
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

SUPREME COURT
FILED

APR 16 2019

KERRIE REILLY,

Jorge Navarrete Clerk

Petitioner-Appellant,

Deputy

v.

MARIN HOUSING AUTHORITY,

Respondent-Appellee.

After the Decision of the First Appellate District,
Division Two, Case No. A149918

Affirming the Judgment of the Superior Court for the State of California,
County of Marin (Hon. Paul M. Haakenson), Case No. CIV 1503896

**BRIEF OF THE UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENT**

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We respectfully submit this brief in response to the Court’s order inviting the views of the United States. Petitioner Kerrie Reilly receives a rental assistance voucher under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f(o). For all Section 8 voucher recipients, the amount of the voucher is calculated by reference to the recipient’s annual income. *See* 24 C.F.R. § 5.628. Annual income is defined as “all amounts, monetary or not,” that an individual receives during the year, unless “specifically excluded” by the regulation. *Id.* § 5.609(a). One such exclusion is for “[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home.” *Id.* § 5.609(c)(16). As we explain below, the Superior Court and the Court of Appeal both correctly held that payments made directly to Reilly under California’s In-Home Supportive Services program to compensate her for time spent caring for her disabled daughter do not qualify for this exclusion, and thus are properly included in calculating Reilly’s annual income.

STATEMENT

A. Section 8 of the United States Housing Act of 1937 authorizes the U.S. Department of Housing and Urban Development (HUD) to provide rental assistance “[f]or the purpose of aiding low-income

families in obtaining a decent place to live and of promoting economically mixed housing.” 42 U.S.C. § 1437f(a). In general, there are two types of Section 8 assistance: “project-based” assistance and “tenant-based” assistance. 24 C.F.R. § 982.1(b)(1). Project-based assistance is tied to specific housing units. *Id.*; *see also id.* § 886.309. Owners of such units enter into long-term contracts with public housing authorities or HUD, under which they agree to rent the units to low-income families who meet Section 8 eligibility requirements in exchange for rental assistance payments from the government. *See* 24 C.F.R. § 886.311; 42 U.S.C. § 1437f(b), (f)(6). Tenant-based assistance is tenant-specific and travels with the tenant if the tenant moves. 24 C.F.R. § 982.1(b)(1)-(2); *see also* 42 U.S.C. § 1437f(f)(7), (o). In the tenant-based program, HUD provides funding to local public housing authorities that administer the program and provide vouchers which eligible tenants can use to pay the rent at the unit of their choosing. *See* 24 C.F.R. § 982.1(b); 42 U.S.C. § 1437f(f)(7). The tenant-based Section 8 program is known as the “Housing Choice Voucher” program. 24 C.F.R. § 982.1(a). Section 8 is not an entitlement program; Congress appropriates only a fixed sum for vouchers under both programs each year, and not every otherwise qualified family receives a voucher.

Under both the project-based and tenant-based voucher programs, tenants are required to pay a statutorily prescribed portion of the rent, typically equal to thirty percent of the tenant family's "adjusted income" or ten percent of their gross income, whichever is greater. 42 U.S.C. § 1437f(o)(2); *see also id.* § 1437a(a)(1); 24 C.F.R. § 5.628(a). The federal government pays the balance of the rent, up to a statutorily capped amount (known as the "payment standard" under the Housing Choice Voucher program). *See* 42 U.S.C. § 1437f(c), (o)(1)-(2).

HUD regulations define "[a]nnual income" broadly as "all amounts, monetary or not," which a family member receives unless "specifically excluded" by regulation. 24 C.F.R. § 5.609(a); *see id.* § 5.609(b) (providing illustrative list of amounts counted as "annual income"). One of the exclusions removes from annual income "[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home." *Id.* § 5.609(c)(16).

B. California's In-Home Supportive Services program (IHSS), Cal. Welf. & Inst. Code § 12300 *et seq.*, "provides supportive services to aged, blind, or disabled persons" to help those individuals "avoid institutionalization." *Basden v. Wagner*, 181 Cal. App. 4th 929, 931 (2010).

IHSS operates in part under the auspices of the Medicaid program, a cooperative program between the federal government and the States that provides medical assistance to certain persons “whose income and resources are insufficient to meet the costs of necessary medical services.” 42 U.S.C. § 1396-1. States that choose to participate in Medicaid must develop a “plan for medical assistance” for approval by the Secretary of the U.S. Department of Health and Human Services. *Id.* § 1396a. As part of this plan, States may develop home- and community-based care programs for individuals with disabilities and receive partial federal reimbursement for the cost of care. *See* 42 U.S.C. § 1396n(c); *Sanchez v. Johnson*, 416 F.3d 1051, 1054 (9th Cir. 2005).

