NATIONAL MULTIFAMILY HOUSING COUNCIL

NATIONAL APARTMENT ASSOCIATION

WHITE PAPER | MARCH 2016

Fair Housing: Familial Status and Occupancy

By MICHAEL W. SKOJEC, ESQ. and MICHAEL P. CIANFICHI
BALLARD SPAHR LLP

Executive Summary

The Fair Housing Act, *inter alia*, prohibits discrimination in housing rental or conditions based on specific protected classes, such as race, sex, religion, national origin, and, pertinently, familial status. Courts assess whether a housing provider discriminates based on familial status by inquiring if families with children are treated differently. A policy that specifically restricts children (such as a pool-use age restriction) will be subject to scrutiny by the court that assesses if the policy furthers a compelling goal (like safety) in the least imposing way on the protected class. The important—and sometimes difficult—concept to understand when drafting a policy is that familial status is equally as protected as the other categories. Therefore, when drafting a policy that singles out children in a restrictive way, one must ask whether that policy would seem discriminatory if "children" were replaced with, e.g., a particular race. If so, as the cases below discuss, then the policy may be unlawful under the Fair Housing Act. There has been a marked increase in familial status suits over the past several years, with many more that settle under consent agreements for monetary damages to the aggrieved person(s), making the potential for these claims serious.

Occupancy restrictions similarly cannot discriminate based on familial status. Although the Keating Memo—an often cited HUD internal guidance memorandum—provides for a two persons per bedroom policy as being reasonable, courts consider this a rebuttable presumption to be analyzed with respect to a totality of factors including the size and configuration of the bedrooms and unit as well as the age of the children occupants. Single room occupancy units present a particular challenge with respect to restrictions on renting to families with children because the courts must balance the safety and welfare of children living among strangers with the federal mandate not to discriminate. Just as housing providers generally cannot restrict children from using certain amenities, so too can they not restrict families with children from renting a dwelling altogether or limiting them to certain floors or areas. HUD frequently employs housing testers to test whether housing providers express discriminatory preferences or steer potential tenants of a protected class, which violates the Fair Housing Act.

The information provided herein is general in nature and is not intended to be legal advice. It is designed to assist our members in understanding this issue area, but it is not intended to address specific fact circumstances or business situations. For specific legal advice, consult your attorney.

NMHC/NAA Joint Legislative Program
1850 M Street, NW, Suite 540
Washington, DC 20036

202 974 2300 Phone | www.nmhc.org

Introduction

This memorandum consists of three parts. First, it explains the legal standard for bringing a claim under the Fair Housing Act ("FHA") and how courts analyze disparate impact versus disparate treatment claims. Part II details recent case trends in familial status lawsuits pertaining to discriminatory policies against children. Part III provides an overview of the current state of the law on occupancy restrictions relating to families with children.

Legal Standard

The important—and sometimes difficult—concept to understand when drafting a policy is that familial status is equally as protected as the other categories.

One must ask whether that policy would seem discriminatory if "children" were replaced with, e.g., a particular race.

Lawsuits filed against housing providers for unlawful familial status discrimination are brought under the FHA, which makes it unlawful for a housing provider to discriminate based on familial status (i.e., families with children) in the terms or conditions of selling or renting housing.[i] The FHA also prohibits a housing provider from making any statements or representations related to housing rentals or sales that indicate any preference, limitation, or discrimination based on familial status.[ii] Congress added this FHA provision prohibiting discrimination based on families with children under 18 in 1988.[iii]

A housing provider can defend a discrimination lawsuit by arguing: (1) that it has "legitimate non-discriminatory reasons" for its policy; or (2) that the policy constitutes a "compelling business necessity in the least restrictive means." Whether a defendant can assert the lower (former) or higher (latter) standard depends on if the plaintiff merely showed a disparate impact using circumstantial evidence or if the plaintiff made a prima facie showing of discriminatory intent (disparate treatment). Although relevant, a defendant need not have subjectively intended to discriminate to violate Section 3604.

***Disparate impact*:** Plaintiffs are allowed to bring a claim under disparate impact theory with the rationale that sometimes there are outwardly neutral-seeming policies that actually have a significantly adverse or disproportionate impact on a particular type of protected class.[iv] Even if the defendant did not intend to discriminate, a claim can still be brought under disparate impact theory if such disproportionate effect is shown.[v] Since this theory rests on neutral—as opposed to explicit—discriminatory policies, a defendant can rebut disparate impact allegations by showing that it has a legitimate and legally sufficient non-discriminatory reason for the policy.[vi] If the defendant satisfies that burden, the plaintiff then must show that the defendant's articulated reason is pre-textual.[vii] This burden shifting framework under disparate impact theory is referred to as *McDonnell Douglas* burden shifting and it is worth reemphasizing that it only applies in cases of disparate impact theory, not disparate treatment, where "the plaintiff relies on circumstantial evidence of discriminatory intent—not when the policy discriminates on its face."[viii]

Disparate treatment: A plaintiff can alternatively make a prima facie case for disparate treatment by showing that a protected group, such as families with children, are subject to explicitly different and discriminatory treatment with direct evidence.[ix] Disparate treatment allegations can be defended by showing that the policy constitutes a "compelling business necessity in the least restrictive means."[x]

