed in  
13 statutory text . . . and will not be implied[.]" Lane v. Pena, 518  
14 U.S. 187, 192 (1996) (internal citations omitted). Any express  
15 waiver, moreover, "will be strictly construed, in terms of its scope,  
16 in favor of the sovereign." Id.

17          Plaintiff appears to concede that he may not recover money  
18 damages from the government under the FHAA. The Federal Defendants  
19 cite several district court cases finding no waiver under the FHAA for  
20 claims for money damages. See, e.g., Boyd v. Browner, 897 F. Supp.  
21 590, 595 (D.D.C. 1995); Gregory v. South Carolina Dept. of Transp.,

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23                   <sup>2</sup>The Court interprets Plaintiff's fifth and sixth claims under  
24 the FHAA against Defendants Brockington and King (styled as claims  
25 against "all Defendants") as pleading claims against these individuals  
26 in their official capacities. As such, they enjoy the same sovereign  
27 immunity as the government itself. See Balser v. Department of  
28 Justice, Office of the U.S. Trustee, 327 F.3d 903, 907 (9th Cir. 2003)  
("In sovereign immunity analysis, any lawsuit against an agency of the  
United States or against an officer of the United States in his or her  
official capacity is considered an action against the United States."  
(citation omitted)).

289 F. Supp. 2d 721, 726 (D.S.C. 2003), aff'd 114 Fed. Appx. 87 (4th Cir. 2004); Bennett v. New York Housing Auth., 248 F. Supp. 2d 166, 170 (E.D.N.Y. 2002); Furtick v. Medford Hous. Auth., 963 F. Supp. 64, 72 (D. Mass. 1997). While these cases did preclude suits for money damages against the United States under the FHAA, none of them discussed the issue in any detail. Nevertheless, the Court finds them persuasive at least with respect to claims for money damages. Waiver of sovereign immunity must be unequivocally expressed in the statute and Plaintiff has pointed to no provision in the FHAA or elsewhere that expressly waives sovereign immunity. Therefore, Plaintiff's fifth and sixth claims for money damages against the Federal Defendants for money damages are DISMISSED.

2. Sovereign Immunity for Injunctive Relief, Private Rights of Action under the FHAA, and the Administrative Procedures Act

In addition to claims for money damages, Plaintiff has pled claims for injunctive relief under the FHAA. Although the Federal Defendants argue that they enjoy sovereign immunity for these claims, sovereign immunity does not bar claims for injunctive relief against the United States, including claims under the FHAA. See Puerto Rico Public Housing Admin. v. United States Dept. of Housing & Urban Dev., 59 F. Supp. 2d 310, 322 (D.P.R. 1999); Young v. Pierce, 628 F. Supp. 1037, 1058-59 (E.D. Tex. 1985).<sup>3</sup>

This does not end the Court's inquiry, however. The Federal Defendants argue that, even so, the FHAA does not provide a private

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<sup>3</sup>The Federal Defendants attempted to distinguish these cases in their reply brief. (See Reply at 4 n.1.) The Court finds their contentions unpersuasive.

1 right of action for injunctive relief. There is case support for this  
2 proposition. See, e.g., NAACP v. Sec'y of Housing & Urban Dev., 817  
3 F.2d 149, 153 (1st Cir. 1987); Jones v. Office of Comptroller of  
4 Currency, 983 F. Supp. 197, 202-03 (D.D.C. 1997) ("The majority of  
5 courts that have considered this issue have concluded that there is no  
6 implied private right of action under [the FHAA.]"). Plaintiff does  
7 not seriously challenge this conclusion, but offers to amend his  
8 complaint under Federal Rule of Civil Procedure 15 to plead his claims  
9 for injunctive relief under the Administrative Procedures Act ("APA"),  
10 5 U.S.C. § 704. Both NAACP and Jones suggest that this would be the  
11 appropriate course for challenging violations of the FHAA. See NAACP,  
12 817 F.2d at 153; Jones, 983 F. Supp. at 202 ("[A]n aggrieved person  
13 not expressly granted the right to sue under [the FHAA] must seek  
14 relief not under [that statute], but under the APA.").

15 For the purposes of this motion, the Court need not determine  
16 whether the FHAA supports a private right of action or whether  
17 Plaintiff must bring his FHAA challenges under the APA. Even if  
18 Plaintiff has a private right of action under the FHAA, he has failed  
19 to state a claim under the FHAA against the Federal Defendants in this  
20 case, as discussed below. Alternatively, even if Plaintiff could  
21 bring an APA claim, which he has not pled, any amendment to his  
22 complaint to plead APA claims would be futile for this same reason: he  
23 cannot state a claim against the the Federal Defendants under the  
24 FHAA. See Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir.  
25 1988) (stating that, under Rule 15, "[a] motion for leave to amend may  
26 be denied if it appears to be futile or legally insufficient" and "a  
27 proposed amendment is futile only if no set of facts can be proved  
28 under the amendment to the pleadings that would constitute a valid and

1 sufficient claim or defense.").