Under the IHSS program, supportive services may be provided by a variety of entities, including by employees of a county, nonprofit consortiums, public authorities, voluntary nonprofit or proprietary agencies, or individuals. *See* Cal. Welf. & Inst. Code §§ 12301.6, 12302. The IHSS program also provides that parents may be compensated as supportive services providers in certain circumstances. Specifically, when a parent is the provider, the parent “shall receive remuneration for those services only when the provider leaves full-time employment or is prevented from obtaining full-time employment because no other suitable provider is available and where the inability of the provider to

provide supportive services may result in inappropriate placement or inadequate care.” *Id.* § 12300(e). Parent providers are also compensated only for specific types of services. *Id.* § 12300(e)(1)-(5).

C. Petitioner Kerrie Reilly provides full-time care for her developmentally disabled adult daughter. *Reilly v. Marin Hous. Auth.*, 23 Cal. App. 5th 425, 428 (2018). Reilly receives payments from the IHSS program for this care. *Id.* Since 1998, Reilly has also received a rental assistance voucher through the Housing Choice Voucher Program. *Id.* at 429. Reilly originally received a voucher for renting a three-bedroom unit to accommodate herself and two daughters. *Id.* One daughter moved out in 2004, but Reilly did not inform the Marin Housing Authority (MHA), which administers Reilly’s voucher, of her daughter’s departure until 2009. *Id.* As a result, MHA determined that Reilly was required to repay \$16,011 in voucher funds, and Reilly entered into a payment agreement with MHA. *Id.* After Reilly breached the agreement, MHA sought to terminate Reilly’s voucher. *Id.* Reilly contested the termination, arguing that MHA had miscalculated her voucher because the payments she received from IHSS should have been excluded from her income as “[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the

developmentally disabled family member at home.” 24 C.F.R.

§ 5.609(c)(16).

Both the Superior Court and the Court of Appeal rejected Reilly’s argument. As the Court of Appeal explained, a payment to “offset the cost of services” must be payments to offset “costs that the family itself incurs.” *Reilly*, 23 Cal. App. 5th at 434. And the term “cost” is naturally read to mean “the amount or equivalent paid or charged for something; price.” *Id.* at 435 (quoting *Merriam-Webster’s Collegiate Dictionary* 262 (10th ed. 2001)). Because Reilly provides care herself instead of employing another person to do so, “the cost of services that Reilly provides her daughter is, to Reilly, zero.” *Id.* This understanding also “treats comparably two families with a developmentally disabled family member” by treating the IHSS payments as a “substitute in the family’s budget for the money the parent would have earned outside the home” if the parent had opted to pay an outside provider for care. *Id.* at 437.

ARGUMENT

IHSS PAYMENTS TO MS. REILLY WERE PROPERLY TREATED AS INCOME BECAUSE THEY DO NOT “OFFSET THE COST OF SERVICES AND EQUIPMENT”

A. HUD regulations exclude from income “[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and

equipment needed to keep the developmentally disabled family member at home.” 24 C.F.R. § 5.609(c)(16). As the Superior Court and Court of Appeal correctly concluded, the natural reading of this regulation excludes payments made directly to Reilly for the care of her own daughter. Such payments do not “offset the cost of services” that Reilly provides; they compensate her for those services.

This understanding of the regulation flows from the usual meaning of its terms. Generally, the “cost” of something is its price in monetary terms. *See, e.g., Oxford English Dictionary* 988 (2d ed. 1989) (defining “cost” as “[t]hat which must be given or surrendered in order to acquire, produce, accomplish, or maintain something; the price paid for a thing); *Webster’s Third New International Dictionary* 514 (1967) (defining “cost” as “the amount or equivalent paid or given or charged or engaged to be paid or given for anything bought or taken in barter or for service rendered; charge, price”). Similarly, to “offset” something is “[t]o set off as an equivalent against something else or part of something else; to balance by something on the other side or of contrary nature.” *Oxford English Dictionary* 738 (2d ed. 1989); *see Webster’s Third New International Dictionary* 1566 (1967) (“to place over against: balance: counterbalance, compensate”). As this definition implies—and as the Court of Appeal correctly observed—a payment made to “offset” a

“cost” “must go to the same entity that incurs the cost.” *Reilly v. Marin Hous. Auth.*, 23 Cal. App. 5th 425, 434 (2018). In the context of § 5.609(c)(16), that entity is the “family” that incurs the monetary cost of “services and equipment” in caring for a developmentally disabled family member.