Courts analyze familial status discrimination suits most often under disparate treatment theory because the policies at issue tend to explicitly discriminate against families with children by singling out children in the policy or rule. For example, the court in *Iniestra v. Cliff Warren Investments* used a disparate treatment in analyzing a rule that stated, "children on the premises are to be supervised by a responsible adult at all times."[xi] The policy involved disparate treatment because it explicitly discriminated against children as opposed to being facially neutral. In contrast, the court in *Dumas v. Sunview Properties* used disparate impact theory to review a rule that stated, "No playing with balls, bicycles, roller blades and other toys on the property."[xii] Disparate impact theory was the proper standard because the rule was neutral on its face and did not explicitly target any particular protected class.[xiii]

A rule is facially discriminatory (i.e., creates disparate treatment) if it treats children (and therefore families with children) differently than it treats adults.

Familial Status

Pool Rules

The first step in a typical familial status discrimination suit is that the plaintiff makes a prima facie showing of discrimination. A rule is facially discriminatory (i.e., creates disparate treatment) if it treats children (and therefore families with children) differently than it treats adults.[xiv] For this reason, pool rules that restrict or single out children can be facially discriminatory.

Examples of pool rules that courts have deemed unlawfully discriminatory include:

- "Children under the age of 18 are not allowed in the pool or pool area at any time unless accompanied by their parents or legal guardian."[xv]
- "Under no circumstances may a child under the age of 18 be in the pool or in the pool area without a parent."[xvi]
- Children must leave the pool by 6:30 pm and must be supervised by a resident relative at all times when using the pool.[xvii]

Once the plaintiff has made a prima facie showing of disparate treatment, the burden shifts to the defendant to "articulate a legitimate justification for their rules" that will "establish that their rules constitute a compelling business necessity and that they have used the least restrictive means to achieve that end."[xviii]

Defendants often assert—and lose—with the defense that their pool rules are to ensure the safety of children. This defense fails because the rule must be the "least restrictive" means of achieving the asserted goal (here, safety). In *Iniestra*, the court pointed out that achieving safety by requiring parental guardians for minors was ineffective because a person younger

than a parent might in fact be a better swimmer than an older parent.[xix] Requiring parents to supervise children, as opposed to any competent adult, "transforms this rule from one that could be reasonably interpreted as a safety precaution to one that simply limits children and their families."[xx]

For these reasons, courts have "uniformly held" that rules requiring parental guardians for minors at a pool violate the FHA.[xxi] Some courts have even found that requiring any supervisory adult for minors at a pool is unduly restrictive, noting that a rule prohibiting a certified 17 year-old lifeguard from swimming unaccompanied by an adult would be overly restrictive.[xxii]

Courts will also consult what the specific state law on swimming dictates. In *Iniestra*, the court discussed how California state law required only children under the age of 14 to be supervised while swimming, which factored into the court's decision to strike the pool rule requiring supervision for those 18 and under.[xxiii] By contrast, rules requiring adult supervision of very young children during specified activities, like swimming (or riding bikes) have been held to be justified.[xxiv]

Defendants often assert—and lose—with the defense that their pool rules are to ensure the safety of children.

In a recent consent order between HUD and a housing provider settling a familial status discrimination complaint, HUD's order directed that the housing provider rescind its policy that prohibited children under 12 from the pool area or swimming in the pool unless accompanied by an adult over 18 years old. Although the consent order does not indicate what maximum age would be permissible to require adult supervision for swimming (if any), it does show that HUD opposes restrictions that set the bar at 12 and under. A HUD consent order does not carry precedential weight like that of a judicial opinion, however.

Adult-Only Pool Use Rules

One court to review an adult-only pool use rule granted a preliminary injunction against the housing provider in favor of the plaintiffs, though the case ultimately settled out of court.[xxv] The rule at issue prohibited children from using the main pool, except in the late afternoon and during certain holidays and events.[xxvi] The court rejected the defendant's justification for the rule in that adults prefer tranquility for "lap walking" or lap swimming.[xxvii] The court analogized that this restrictive rule is equally as unlawful as a rule that prohibits women or Iraqi nationals from swimming during certain hours.[xxviii] While peace and quiet are a worthy goal, they are not sufficiently valid justifications for denying access to common facilities because of familial status.[xxix]

In a similar scenario, a housing provider prohibited children from using the swimming pool except during specified two to four hour intervals depending on the day of the week.[xxx] The court rejected the defendant's justification of "equitably accounting for the interests of all tenants" as a compelling interest and deemed the rule plainly discriminatory toward children.[xxxi] The court stated that the desire of the adult tenants to discriminate against children will never justify familial status discrimination.[xxxii]

The defendant in *Brookside Village* attempted to justify its adult-only pool use time restrictions on the basis of safety concerns, which this court, like the others, rejected.[xxxiii] The

defendant failed to show how children swimming in a pool could be more dangerous at certain times of the day over others to justify such time restrictions, especially in light of the adult supervision requirement in place.[xxxiv]

Best Practices

Rules that broadly target all children will be facially discriminatory, therefore efforts should be made to construct rules that specify their basis (safety) and narrowly target the subgroup of children to which the rule applies. Consult local state law on swimming age supervision. Rules that specifically require parental guardian supervision, as opposed to supervision by any competent swimmer or adult, should be avoided. Courts reject "adult only time" rules that limit children from swimming in the pools during certain hours.