2 3. Discrimination Under the FHAA

3 As stated above, the FHAA makes it unlawful "[t]o discriminate in  
4 the sale or rental, or to otherwise make unavailable or deny, a  
5 dwelling to any buyer or renter because of a handicap." 42 U.S.C. §  
6 3604(f)(1). The Federal Defendants argue that they cannot be liable  
7 for discrimination under the FHAA because they do not engage in the  
8 "sale or rental" of a "dwelling" under the Section 8 Housing Choice  
9 Voucher Program. The Court agrees. By statute, HUD merely provides  
10 funding to local PHAs, who then administer their own housing programs  
11 to accept and process applications for funding, enter into contracts  
12 with private housing owners, and make subsidy payments to those owners  
13 who are providing dwellings to assisted families. 24 C.F.R. §  
14 982.1(a)(1)-(2).<sup>4</sup> The statutory language of Section 8 then  
15 specifically allocates the selection of tenants for a particular  
16 dwelling to the owner, not HUD. 42 U.S.C. § 1437f(o)(6)(B) ("Each  
17 housing assistance payment contract entered into by the public housing  
18 agency and the owner of a dwelling unit[] shall provide that the  
19 screening and selection of families for those units shall be the  
20 function of the owner.").

21 Plaintiff claims that, even if the Federal Defendants do not  
22 engage in the "sale or rental" of dwellings, they "otherwise make  
23 unavailable" "dwellings" by arbitrarily enforcing HUD regulations.  
24 "Although the 'otherwise make available or deny' phrase seems all-  
25 encompassing, its scope is not limitless." Cox v. City of Dallas,

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26  
27 <sup>4</sup>The Court expresses no opinion on whether PHAs, such as  
28 Defendant Santa Monica Housing Authority, engage in the "sale or  
rental" of a "dwelling" within the meaning of the FHAA. That issue is  
not before the Court on this motion.

1 Tex., 430 F.3d 734, 740 (5th Cir. 2005) (rejecting FHAA claim that a  
2 reduction in property values made a dwelling unavailable under the  
3 statute) (citation omitted). Plaintiff's contention fails for two  
4 reasons. First, Plaintiff's chief complaint is not that HUD  
5 regulations make dwellings unavailable, but that the HUD regulations  
6 governing the tenant-based housing subsidy program make a subsidy to  
7 obtain a dwelling unavailable. He admits that Section 8 simply  
8 "aid[s] low-income families by providing rent subsidies to enable them  
9 to rent units existing in the private rental housing market." (FAC ¶  
10 30 (emphasis added).) While the Court certainly accepts Plaintiff's  
11 allegation that he is unable to qualify for a Section 8 subsidy, that  
12 subsidy is not the equivalent of making any dwellings unavailable.  
13 Nothing prevents Plaintiff from renting any dwelling he wants, albeit  
14 without the assistance of a Section 8 subsidy. HUD's failure to  
15 qualify Plaintiff for the subsidy program does not mean that HUD is  
16 otherwise making unavailable any "dwelling" to Plaintiff.

17 Second, Plaintiff's connection between his denial of Section 8  
18 subsidy and making a dwelling unavailable is too tenuous. Taken to  
19 its logical conclusion, Plaintiff's theory of liability would cover  
20 any entity that provides funds to a potential housing applicant,  
21 whether those funds are related to housing or not. For example, an  
22 employee might be terminated from her employment, only to file for and  
23 be denied unemployment benefits. She may need to find a new rental  
24 unit, but may be unable to pay for it without unemployment payments.  
25 According to Plaintiff's theory, that individual could sue under the  
26 FHAA because the failure to award unemployment benefits would  
27 literally "otherwise make unavailable" her chosen housing unit.  
28 Congress must have intended a stricter construction of the FHAA to

1 avoid sweeping in legions of agencies providing public monies to  
2 individuals who might then search for housing.

3 By the very terms of the Section 8 statute, HUD is not in the  
4 business of providing housing. As a matter of legislative directive,  
5 it cannot. Congress has preserved the traditional powers of dwelling  
6 owners to select tenants for Section 8 dwellings. See 42 U.S.C. §  
7 1437f(o)(6)(B). HUD has outlined an owner's responsibilities both in  
8 selecting a suitable tenant family and in terminating a tenancy. 24  
9 C.F.R. §§ 982.307, 982.310. In fact, HUD specifically requires the  
10 owner to perform "all management and rental functions for the assisted  
11 unit, including selecting a voucher-holder to lease the unit and  
12 deciding if the family is suitable for tenancy of the unit," complying  
13 with equal opportunity requirement, and enforcing tenant obligations  
14 under the lease. Id. § 982.452. Plaintiff's attempt to stretch the  
15 FHAA's "otherwise makes unavailable" language to cover the Federal  
16 Defendants does not stand up to this scrutiny.

17 Even if the Federal Defendants could somehow qualify as renting,  
18 selling, or otherwise making unavailable dwellings, however, Plaintiff  
19 still fails to state a claim that they unlawfully discriminated under  
20 the FHAA because of his disability. The anti-discrimination provision  
21 in the FHAA contains a causation requirement: any actionable  
22 discrimination must occur because of his disability. 42 U.S.C. §  
23 3604(f)(1). This provision is satisfied by alleging the HUD  
24 regulations regarding trusts constitutes either disparate treatment of  
25 Plaintiff because of his disability or results in a disparate impact  
26 on him because of his disability. See Budnick v. Town of Carefree, --  
27 - F.3d ----, 2008 WL 638385, at \*2 (9th Cir. March 11, 2008) ("Title  
28 VII discrimination analysis is used to examine claims under the FHAA;

1 thus, a plaintiff may establish discrimination in violation of the  
2 FHAA under a theory of disparate treatment or disparate impact.").