This straightforward understanding of the terms of the regulation resolves Reilly’s case. Reilly is compensated by IHSS for the time she spends caring for her daughter. Reilly thus incurs no “cost of services and equipment” that could be “offset,” because she pays no monetary price for the care that her daughter receives; “the cost of services that Reilly provides her daughter is, to Reilly, zero.” *Reilly*, 23 Cal. App. 5th at 435. Amounts Reilly receives from IHSS therefore are not excluded from her income when calculating her housing voucher.

Although this plain-meaning understanding is sufficient, this interpretation also accords with the basic policy objectives of the regulation. *See People v. Shabazz*, 38 Cal. 4th 55, 68 (2006) (“[I]f a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed.”). As HUD explained in promulgating § 5.609(c)(16), the exclusion exists because “families that strive to avoid institutionalization should be encouraged, and not punished.” *Combined Income & Rent*, 60 Fed. Reg. 17,388, 17,389 (Apr. 5,

1995). The regulation pursues this goal in part by ensuring that families that choose different means of keeping the developmentally disabled family member at home are treated evenhandedly. As the Court of Appeal explained, the plain-meaning understanding of the regulation treats identically “two families with a developmentally disabled family member: one family in which a third party cares for the disabled person, and the other in which a parent does.” *Reilly*, 23 Cal. App. 5th at 437. If a family relies on third-party care, the family’s costs for services and equipment to provide that care are excluded from income when calculating the amount of the housing voucher. In that scenario, any money that the family earns from working outside the home while the third party provides care is treated as income. *Reilly*, however, is compensated directly for the care that she provides to her daughter, without any corresponding outlay. That compensation substitutes for income *Reilly* could otherwise earn for working outside the home, and is therefore treated as income under the regulation. *See id.* at 438; *see also* Cal. Welf. & Inst. Code § 12300(e) (providing that a parent provider of care receives payment from IHSS “only when the provider leaves full-time employment or is prevented from obtaining full-time employment”).

This interpretation also accords with the only other case addressing the meaning of § 5.609(c)(16). In *Anthony v. Poteet Housing Authority*, the Fifth Circuit addressed the situation of a mother (Anthony) whose son received services through STAR+PLUS, Texas’s equivalent of the IHSS program. 306 F. App’x 98, 99 (2009). Anthony was hired by a private attendant services company that delivered STAR+PLUS services on the State’s behalf, and was assigned to care for her own son. *Id.* at 100. Anthony asserted that the income she received for caring for her son should be excluded from the calculation of her income under § 5.609(c)(16). *Id.* at 101. The Fifth Circuit rejected that argument, holding that “the regulation is clear” that “[o]ne must incur costs before they can be offset,” and that Anthony had “incurred no costs which must be offset with state funds.” *Id.* Although the payments to Anthony “coincide[d] with state funds that are set aside for her son’s care,” that fact did “not make that income a form of reimbursement.” *Id.* at 101-02. And while Anthony contended that the services provided “have a cost,” the Fifth Circuit observed that the services were “free” from Anthony’s perspective: “[s]he has no out-of-pocket expenses—‘costs’—that must be reimbursed or ‘offset’ by the state.” *Id.* at 102.

B. Reilly argues (Br. 14-16) that the term “cost” in § 5.609(c)(16) does not have its usual meaning of a monetary “price,” but instead refers

to the broader set of “sacrifice[s]” of “time, freedom, and energy” that families with developmentally disabled members make on a daily basis. HUD recognizes the considerable challenges that families like Reilly’s face. But Reilly identifies no textual reason to displace the “more common and concrete” meaning of “cost” as referring to the monetary price paid for something. *Reilly*, 23 Cal. App. 5th at 435. And in the context of § 5.609(c)(16), reading “cost” to refer to a monetary price paid is further reinforced by the fact that the regulation also refers to the “cost . . . of equipment,” which is generally understood to have a monetary cost. For the same reasons, the Court of Appeal correctly rejected the suggestion that § 5.609(c)(16) excludes from income the “opportunity cost” Reilly incurs by offsetting Reilly’s “loss of income in staying home to care for her daughter.” *Reilly*, 23 Cal. App. 5th at 434-35. The regulation excludes from income amounts paid “to offset the cost of *services and equipment*”—in other words, the actual outlay by the family—not the opportunity cost of providing services.