Rules that broadly target all children will be facially discriminatory.

General premises rules, specifically regarding adult supervision of children, also tend to be problematic for facial discrimination.

Curfew Rules

Curfew rules that likewise broadly target all children can discriminate against familial status. Three examples of such unlawfully discriminatory rules are below:

- "When the building lights come on all children are to be in their apartments. This is for the protection of the children and respect of your neighbors. Knott Village Apartments is a quiet complex and we must insist the children play in a place more suitable for them."[xxxv]
- "[P]ersons under the age of 18 must be in their home or on their patio after sunset."[xxxvi]
- "Persons under the age of 18 must abide by the set curfew of 10:00 P.M."[xxxvii]

Because these rules treat children differently than adults, they are facially discriminatory and are subject to the heightened "compelling business necessity through the least restrictive means" defense. The defendants in *Sonoma* asserted safety and crime prevention in defense of the rule confining children to their homes at night. The court deemed this defense unpersuasive because it could not evaluate the legitimacy of the "intangible goal of general crime prevention" without any specific evidence that children in this area were so heavily disposed to criminal activity that such a broad rule was warranted.[xxxviii]

When raising this type of safety defense, the defendant must show that the rule responds to legitimate safety concerns posed by the individuals restricted and is not merely based on stereotypes.[xxxix]

Best Practices

Courts will be reluctant to find broad curfew rules encompassing all children as sufficiently "least restrictive" and instead will look to see if the rule is tailored to a legitimate and documented problem. Defendants asserting crime prevention should be prepared to have evidence to support the claim.

Premises Rules

SUPERVISION:

General premises rules, specifically regarding adult supervision of children, also tend to be problematic for facial discrimination. Examples of rules that violate the FHA include the following:

- "All kids must be supervised by an adult who will be made responsible of [sic] any damage done by the kids to the building, such as destroying the plants, etc."[xl]
- "Children on the premises are to be supervised by a responsible adult at all times."[xli]

General premises rules, specifically regarding adult supervision of children, also tend to be problematic for facial discrimination

As seen in the prior discussions, rules that restrict *all* children are overly broad.[xlii] Rules requiring adult supervision on the premises of children at all times are not just justified because, like above, they are not the least restrictive means of accomplishing the rule's goal, which is normally safety.[xliii] For example, the defendant in *Iniestra* contended that the supervision rule was required for child safety, but failed to address why a child would need adult supervision when not near any potentially dangerous areas.[xliv]

In a recent consent order between HUD and a housing provider, HUD mandated that the provider rescind its policy of requiring children under age 12 to be accompanied at all times by an adult over 18 anywhere on the premises. This mandated rescission applied to policies that restricted children's access to areas including the laundry room, gym, and clubhouse rooms. This consent order displays HUD's disapproval of rules that broadly restrict children's access without compelling justifications and least restrictive means.

Best Practices

If there are specific safety hazards that affect specific age groups, the rules should be tailored to those concerns, but the rules should not generally restrict all children from all areas of a premises at all times of the day and night.

NOISE:

When legitimate reasons exist for enacting a rule, like reducing noise or attire decency, courts want to see that the rule applies to all people and does not specifically target children and as a result discriminate on familial status. The following noise and attire rules provide examples of how a rule can be cured to survive familial status court scrutiny.

In *Rojas*, the defendant had the following noise rule that the court deemed unlawful: There is to be no "loud and boisterous activity on the premises, music played loud and/or with too much bass, a continuous or excessive number of guests, *noisy children*, or vehicles with very loud exhaust system."[xlv] (emphasis added)

The defendant asserted that its "compelling business necessity" in enacting the facially discriminatory rule was to provide a "quiet and well maintained environment" for tenants.[xlvi] While that goal was legitimate, the rule was not written in the least restrictive means, prompting the court to explain how the rule could be amended to comport with the law. The

court explained that there "is no need to single out 'noisy children' as a particular problem to be avoided when the Noise Rule already lists 'loud and boisterous activity.' This rule could accomplish its purpose equally effectively if it referred instead to 'noisy people.'"[xlvii] By deleting the words "noisy children," the rule likely would have been entirely lawful.

Best Practices

The *Rojas* court provides instructive guidance on the type of language courts want to see in rules. If there is a legitimate goal, like reducing noise volume, that noise restriction should equally apply to all residents and not just children (or members of a certain race religion, or any other of the protected classes for that matter).

ATTIRE RULES:

Similarly, the following rule on attire was deemed lawful precisely because it generally applied to all people and did not target only children:

- "[T]hat all residents wear proper attire when walking on the streets of the development, no boys should be shirtless, and girls must wear a cover up over a bathing suit when walking to the pool."[xlviii]

In reviewing this rule, the court denied the plaintiff's motion for summary judgment because, although the latter half of the sentence uses the terms "boys" and "girls," the first half of the sentence referenced all residents and made it ambiguous enough on whether the rule specifically targeted children. Despite that this rule survived summary judgment, a better rule would have used the terms "males" and "females" instead so to make clear that it was a rule of general applicability.