3 Plaintiff's disparate treatment theory is convoluted and  
4 ultimately fails. He apparently believes the Federal Defendants have  
5 discriminated against him because of his disability through HUD  
6 regulations that mandate including disbursements from his special  
7 needs trust in calculating his eligible income for purposes of the  
8 tenant-based voucher program. The income calculation for trusts,  
9 however, does not facially discriminate based on an applicant's  
10 disability. HUD adopted income-calculation regulations to ensure that  
11 the Section 8 housing program would benefit low-income families, the  
12 express target of Section 8 assistance. See 42 U.S.C. § 1437f(a).  
13 Some of HUD's complex calculations specifically exclude certain funds  
14 from qualifying income for families who suffer from disabilities. For  
15 example, income under Section 8 does not include: payments received  
16 for foster adults with disabilities, id. § 5.609(c)(2); reimbursements  
17 for medical payments, id. § 5.609(c)(4); income of a live-in aide, id.  
18 § 5.609(c)(5); certain funds disregarded under SSI for a limited time,  
19 id. § 5.609(c)(8)(ii); and amounts received from the state for a  
20 developmentally disabled person living at home, id. § 5.609(c)(16).  
21 PHAs are also directed to subtract from income \$400 for a disabled  
22 family and unreimbursed attendant care and medical expenses. Id. §  
23 5.611. After accounting for these (and other) considerations, the PHA  
24 then determines whether a family meets or exceeds an income threshold.

25 Plaintiff does not allege that the Federal Defendants applied  
26 this provision with some intent to discriminate against him because of  
27 his disability. Nor does this provision facially treat Plaintiff  
28 differently because of his disability. Under Plaintiff's theory, some



1 disabled applicants would be income-eligible for tenant-based  
2 assistance, while other disabled applicants would not. This might  
3 evidence discrimination based how a disabled person obtains an income  
4 (i.e., through a special needs trust), but it does not demonstrate  
5 that HUD discriminates against a person because of that person's  
6 disability. Rather, a disabled person would be eligible for tenant-  
7 based assistance if he or she met the income guidelines, obtained  
8 income from a source subject to a valid exclusion under the  
9 regulations, or even received income from a special needs trust that  
10 met the income-eligibility ceiling. Any way the Court interprets  
11 these regulations, HUD's actions do not amount to disparate treatment  
12 because of Plaintiff's disability.

13 Plaintiff also fails to allege that the Federal Defendants used  
14 discriminatory treatment of special needs trusts as a proxy for  
15 disability discrimination. See Community Servs., Inc. v. Wind Gap  
16 Mun. Authority, 421 F.3d 170, 177-78 (3d Cir. 2005). Under the  
17 "proxy" theory of disparate treatment, "a regulation or policy cannot  
18 use a technically neutral classification as a proxy to evade the  
19 prohibition of intentional discrimination, such as classifications  
20 based on gray hair (as a proxy for age) or service dogs or wheelchairs  
21 (as proxies for handicapped status)." Id. The primary inquiry in the  
22 "proxy" analysis is whether the ostensibly neutral criterion is  
23 "inextricably linked" to the protected characteristic. See id.  
24 (citing Johnson v. State of N.Y., 49 F.3d 75, 79-80 (2d Cir. 1995)).

25 Here, Plaintiff has not alleged that HUD uses income from or  
26 existence of a special needs trust as a proxy for disability  
27 discrimination. It may be true that a special needs trust could be  
28 used as a proxy for disability since a special needs trust appears to

1 be created for individuals with disabilities. See Cal. Probate Code  
2 §§ 3600 et seq. However, HUD has not so used it. HUD has not adopted  
3 a blanket policy of excluding all individuals with special needs  
4 trusts from eligibility in the Section 8 program. If it did, that  
5 might suggest HUD uses a special needs trust as a proxy for  
6 disability. But HUD's policy leaves open the distinct possibility  
7 that some individuals could qualify for Section 8 assistance with a  
8 special needs trust, as long as that trust income meets HUD's low-  
9 income guidelines. Therefore, the true basis of the trust income  
10 regulation is income, not the existence of a special needs trust.  
11 Thus, Plaintiff has not stated a claim that the Federal Defendants use  
12 the existence of a special needs trust as a proxy for disability  
13 discrimination.

14 Finally, Plaintiff alludes to a claim for disparate impact from  
15 the application of the ostensibly neutral trust income regulation.  
16 (See Compl. ¶ 65 ("Defendants utilize methods of administration that  
17 have the effect of subjecting individuals with disabilities to  
18 discrimination.")) Like his disparate treatment claims, this claim  
19 fails as well. "To establish a prima facie case of disparate impact  
20 under the [FHAA], a plaintiff must show at least that the defendant's  
21 action had a discriminatory effect." Budnick, --- F.3d at ---, 2008  
22 WL 638385, at \*7. "[A FHAA] plaintiff must establish (1) the  
23 occurrence of certain outwardly neutral . . . practices, and (2) a  
24 significantly adverse or disproportionate impact on persons of a  
25 particular [type] produced by the [defendant's] facially neutral acts  
26 or practices." Id. (brackets and ellipsis in original) (citations  
27 omitted). "A plaintiff need not establish discriminatory intent but  
28 the discriminatory impact must be proven; an inference of

1 discriminatory impact is not sufficient." Id.