Reilly looks for textual support by comparing § 5.609(c)(16) to other exclusions in the same regulation, contending that other provisions contain language limiting their “coverage to reimbursement for . . . out-of-pocket expenses.” Br. 17; *see* Br. 20-21; Reply 6-7. To be sure, other exclusions from income use the phrase “specifically for or in

reimbursement of” certain expenses or costs. *See* 24 C.F.R. § 5.609(c)(4) (excluding “[a]mounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member”); *id.* § 5.609(c)(8)(iii) (excluding “[a]mounts received by a participant in other publicly assisted programs which are specifically for or in reimbursement of out-of-pocket expenses incurred . . . and which are made solely to allow participation in a specific program”). But a drafter need not employ precisely the same language to accomplish the same ends; just as “[d]ifferent bills, drafted by different authors, passed at different times, might well use different language to convey the same basic rule,” *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.*, 4 Cal. 5th 1082, 1093 (2018), exclusions from income promulgated over time may use different formulations to reach the same result. And nothing in either § 5.609(c)(4) or § 5.609(c)(8)(iii)—both of which predated HUD’s addition of § 5.609(c)(16)—changes the ordinary meaning of “cost” in § 5.609(c)(16), much less what it means to “offset the cost of services and equipment.”

Reilly also suggests that § 5.609(c)(16) must be read broadly because of the public policy goals the exclusions from income serve. Br. 22-24. But § 5.609(c)(16) does not categorically exclude from income all “amounts” that a family receives through IHSS and similar programs; it

limits the exclusion to amounts paid “to offset the cost of services and equipment.” Although the exclusion is designed to encourage families to provide care for developmentally disabled family members at home, it does not pursue that goal by ignoring the material differences between families with members who use state support to work outside the home and those who receive the same support in the form of compensation for work performed in the home. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (observing that no provision “pursues its purposes at all costs” (quotation marks omitted)); *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1167 (2013) (same). To the extent that Reilly believes that the IHSS program itself should be operated in a more generous fashion, *see* Br. 31-33, those concerns are not a reason to disregard the plain meaning of § 5.609(c)(16).

Reilly’s suggestion that the regulation treats similarly situated families equally because no family would ever see its rent increase when it receives IHSS payments, Br. 30, disregards the differences among families that the regulation is designed to respect. If Reilly is correct that many families do not use IHSS funds to enable a family member to work (Br. 32), then it is all the more anomalous that a family that receives IHSS payments as compensation for a parent performing in-home care should have those payments excluded from income in voucher

calculations. Families, like Reilly's, that receive IHSS funds as compensation would be able to spend those funds on household expenses without devoting any greater amount to rent. But families that rely on third parties for care, and do not earn other income by working outside the home, would have no comparable source of funds for household expenses, while receiving a voucher identical to Reilly's. Section 5.609(c)(16) prevents this sort of inequity by distinguishing between costs actually incurred and paid by the family and amounts paid to the family as compensation.

Finally, Reilly suggests that the federal tax treatment of IHSS payments is relevant to the interpretation of § 5.609(c)(16). Br. 33. But HUD's regulations governing income look broadly to "all amounts" a family receives, regardless of their particular tax treatment. 24 C.F.R. § 5.609(a); *see, e.g., id.* § 5.609(b)(1) (including in income "[t]he full amount, before any payroll deductions, of wages and salaries"). That IHSS payments may be "excludable from gross income" in calculating federal income tax, Br. 33, does not affect whether they qualify as income for purposes of calculating the amount of a recipient's housing voucher, nor does it determine whether they are payments made "to offset the cost of services and equipment" for purposes of § 5.609(c)(16).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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April 2019

CERTIFICATE OF COMPLIANCE

This brief contains 3,148 words, as reported by Microsoft Word

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CERTIFICATE OF SERVICE

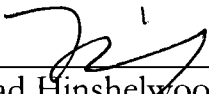
I am over 18 years of age and not a party to this action. I am employed in the City of Washington in the District of Columbia. My business address is 950 Pennsylvania Avenue NW, Washington, D.C. 20530.

Pursuant to California Rule of Court 8.25(a)(2), I hereby certify that on April 15, 2019, I caused an original and thirteen copies of the foregoing amicus brief to be sent by overnight Federal Express to the Clerk of Court of the Supreme Court of the State of California. In addition, I electronically served a copy on the interested parties in this action by email to the following counsel:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



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