Best Practices

Make attire rules applicable to all members of the particular gender so that children are not restricted in a way that other adults are not.

GYM AND LAUNDRY ROOM RULES:

The housing provider in *Landesman* had a facially discriminatory gym use rule that survived the plaintiff's motion for a preliminary injunction:

- Children under 16 are prohibited from using gym equipment at any time and may not be present in the gym unless accompanied by an adult.[xlix]

The court did not grant a preliminary injunction against the housing provider for this rule, but that does not necessarily mean that the rule would have been upheld at trial, as the case ultimately settled before trial. Nevertheless, the court found that the defendant's safety justification for not allowing children under age 16 to use gym equipment was sufficient.[l]

Prohibitions on children's access to certain facilities within a clubhouse are also disfavored by the courts, for example, the following rule:

- All children must be supervised by their parents in the laundry room area.[li]

The court did not specifically address the laundry room access rule, but instead addressed it generally with other "adult supervision" rules at issue. The court determined these rules to be overly broad and not the least restrictive means of achieving its purported goal of health and safety.[lii]

Best Practices

There is a dearth of case law relating to gym and laundry room rules, but the two courts to have analyzed the above rules are consistent with other court rulings discussed in this memorandum. The presence of dangerous and heavy gym equipment is a more compelling safety interest than the other aforementioned prohibitions. At the same time, the prohibition on laundry room access is comparable to the other discriminatory supervision rules where a strong health and safety interest, unlike that of a gym, is not present.

Rules restricting children from playing in common areas are unlawful and can lead to expensive settlements.

Although case law does not discuss rules regarding business centers, a rule that prohibits children from entering a business center would be facially discriminatory under disparate treatment. A rule, however, that generally prohibits loud noise and recreational games in a business center could be valid, as it does not single out children and contains a general prohibition applicable to all persons and does not specifically state that "children cannot play games or make loud noise in business centers."

NO PLAYING RULES:

Two recent settlements announced by the Department of Justice ("DOJ") highlight how rules restricting children from playing in common areas are unlawful and can lead to expensive settlements. In *United States v. Greenbrier Homeowners Association* and *United States v. Woodland Garden Apartments*, the DOJ brought suit because the defendants enacted rules that restricted children from playing in common areas that did not equally restrict adults. Each defendant settled for around one hundred thousand dollars and consented to cease these prohibited practices. In the consent order, Greenbrier Village agreed to not "[r]equire that children be supervised by an adult when playing in common areas . . . unless the requirement or rule is narrowly tailored to meet a compelling purpose, such as safety in a swimming pool or exercise facility." The press release for the Woodland Gardens case emphasized that an "apartment complex may not impose conditions on families with children that they do not impose on other residents."

The defendant in *Rojas* likewise had recreation rules that were struck down by the court because the purported safety goal was not met in the least restrictive means. There, the defendant's rule stated:

- "Under no circumstances may children play on stairwells, walkways, or carports. Under no circumstances may children[s'] toys or vehicles be used in the above areas or in pool area."[liii]

This rule was facially discriminatory because it treated children less favorably than other persons, and although the defendant asserted a compelling goal of child safety, the rule was not the least restrictive means of ensuring safety. The court explained that if a defendant is concerned about safety in the stairways, then *all* residents should be banned from playing on them, not just children.[liv]

Permissible Playing Rules

In contrast, a rule that does not discriminate against children, but still ensures orderly premises with respect to playing with toys, is the rule in *Fair Housing Congress v. Weber* that stated:

- "Bikes, carriages, strollers, tricycles, wagons, etc. must be kept inside apartments or in garage areas and not left outside."[lv]

The word "children" should be avoided in all rules.

This rule was not facially discriminatory, despite specifying common children's toys, because it also included objects used by adults. Further, the defendant had a compelling safety reason in that the sidewalks were narrow and objects left on them would present a danger.[lvi] Another example of a lawful playing rule because it did not specifically target children was analyzed by the court in *Dumas*:

- "No playing with balls, bicycles, roller blades and other toys on the property."[lvii]

Since this rule is neutral on its face, the plaintiffs used disparate impact theory to show that it was nonetheless unlawful by arguing that it adversely and disproportionately impacted children. This argument failed because the court found no evidence in the record that children were more likely to engage in the prohibited activities than adults.[lviii]

Best Practices

These latter cases highlight that the best rules to implement to alleviate the safety concern that toys pose is to enact a broad rule that includes objects played with by both adults and children and to enforce the rule in an even-handed manner. One court suggested that instead of age restrictions for using bikes on the premises, legitimate safety goals could be better served by requiring bicyclists (or swimmers, for that matter) to pass a proficiency test to ensure the safety of residents in a non-discriminatory way.[lix]

Summary of Best Practices

***Wording Matters*:** Rules that specifically single out and restrict children are facially discriminatory. The word "children" should be avoided in all rules. One must think of children the same way as the other categories of protected groups (race, religion, gender, national origin). Just as a rule could not lawfully prohibit all Italians from being outside after dark, or all Christians from making loud noises, so too can rules not prohibit children in these ways. Rules must be generally applicable.