2 Here, Plaintiff has not alleged facts to support a disparate  
3 impact claim. Plaintiff has alleged only the potential impact of  
4 HUD's trust income calculation in his individual situation; he has not  
5 alleged any other instances to suggest a statistically significant  
6 impact on disabled applicants generally. This is critical because  
7 HUD's regulation is not applied based on disability, but on the basis  
8 of income, as discussed above. As demonstrated in the Court's proxy  
9 analysis, it is conceivable, and even likely, that some individuals  
10 receiving income from a special needs trust may meet HUD's low-income  
11 threshold, despite HUD's regulation that includes the income from the  
12 special needs trust in its calculation. Plaintiff may be in the  
13 minority of cases where the HUD regulations have the effect of  
14 excluding him from eligibility because of his income from a special  
15 needs trust. In fact, housing officials' apparent confusion over his  
16 situation strongly suggests that his situation may be unique. Without  
17 some allegations that HUD's regulation has a disproportionate impact  
18 on more than just his own application, Plaintiff has not stated a  
19 claim for disparate impact under the FHAA. See Gamble v. City of  
20 Escondido, 104 F.3d 300, 306 (9th Cir. 1997) (rejecting a disparate  
21 impact claim because plaintiff "has advanced no evidence that such a  
22 discriminatory effect occurs or that it occurs significantly.").

23 In sum, Plaintiff's arguments boil down to a policy objection to  
24 HUD's administration of the Section 8 program: "[t]here are strong  
25 public policy reasons for allowing persons with disabilities to retain  
26 assets for their care and other special needs while remaining eligible  
27 for benefits" by "allow[ing] persons such as Plaintiff to reside in  
28 his own community, which is more cost-effective, rather than in an

1 institution." (Opp'n at 3:19-23.) Both Congress and HUD appear to  
2 have considered this laudable goal in excluding various medical- and  
3 disability-related expenses and income from Section 8 eligibility  
4 requirements. HUD, however, has made an administrative decision to  
5 include Plaintiff's specific type of income in the Section 8 income  
6 calculation. This might have resulted in Plaintiff's ineligibility  
7 for the Section 8 program, but Plaintiff has failed to state a claim  
8 that HUD has subjected him to discriminatory treatment because of his  
9 disability or that HUD's actions result in a disparate impact because  
10 of his disability.

11 4. Reasonable Accommodation under the FHAA

12 Plaintiff seems also to suggest that the Federal Defendants  
13 should have granted him an exemption from the trust income regulation  
14 as a "reasonable accommodation" under the FHAA. The FHAA defines  
15 discrimination to include "a refusal to make reasonable accommodations  
16 in rules, policies, practices, or services, when such accommodations  
17 may be necessary to afford such person equal opportunity to use and  
18 enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). To state a claim for  
19 reasonable accommodation, Plaintiff must allege: "(1) he suffers from  
20 a handicap as defined by the FHAA; (2) defendants knew or reasonably  
21 should have known of the plaintiff's handicap; (3) accommodation of  
22 the handicap may be necessary to afford plaintiff an equal opportunity  
23 to use and enjoy the dwelling; and (4) defendants refused to make such  
24 accommodation." Budnick, --- F.3d at ---, 2008 WL 638385, at \*8.

25 Although Plaintiff has alleged the first, second, and fourth  
26 elements, Plaintiff has failed to allege that his requested  
27 accommodation - exclusion of his special needs trust income from  
28 calculating his eligibility under Section 8 - was necessary to afford

1 him an equal opportunity to use and enjoy a dwelling. As discussed at  
2 length above, Plaintiff is free to select any dwelling and pay for  
3 that dwelling out of his own funds. He is also free to forego some of  
4 his income to meet Section 8 low-income restrictions. But he cannot,  
5 through the vehicle of the FHAA, compel HUD to alter the very defining  
6 purpose of the Section 8 program - to aid low-income families in  
7 obtaining suitable housing - so that he may participate. His argument  
8 again leads the Court down a slippery slope. Say, for example,  
9 Plaintiff's income did not come from a special needs trust, but from a  
10 personal injury settlement sitting in his personal bank account. He  
11 would still be disabled and he could very well qualify for the Section  
12 8 program if HUD would only waive the low-income requirement. The  
13 FHAA does not require HUD to alter the fundamental character of the  
14 Section 8 program just so Plaintiff may be able to participate. Cf.  
15 School Bd. of Nassau Cty., Fla. v. Arline, 480 U.S. 273, 287 n.17  
16 (1987) (noting that a reasonable accommodation under the  
17 Rehabilitation Act does not require a "fundamental alteration in the  
18 nature of [the] program." (brackets in original)). Plaintiff, like  
19 every other applicant, must meet the low-income guidelines as set by  
20 Congress and interpreted by HUD. The FHAA does not require anything  
21 more.

22 Judge Posner explained reasonable accommodations under the FHAA  
23 aptly when he wrote: "The result that we have called absurd is avoided  
24 by confining the duty of reasonable accommodation in 'rules, policies,  
25 practices, or services' to rules, policies, etc. that hurt handicapped  
26 people by reason of their handicap, rather than hurt them solely by  
27 virtue of what they have in common with other people, such as a  
28 limited amount of money to spend on housing." Hemisphere Bldg. Co. v.

1 Village of Richton Park, 171 F.3d 437, 440 (7th Cir. 1999) (emphasis  
2 in original). Plaintiff here shares the frustration common to all  
3 families who do not meet Section 8's low-income guidelines, whether  
4 disabled or not: he must pay more for housing. This does not mean  
5 that the Federal Defendants discriminated against him because of his  
6 handicap or that they must fundamentally change the neutral and  
7 fundamental component of the Section 8 program to accommodate his  
8 higher income.<sup>5</sup>

9           5. Conclusion

10           Plaintiff has failed to demonstrate that the Federal Defendants  
11 sell, rent, or otherwise make unavailable a dwelling under the Section  
12 8 program. Even if they did, Plaintiff has not stated a claim that  
13 the Federal Defendants subjected him either to discriminatory  
14 treatment or that their trust income regulation has a disparate impact  
15 on disabled individuals. Plaintiff has also failed to state a claim  
16 that the Federal Defendants are required to provide him an exemption  
17 from the Section 8 low-income requirements as a reasonable  
18 accommodation. The Court DISMISSES Plaintiff's fifth and sixth claims  
19

20           <sup>5</sup>Plaintiff also appears to argue that the Federal Defendants must  
21 modify and apply an income exemption to him which allows an eligible  
22 applicant to deduct from the amount he must pay for rent the  
23 "[u]nreimbursed reasonable attendant care and auxiliary apparatus  
24 expenses for each member of the family who is a person with  
25 disabilities, to the extent necessary to enable any member of the  
26 family (including the member who is a person with disabilities) to be  
27 employed." 24 C.F.R. § 5.611(a)(3)(ii). This regulation, however,  
28 only applies to "adjusted income," which is used to determine the  
family's portion of rent once the family is accepted into the Section  
8 program. See 42 U.S.C. § 1437f(o)(2). Plaintiff's chief objection  
is not with "adjusted income," but "annual income," which is used to  
calculate program eligibility. Therefore, this provision covering  
attendant care expenses enabling families to work does not apply to  
him, with or without the modification he seeks. Compare 24 C.F.R. §  
5.609 (defining annual income) with 24 C.F.R. § 5.611 (defining  
adjusted income).

1 for injunctive relief against the Federal Defendants under the FHAA  
2 WITH PREJUDICE.<sup>6</sup>

3 **C. Plaintiff's Seventh Claim under the Rehabilitation Act**

4 Plaintiff pleads a claim under the federal Rehabilitation Act, 29  
5 U.S.C. § 794(a) ("Section 504") against all Defendants.<sup>7</sup>

6 Generally, Section 504 of the Rehabilitation Act provides:

7 No otherwise qualified individual with a disability . . .  
8 shall, solely by reason of her or his disability, be  
9 excluded from the participation in, be denied the benefits  
10 of, or be subjected to discrimination under any program or  
11 activity receiving Federal financial assistance or under any  
12 program or activity conducted by any Executive Agency.

13 29 U.S.C. § 794(a). To state a claim under Section 504, Plaintiff  
14 must plead: "(1) he is an individual with a disability; (2) he is  
15 otherwise qualified to receive the benefit; (3) he was denied the  
16 benefits of the program solely by reason of his disability; and (4)  
17 the program receives federal financial assistance." O'Guinn v.  
18 Lovelock Correctional Ctr., 502 F.3d 1056, 1060 (9th Cir. 2007).

19 Plaintiff's Section 504 claim more narrowly addresses two components  
20 of Section 8 regulations that Plaintiff alleges both impose  
21 discriminatory treatment and have discriminatory effect on him because  
22 of his disability. The Federal Defendants argue that Plaintiff is not  
23 "otherwise qualified" to receive the Section 8 subsidy, and, even so,  
24 the two specific regulations to which he refers in his complaint do

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25 <sup>6</sup>While Plaintiff might be able to amend his complaint in response  
26 to the Court's ruling on the merits of his FHHA claims, he cannot  
27 remedy the Court's legal conclusion that HUD does not sell, rent, or  
28 otherwise make unavailable a dwelling, so any amendment would be  
futile.

<sup>7</sup>The parties agree that sovereign immunity bars money damages  
under the Rehabilitation Act, but claims for injunctive relief may be  
brought against the federal government. See Lane, 518 U.S. at 197.

1 not discriminate "solely by reason of his disability."

2 1. Otherwise Qualified to Participate in Section 8

3 The Federal Defendants argue that Plaintiff was not qualified to  
4 receive a benefit under Section 8 because he could not meet Section  
5 8's low-income requirement. To participate in the Section 8 program,  
6 an applicant must demonstrate: (1) he is a "family" as defined in the  
7 regulations; (2) he is income-eligible; and (3) he has qualifying  
8 citizenship or immigration status. 24 C.F.R. § 982.201(a).