***Use Broad and Inclusive Language*:** Use all-inclusive terms like "all residents" instead of specifying a group. In prohibiting certain activities or objects, include a list of nouns that include words that relate to both adults and children.

***Discuss and State Justifications*:** In case a court finds a rule discriminatory, be prepared with a legitimate and compelling business necessity reason that is furthered in the least restrictive way. Discuss and write down these justifications during the process of drafting the rule.

***Narrowly Tailor*:** The goal of the rule must be furthered in the least restrictive means possible. Think about how to narrow a rule's effect so that it is not unduly restricting unnecessary persons.

***Prior and Outdated HUD Legal Opinion (the "Wilson Memo")*:** Contrasting a 1992 Legal Opinion from HUD's Associate General Counsel Carole Wilson[lx] with the above case law discussions demonstrates how much has changed in the roughly three decades since the passage of the FHA Amendments in 1988 that incorporated familial status into a protected class. Namely, HUD and the courts no longer provide as much deference to housing providers in determining whether a restrictive facilities use rule is reasonable in light of safety concerns.

In the 1992 Memorandum, Wilson outlines the Office of General Counsel's permissive view on rules that discriminate against children but are justified by health and safety concerns. As discussed above, recent case law departs from such a deferential approach to discriminatory and restrictive rules, indicating that the Wilson Memo is no longer valid authority. In the memo, Wilson states that, "the [Fair Housing] Division believes the [Fair Housing] Act does not prohibit housing providers from imposing reasonable health and safety rules designed to protect minor children in their use of facilities associated with the dwellings (e.g., requiring adult supervision of young children using a swimming pool without lifeguards)."[lxi]

For example, the Wilson Memo discusses a case where HUD found no reasonable cause to bring a discrimination charge where the housing provider prohibited all children under age 18 from using any of the complex's swimming pools unless accompanied by their parent.[lxii] The Office of General Counsel determined that the unusual design of the pool with sharp edges, coupled with the fact that there was no lifeguard, rendered the prohibition a reasonable means of ensuring safety. The Wilson Memo emphasized that the FHA does not "limit the ability of landlords . . . to develop and implement reasonable rules and regulations relating to the use of facilities associated with dwellings for the health and safety of persons."[lxiii]

As the Wilson Memo indicates, the notable difference between case law interpreting FHA familial status discrimination now versus in the early 1990's is the extent to which the FHA Amendments protect against discrimination on habitation versus facilities use. The Wilson Memo notes that the restrictive pool-use rule was permissible because:

> [H]ousing providers' rules lawfully can limit children's use of facilities associated with dwellings, but housing providers are prohibited from adopting rules which exclude families with children from the dwellings themselves. In Fernandez, the housing provider's policy did not exclude families with children from the housing or restrict them to certain units. Instead, it addressed a potential danger to children

> from the complex's facilities (in this case, its swimming pools), not by prohibiting families with children from living in the complex or restricting them to certain locations; rather, in a reasonable fashion, it limited the perceived risk by limiting children's access to the potentially dangerous facilities.[lxiv]

HUD's Office of General Counsel focused its inquiry on whether families with children were entirely barred from living at the complex—which they were not. In contrast, contemporary courts give equal weight as to whether a rule restricts the ability of families with children to live at the dwelling *and use its facilities*. Indeed, the rule at issue in the Wilson Memo case is identical to the rules in *Rojas* and *Iniestra* that the courts struck down as discriminatory.[lxv]

The Wilson Memo also discusses a case where rules prohibiting children under 14 from using the pool without an adult and prohibiting children under 18 from using the clubhouse billiards room without a parent were deemed legitimate due to safety concerns and maintaining the facilities condition.[lxvi] Such a restrictive rule would almost certainly be deemed unlawfully discriminatory by a court or HUD today under a disparate treatment analysis. The discussion and cases in the Wilson Memo highlight how HUD's interpretation of familial status discrimination has expanded since the law's inception.

The Keating Memo then illustrates hypothetical examples of when the two person per room rule may not be reasonable.

Occupancy Restrictions

Occupancy restrictions and discrimination present easier sets of facts in determining an FHA violation. In short, it violates the FHA to refuse housing to a prospective tenant solely because the tenant has children. Regarding occupancy limitations, the HUD-issued Keating Memorandum provides for a two person per bedroom limit as being reasonable, though that limit is rebuttable in light of certain other factors. Familial status discrimination that is not express, but instead disguised in the form of steering or preferences, likewise violates the FHA.

OCCUPANCY RESTRICTIONS & THE KEATING MEMO:

The Keating Memorandum

In March of 1991, HUD released the so-called Keating Memorandum that attempted to clarify HUD's position on FHA violations relating to occupancy restrictions.[lxvii] The Keating Memo clarified that HUD and DOJ, as a general rule, considered an occupancy policy of two persons per bedroom to be reasonable, but that reasonableness is rebuttable and is not a bright line rule.[lxviii]

The Keating Memo then illustrates hypothetical examples of when the two person per room rule may not be reasonable.[lxix] Factors relevant in this analysis include the size of the bedroom and overall unit, the age of any children occupants, the configuration of the unit, state and local laws, and other physical limitations of the building.[lxx] The Keating Memo, later incorporated into the Federal Register by Congress, is still valid HUD policy and the Keating

factors serve as a reminder that it is ultimately a totality test and there is not a bright line rule on occupancy restrictions.