9 The parties do not dispute that Plaintiff meets the definition of  
10 a "family," see id. § 982.201(c)(4), and that he has eligible  
11 immigration status. The Federal Defendants argue that Plaintiff was  
12 not otherwise qualified because he could not meet the income  
13 requirement. But Plaintiff alleges that he is ineligible precisely  
14 because HUD imposed an allegedly discriminatory exclusion in the  
15 income eligibility calculation. Plaintiff has the better argument  
16 here: he was "otherwise qualified" because he met requirements of the  
17 Section 8 program without regard to the challenged criterion. See  
18 Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1182 n.8 (6th  
19 Cir. 1996) (noting in the context of the ADA that "the plaintiff will  
20 have the burden of establishing that he or she is otherwise qualified  
21 to perform the essential functions of the job, absent the challenged  
22 job criteria or with proposed reasonable accommodation."); Ward v.  
23 Wal-Mart Stores, Inc., 140 F. Supp. 2d 1220, 1225 n.5 (D.N.M. 2001)  
24 (quoting same). Therefore, Plaintiff has alleged that he was  
25 "otherwise qualified" to participate in the Section 8 program aside  
26 from the challenged income regulations.

27 2. Denial of Benefits Solely Because of His Disability

28 Although Plaintiff has alleged that he is "otherwise qualified"



1 for the Section 8 program, his claim under the Rehabilitation Act  
2 fails because, as discussed in detail above, he does not allege that  
3 he was subject to discrimination solely because of his disability.  
4 The Rehabilitation Act was promulgated "to assure that handicapped  
5 individuals receive evenhanded treatment in relation to nonhandicapped  
6 individuals." Traynor v. Turnage, 485 U.S. 535, 548 (1988). It was  
7 not created to "guarantee the handicapped equal results" from a  
8 program. Alexander v. Choate, 469 U.S. 287, 304 (1985) (emphasis  
9 added). In Alexander, the Supreme Court recognized "two powerful but  
10 countervailing considerations" in interpreting Section 504: "the need  
11 to give effect to the statutory objectives and the desire to keep §  
12 504 within manageable bounds." Id. at 299. The relevant inquiry  
13 under Section 504 is whether a disabled individual has "meaningful  
14 access" to the benefits of a program. Id. at 301. If meaningful  
15 access is not provided, "[a] failure to provide reasonable  
16 accommodation can constitute discrimination under section 504 of the  
17 Rehabilitation Act." See Vinson v. Thomas, 288 F.3d 1145, 1154 (9th  
18 Cir. 2002); see also Alexander, 469 U.S. at 301 (stating that, "to  
19 assure meaningful access, reasonable accommodations in the grantee's  
20 program or benefit may have to be made.").<sup>8</sup> Similar to the FHAA,  
21 Section 504 imposes a causation requirement, although that requirement  
22 imposes a more stringent burden on Plaintiff, prohibiting  
23 discrimination "solely because of" Plaintiff's disability, rather than  
24 simply "because of" his disability. See Solidad v. United States

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25  
26 <sup>8</sup>The Supreme Court in Alexander did not preclude disparate impact  
27 claims under the Rehabilitation Act. 469 U.S. at 299. The touchstone  
28 for any claim under the Rehabilitation Act is therefore whether a  
disabled individual is "provided meaningful access to the benefit that  
the grantee offers." Id. at 301.

1 Dept. of Treas., 304 F.3d 500, 504 (5th Cir. 2002).

2 For the same reasons that he has failed to allege a claim under  
3 the FHAA, he has failed to state a claim under the Rehabilitation Act.  
4 Cf. United States v. California Mobile Home Park Mgmt. Co., 29 F.3d  
5 1413, 1416-17 (9th Cir. 1994) (relying on authority under the  
6 Rehabilitation Act to construe the reasonable accommodation provision  
7 in the FHAA). The Section 8 program provides meaningful access to  
8 disabled applicants and treats them equally to nondisabled applicants  
9 in determining low-income status. The whole purpose of the program is  
10 designed "[f]or the purpose of aiding low-income families in obtaining  
11 a decent place to live and of promoting economically mixed housing."  
12 42 U.S.C. § 1437f(a). To achieve that fundamental purpose, HUD  
13 requires all applicants to meet a low-income ceiling, disabled or not.  
14 The Court can certainly presume that some applicants who are disabled  
15 meet these guidelines, while some, like Plaintiff, do not. The same  
16 is true for non-disabled applicants: some are eligible based on  
17 income, some are not. Even more specifically, some individuals with  
18 special needs trusts, like Plaintiff, may or may not qualify for  
19 Section 8 assistance based on the income they receive from the trust.  
20 Thus, the low-income requirement provides meaningful access to all  
21 individuals, without regard to disability. See Alexander, 469 U.S. at  
22 304.

23 Further, as discussed in detail above, the Court cannot sanction  
24 Plaintiff's requested accommodation of waiving the income requirement  
25 to allow him to obtain a Section 8 subsidy. Such a fundamental  
26 alteration to the Section 8 program is not compelled by the  
27 Rehabilitation Act. See id. at 300 (noting that a "fundamental  
28 alteration in the nature of a program" is not required under the

1 Rehabilitation Act).

2 Plaintiff nevertheless challenges two specific HUD regulations to  
3 suggest that he was denied Section 8 benefits in violation of the  
4 Rehabilitation Act. Neither of these contentions compels a different  
5 result. First, he challenges 24 C.F.R. § 5.611(a)(3)(ii), which  
6 exempts from income calculations "[u]nreimbursed reasonable attendant  
7 care and auxiliary apparatus expenses for each member of the family  
8 who is a person with disabilities, to the extent necessary to enable  
9 any member of the family (including the member who is a person with  
10 disabilities) to be employed." As discussed supra at note five, this  
11 provision only applies to "adjusted income" for the purpose of  
12 calculating a family's share of rent in a subsidized unit, not to  
13 "annual income" for the purpose of determining initial low-income  
14 eligibility for the Section 8 program. Thus, Plaintiff's arguments  
15 directed at this provision are irrelevant to determining his program  
16 eligibility.

17 Second, Plaintiff alleges that the Federal Defendants "utilize  
18 methods of administration that have the effect of subjecting  
19 individuals with disabilities to discrimination" because "[l]ump-sum  
20 additions of assets do not make one ineligible for Section 8. Yet,  
21 Plaintiff, on the basis of his disability, requires a trustee, and  
22 therefore incurs court costs and fees and other expenses that  
23 defendants count as his personal income in determining his eligibility  
24 for subsidized housing." (Compl. ¶ 81.) Plaintiff argues that,  
25 "[e]ven if there were no expenditures or distributions from the  
26 special needs trust on his behalf, there are ongoing costs associated  
27 with the trust because it was established in court, as a result of his  
28 disability. Were it not for his disability, he would have none of the

1 costs which[,] even thought they do not benefit him, are nonetheless  
2 counted as income when calculating his countable income for purposes  
3 of determining Section 8 eligibility." (Opp'n at 14:23-15:2.)

4 Plaintiff again misses the mark. Even if HUD regulations count  
5 this as income, he has failed to allege that he was treated  
6 differently than anyone else applying for Section 8 benefits, whether  
7 with a special needs trust or not. The inclusion of these expenses in  
8 HUD's income calculations are not based upon Plaintiff's disability,  
9 but the existence of his special needs trust and the disbursements he  
10 receives from it, whether those disbursements pay for his needs or for  
11 the administrative expenses associated with the trust. While it may  
12 be an unwise policy decision to consider these expenses in Section 8  
13 low-income calculations, their inclusion does not demonstrate  
14 differential treatment because of Plaintiff's disability.

15 Like his claims under the FHAA, Plaintiff's seventh claim under  
16 the Rehabilitation Act challenges the legislative and administrative  
17 judgment under the Section 8 program. However wise or unwise these  
18 regulations might be, they do not violate his rights under the  
19 Rehabilitation Act and this claim against the Federal Defendants is  
20 DISMISSED WITH PREJUDICE.

21 **D. Qualified Immunity for Plaintiff's Second and Fourth Claims**

22 In his second and fourth claims, Plaintiff alleges equal  
23 protection and due process violations under Bivens v. Six Unknown  
24 Named Federal Agents, 403 U.S. 388, 415 (1971) against Federal  
25 Defendants Alphonso Jackson, K.J. Brockington, and Sebastian King in  
26 their individual capacities. The Federal Defendants assert qualified  
27  
28

1 immunity to bar these claims.<sup>9</sup>

2       The first question in determining whether officers are shielded  
3 by qualified immunity is whether, "[t]aken in the light most favorable  
4 to the party asserting the injury, . . . the facts alleged show the  
5 [officers'] conduct violated a constitutional right[.]" Saucier v.  
6 Katz, 533 U.S. 194, 201 (2001). If the plaintiff can establish a  
7 constitutional injury, then the court must determine whether the right  
8 was clearly established at the time of the violation. Id. For this  
9 second prong of the analysis, the Court must determine whether "the  
10 contours of the right [were] sufficiently clear that a reasonable  
11 official would understand that what he is doing violates that right."  
12 Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The  
13 "clearly established" inquiry "must be undertaken in light of the  
14 specific context of the case . . .," id., and with regard to the law  
15 at the time of the alleged violations, see Anderson, 483 U.S. at 639.  
16 Qualified immunity is not proper, however, when the facts demonstrate  
17 that a reasonable officer would have known his or her actions would  
18 violate the plaintiff's constitutional rights. See Martinez v.  
19 Stanford, 323 F.3d 1178, 1184-85 (9th Cir. 2003).

20       The Equal Protection clause of the Fourteenth Amendment directs  
21 "that all persons similarly situated should be treated alike." City  
22 of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). If no  
23 suspect classification or fundamental right is involved in the  
24 challenged statute or decision, these distinctions survive scrutiny if

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25  
26       <sup>9</sup>In his opposition, Plaintiff does not challenge the Federal  
27 Defendants' motion to dismiss his due process or statutory claims as  
28 they are alleged in his second and fourth causes of action. The Court  
deems these claims abandoned and GRANTS the Federal Defendants' motion  
to dismiss them WITH PREJUDICE.

1 they are "rationally related to a legitimate state interest." Id. at  
2 440.