The Keating Memo, however, has not always represented HUD's position with respect to occupancy restrictions. For a brief period in 1995, HUD's "Diaz Memo" was in effect, which advocated a bright line rule where housing providers would have "safe harbor" if their occupancy policies complied with the Building Officials and Code Administrators (BOCA) model code.[lxxi] This objective standard was based on calculating minimum square footage requirements per person. The Diaz Memo was withdrawn three months after its issuance due to industry backlash by subsequent HUD guidance that reinstated the Keating Memo totality test and abrogated the square footage test usage.[lxxii]

Case Law

The following cases demonstrate situations where the two person per bedroom guidance is not reasonable in light of the other Keating Memo factors:

In *Rhode Island Comm'n for Human Rights v. Graul*,[lxxiii] the defendant forced the married plaintiffs to move out of their one-bedroom apartment after they had a child, which had led to three persons living in that one bedroom apartment. The defendant based this action on its two persons per bedroom policy. The plaintiffs brought a disparate impact action, which the defendant defended by asserting that it was merely following the guidance of the Keating Memo.

The court, however, held that neither the Keating Memo itself, nor the defendant's attempt to "comply" with the memo constituted legitimate business interests that justified their policy action of forcing the plaintiffs to move out. The court noted that the Keating Memo is mere internal guidance, is not enforceable as a liability rule, and cannot be used as protection from a policy that discriminates on the basis of familial status. The *Graul* case demonstrates that the FHA trumps the Keating Memo when the Memo's guidance would be unreasonable, which, here, was because the third occupant was a baby infant.

Similarly, in *Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc.*,[lxxiv] the defendant forced the married plaintiffs to move out of their one-bedroom apartment after the wife gave birth to a baby, raising the level of occupants in their one bedroom apartment to three. The defendants similarly invoked a policy that limited occupants to two persons per bedroom.

In ruling for the plaintiffs, the court pointed out that the Keating Memo states that compliance is a totality test and is not solely determined based on the number of people permitted in each bedroom. The court quoted the Keating Memo in that "owners and managers may develop … reasonable occupancy requirements based on factors such as the number and *size of sleeping areas or bedrooms* and the overall size of the dwelling unit."[lxxv] The court criticized the defendant's policy because it strictly limited the number of occupants per room at two persons, without any regard to these other factors such as size of the rooms or age of the occupants.[lxxvi]

Best Practices

Rigid and blanket occupancy restrictions should be avoided, especially if the size of units varies within a housing complex. Consider the size and configuration of a particular unit in determining the maximum number of occupants per room. The defendant in *Gashi* was criticized by the court because it did not tie its two person per room policy to unit size. Recent reports indicate that HUD is also proposing that unit size in square footage is a better basis for a policy than persons per room.

Courts want to see informed deliberation based on the unique factors of the unit in the drafting of the occupancy policy. Units with significantly larger bedrooms than units with smaller ones should have occupancy limits that reflect such differences.

Rigid and blanket occupancy restrictions should be avoided, especially if the size of units varies within a property.

The other Keating Memo factors such as the age of the occupants and the physical limitations of the building (e.g., sewer capacity) should also be considered in forming occupancy policies. Just as the word "children" should be avoided in amenities policies, so too should that term be avoided here. As the Keating Memo itself states, "An occupancy policy which limits the number of children per unit is less likely to be reasonable than one which limits the number of people per unit."

Occupancy policies are governed by the same § 3604 of the FHA, meaning that rules and policies still cannot be facially discriminatory against the protected class of familial status.

State and local laws are also important to consult in forming occupancy limits. The Keating Memo notes that compliance with such laws will "tend[] to indicate that the housing provider's occupancy policies are reasonable."

The takeaway from the Keating Memo is that although HUD suggests that a two person per bedroom policy is "reasonable" as a "general rule" under the FHA, it is rebuttable and courts will take a totality of the circumstances approach based on the special consideration factors when relating to familial status discrimination.

COMPARISON TO THE HUD OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS ("HUD PUBLIC HOUSING HANDBOOK"):

HUD's Public Housing Handbook provides Occupancy Standards in Chapter 3-23, which although only relate to public housing, are nevertheless probably instructive as to how private housing providers can ensure compliance with applicable federal laws and regulations.[lxxvii] The HUD Public Housing Handbook states that public housing providers have discretion in developing their own written occupancy standards, but that they must comply with federal, state, local, and landlord-tenants laws, zoning restrictions, and HUD's administrative nondiscrimination requirements.[lxxviii] The Handbook also states that owners cannot exclude families with children from their properties or enact policies that have the effect of prohibiting children.[lxxix]

The Handbook refers owners to the Federal Register adoption of the Keating Memo for guidance on HUD occupancy policy. The Handbook then provides that, for public housing owners, a two person per bedroom standard is generally acceptable, but they must also take into account the following factors "(1) the number of persons in the family; (2) the age, sex and relationship of family members; (3) the family's need for a larger unit as a reasonable accommodation; and (4) balancing the need to avoid overcrowding with the need to avoid underutilization of the space and unnecessary subsidy."[lxxx] The Handbook prohibits owners from making social judgments regarding occupancy, such as determining whether unmarried couples may share a bedroom or whether young children can sleep in a parent's bedroom.[lxxxi]

With its specific direction to consult the HUD occupancy guidelines in the Federal Register that incorporated the Keating Memo, coupled with its list of consideration factors for developing occupancy policies for public housing owners, the HUD Public Housing Handbook accords with case law for private housing providers. The similarity is that while a two person per bedroom standard is acceptable, a totality of the circumstances factor analysis is necessary to examine occupancy policies on a factual case-by-case basis.

SINGLE-ROOM OCCUPANCY:

Single room occupancy (SRO) units are generally defined as rooming units that lack either an in-unit kitchen or in-unit bathroom and therefore often involve multiple single-unit rooms that share a common kitchen or bathroom facilities.[lxxxii] The shared nature of bathrooms and kitchens raises concerns for legislators regarding child safety, leading some to pass laws prohibiting children from inhabiting an SRO, which implicates familial status discrimination under the FHA.

In *Sierra v. City of New York*, the plaintiff sued the City for FHA familial status discrimination over a law that prohibited families with children under 16 from inhabiting an SRO.[lxxxiii] Because the law facially discriminated against families with children, the court analyzed it under a heightened level of scrutiny that asked whether the defendant was able to "prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."[lxxxiv]

The court ruled in favor of the City because it produced evidence of the negative physical safety and psychological effects that living in a SRO has on children.[lxxxv] Since the City sufficiently demonstrated that the restrictive law furthered legitimate interests of children's health, safety, and welfare, and that those interests could not be achieved in any less restrictive means, the court dismissed the FHA claim with prejudice and upheld the law.[lxxxvi]

Best Practices

The limited case law on FHA familial status discrimination claims arising from SRO laws complicates an extensive discussion of how courts would rule in similar cases. The *Sierra* case, however, instructs that courts will use the familiar facial discrimination scrutiny to determine if there is a legitimate interest driving the facially discriminatory law that cannot be achieved through an alternative means. The City in *Sierra* had substantial evidence to support the unsafe and problematic environment

for children living in SRO units and future defendants should likewise have evidence and testimony to support health, safety, and welfare concerns for children in SRO units. Be advised that, despite the outcome of the *Sierra* case, HUD takes a strong position against any restrictions prohibiting children from SROs.

Discrimination Based on Steering and Preferences Refusals

In addition to violating the FHA in enacting occupancy limit policies, housing providers can also commit familial status discrimination by refusing to provide housing to prospective tenants because they have children. The relatively straightforward takeaway from this area of FHA case law is that housing providers cannot discriminate against renting to families simply because they have children (absent special exemptions, like the senior housing 55+ exemption).

Recent Department of Justice Consent Orders

The DOJ and HUD often conduct "testing" to ensure housing providers comply with the FHA. These test trials usually involve a tester calling or visiting a housing provider and providing information that ascertains whether the provider discriminates against that tester based on any of the protected classes. For offenders, the usual result is a consent order that the DOJ publishes in the form of press releases on its website. Two of such recent consent orders, detailing the discriminatory practices, are discussed below.

In *United States v. Williams*, the defendant told the tester that the mobile home park tries to "discourage" children from living there because they tend to "run wild" and "aggravate" people. In lieu of litigation, the defendant agreed to a consent order in August 2015 where it was enjoined from discriminating on the basis of familial status, would post public notices that it is an equal housing provider, training its staff to comply with federal law, and develop non-discrimination policies and procedures for remaining in compliance with federal law.

In *United States v. J & R Associates*, a tester caught a defendant engaged in "steering" families with children into certain buildings in the apartment complex. The defendant's agent represented to the tester that certain buildings were for "working professionals so that kids aren't running around screaming" and that the "children we put in family buildings in the back." In the May 2015 Consent Order, the defendant consented to being enjoined from "making unavailable or denying a dwelling to any person because of familial status."

These two examples are indicative of the majority of DOJ consent orders. In each case, the defendant discriminated against the tester because of children, a clear violation of the FHA.

Case law further demonstrates that where housing providers steer away or indicate preferences against families with children, those actions will also violate the FHA despite not being express prohibitions. When determining if a housing provider indicates such an impermissible "preference," courts employ the "ordinary listener"

standard.[lxxxvii] Below is a list of such discriminatory conduct that courts have held to violate the FHA:

- Landlord's informal policy of steering away families with small children from second floor units to first floor units violated the FHA. Landlord assert child safety as justification, but safety judgments are left to parents, not landlords, and the landlord did not further that goal in the least restrictive means because it did not modify the balconies to make them safer.[lxxxviii]

- Landlord's policy of not renting one bedroom units where occupants would be one adult and one child violated the FHA because it impermissibly discriminates against familial status.[lxxxix]