3 Plaintiff argues that the individual Federal Defendants violated  
4 his equal protection rights by treating HUD income calculations  
5 differently under the voucher-based and project-based programs. His  
6 argument fails because, even accepting his allegations that HUD  
7 calculates income differently for tenant-based and project-based  
8 applicants, such a distinction is rationally related to the legitimate  
9 objectives of those programs. Both the tenant-based and project-based  
10 programs are created by 42 U.S.C. section 1437f, which, again, has the  
11 overarching goal of assisting low-income families in finding suitable  
12 housing. However, project-based assistance attaches to the property,  
13 while tenant-based assistance attaches to the tenant, rendering the  
14 two types of assistance distinct under the statute. Congress might  
15 have conceived of many reasons to create both project-based and  
16 tenant-based assistance programs, and HUD might have concluded that  
17 the income calculations for each program must be tailored differently.  
18 For example, HUD may have been dealing with an abundance of units  
19 covered by project-based assistance and a shortage of units covered by  
20 tenant-based assistance. It could have rationally concluded that, in  
21 light of this shortage, the low-income requirements for the tenant-  
22 based program must be tighter to ensure only the neediest applicants  
23 receive tenant-based assistance. One way to legitimately advance this  
24 goal would be to include something like a special needs trust in the  
25 low-income calculation. This might result in differing treatment of  
26 tenant-based and project-based applicants, but there is nothing

1 irrational or illegitimate about this distinction.<sup>10</sup>

2       These programs rationally "represent[] two different approaches  
3 to the provision of housing for low-income persons," see Hill v. Group  
4 Three Housing Dev. Corp., 799 F.2d 385, 394 (8th Cir. 1986), and a  
5 decision to include a special needs trust in calculating income  
6 eligibility in one program but not the other could certainly advance  
7 the legitimate interest in allocating limited resources to low-income  
8 applicants. As the Eighth Circuit aptly stated in a similar context,  
9 "[w]hat plaintiffs in essence are complaining about is a policy choice  
10 made by the same body politic within whose jurisdiction this dispute  
11 properly and exclusively belongs - Congress." Id.

12       Even if Plaintiff has somehow pled that the individual Federal  
13 Defendants violated his equal protection rights, for the purposes of  
14 qualified immunity, those rights were not clearly established at the  
15 time of the violation. See Saucier, 533 U.S. at 201. A  
16 constitutional right becomes clearly established for purposes of  
17 qualified immunity through case law. See, e.g., Lum v. Jensen, 876  
18 F.2d 1385, 1387 (9th Cir. 1989) ("In determining whether officials are  
19 entitled to qualified immunity, officials are charged with knowledge  
20 of constitutional developments at the time of the alleged  
21 constitutional violation, including all available case law.").  
22 Plaintiff has not cited a single case to support his claim that his

---

23  
24       <sup>10</sup>While the Federal Defendants do not suggest that this motivated  
25 HUD in making the distinction Plaintiff challenges here, it is enough  
26 under rational basis scrutiny that the Court can conceive of rational  
27 reasons for the challenged distinction. See F.C.C. v. Beach Commc'ns,  
28 Inc., 508 U.S. 307, 313 (1993) ("[A] statutory classification that  
neither proceeds along suspect lines nor infringes fundamental  
constitutional rights must be upheld against equal protection  
challenge if there is any reasonably conceivable state of facts that  
could provide a rational basis for the classification.").

1 equal protection rights at issue here were clearly established at the  
2 time he was denied Section 8 benefits. It is his responsibility to do  
3 so and the Court will not scour literally thousands of judicial  
4 decisions to make Plaintiff's argument for him.

5 Instead of citing case law, Plaintiff argues that his rights were  
6 clearly established because he sent the individual Federal Defendants  
7 a ten-page letter explaining his objections to the Section 8 income  
8 calculations. As a matter of law, Plaintiff cannot, himself, render  
9 the law clearly established merely by bringing his complaint to the  
10 attention of government officials. If this were the rule, any  
11 plaintiff could easily defeat qualified immunity simply by notifying  
12 an official of his complaint prior to bringing suit. Qualified  
13 immunity "provides ample protection to all but the plainly incompetent  
14 or those who knowingly violate the law." See Malley v. Briggs, 475  
15 U.S. 335, 341 (1986). To accept Plaintiff's argument would eviscerate  
16 qualified immunity for even those officials who act reasonably and in  
17 good faith with no knowledge that their actions might later be  
18 successfully challenged.

19 Therefore, Plaintiff has failed to state an equal protection  
20 claim against Federal Defendants Brockington, King and Jackson and,  
21 even if he could, they are entitled to qualified immunity.

22 Plaintiff's second and fourth claims are DISMISSED WITH PREJUDICE.

## 23 V. CONCLUSION

24 Plaintiff's allegations against the Federal Defendants are  
25 legally insufficient to state claims under the FHAA, the  
26 Rehabilitation Act, and the Equal Protection clause of the Fourteenth  
27 Amendment. Anti-discrimination laws like FHAA and the Rehabilitation  
28 Act, as well as constitutional provisions such as equal protection,



1 may be appropriate vehicles to challenge truly discriminatory laws and  
2 regulations related to Section 8 housing, but Plaintiff has simply  
3 failed to demonstrate that this is such a case. His complaints under  
4 the Section 8 housing program are appropriately handled, not by the  
5 Court, but by the legislative and administrative processes.

6 The Court DISMISSES Plaintiff's second, fourth, fifth, sixth, and  
7 seventh claims against the Federal Defendants WITH PREJUDICE, as the  
8 shortcomings of his complaint are legal and cannot be remedied by  
9 amendment. See Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806  
10 F.2d 1393, 1401 (9th Cir. 1986). Because no claims remain against  
11 Defendants HUD, Alphonso Jackson, K.J. Brockington, and Sebastian  
12 King, the Court DISMISSES them from this lawsuit.

13 IT IS SO ORDERED.

14 DATED: 4/9/08

*Audrey B. Collins*

AUDREY B. COLLINS  
UNITED STATES DISTRICT JUDGE