- Landlord indicated a preference for renting his house to tenants without children and that the "property was less suitable for tenants with small children," which violated the FHA as unlawful familial status discrimination. The landlord's defense that it was for protection of his valuable possessions inside the home was not a "legitimate nondiscriminatory reason" because there was no evidence the landlord would have used that reason to refuse rental had the tenant not had children.[xc]

- Landlord violated FHA by indicating to a prospective tenant that she "did not normally rent to people with children" and telling another single mom prospective tenant that her three children were "too many" for a two- bedroom unit. Landlord also unlawfully required tenants to sign lease addendum that "rooms are for singles only."[xci]

Summary of Best Practices

Aside from not having written policies that discriminate against familial status, employees also must not make oral representations that steer away families with children. Families with children cannot be directed to live in certain sections of a building, on certain floors, or in certain areas of an apartment community. Since familial status is a protected class under the FHA, policies cannot restrict unit availability to families with children any more than they would restrict unit availability to persons based on race or religion.

---

[i] 42 U.S.C. § 3604(b).
[ii] 42 U.S.C. § 3604(c).
[iii] Fair Housing Act Amendments of 1988, Pub.L. No. 100-430, 102 Stat. 1620.
[iv] The Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 711 (9th Cir. 2009).
[v] Ricci v. DeStefano, 557 U.S. 557, 557 (2009).
[vi] City of Modesto, 583 F.3d at 711.
[vii] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). The *McDonnell Douglas* framework only applies to cases where the plaintiff uses circumstantial evidence of discriminatory intent—not when the policy is prima facie discriminatory. *See., e.g.,* Reidt v. County of Trempealeau, 975 F.2d 1336, 1341 (7th Cir. 1992).
[viii] *McDonnell Douglas*, 411 U.S. at 802–04.
[ix] *See* HDC, LLC v. City of Ann Arbor, 675 F.3d 608, 612 (6th Cir. 2012).

[x] Fair Hous. Cong. v. Weber, 993 F. Supp. 1286, 1292 (C.D. Cal. 1997).
[xi] Iniestra v. Cliff Warren Investments, Inc., 886 F. Supp. 2d 1161, 1164 (C.D. Cal. 2012).
[xii] Dumas v. Sunview Properties, 2014 WL 585630, at *1 (S.D. Cal. Feb. 14, 2014).
[xiii] Id. at *4.
[xiv] *Iniestra*, 886 F. Supp. at 1166.
[xv] *Id.* at 1166.
[xvi] Rojas v. Bird, 2014 WL 260597, at *2 (C.D. Cal. Jan. 10, 2014).
[xvii] Fair Hous. Council of Oregon v. Brookside Vill. Owners Ass'n, 2012 WL 8017842, at *2 (D. Or. Oct. 19, 2012) report and recommendation adopted, 2013 WL 1914378 (D. Or. May 8, 2013).
[xviii] *Iniestra*, 886 F. Supp. 2d at 1167 (citing *Fair Housing Council v. Ayres*, 855 F. Supp. 315, 318–19 (C.D. Cal. 1994)).
[xix] *Iniestra*, 886 F. Supp. 2d at 1167-68.
[xx] Pack v. Fort Washington II, 689 F. Supp. 2d 1237, 1246 (E.D. Cal. 2009).
[xxi] *Rojas*, 2014 WL 260597 at *3.
[xxii] Fair Hous. Cong. v. Weber, 993 F. Supp. 1286, 1292 (C.D. Cal. 1997).
[xxiii] *Iniestra*, 886 F. Supp. 2d at 1167-68.
[xxiv] *United States v. M. Westland Co.,* CV 93–4141, Fair Housing–Fair Lending ¶ 15,941.2-4 (HUD ALJ 1994).
[xxv] Granting a preliminary injunction against the housing provider had the effect that, until a full trial on the merits was to be held, the provided was enjoined from enforcing its current pool use rules because the plaintiffs had sufficiently demonstrated "a likelihood of success on the merits." Landesman v. Keys Condo. Owners Ass'n, 2004 WL 2370638, at *4 (N.D. Cal. Oct. 19, 2004).
[xxvi] *Id.* at *4 fn.3.
[xxvii] *Id.* at *4.
[xxviii] *Id.*
[xxix] *Id.*
[xxx] United States v. Plaza Mobile Estates, 273 F. Supp. 2d 1084, 1093 (C.D. Cal. 2003).
[xxxi] *Id.*
[xxxii] *Id.*
[xxxiii] *Brookeside Village*, 2012 WL 8017842 at *26.
[xxxiv] *Id.*
[xxxv] *Iniestra*, 886 F. Supp. 2d at 1164.
[xxxvi] Fair Hous. Ctr. of the Greater Palm Beaches, Inc. v. Sonoma Bay Cmty. Homeowners Ass'n, Inc., 2015 WL 5737346, at *1 (S.D. Fla. Oct. 1, 2015).
[xxxvii] *Pack*, 689 F. Supp. 2d at 1240.
[xxxviii] *Sonoma Bay Cmty.*, 2015 WL 5737346 at *5.
[xxxix] Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1050 (9th Cir. 2007).
[xl] Dumas v. Sunview Properties, 2014 WL 585630, at *5 (S.D. Cal. Feb. 14, 2014).
[xli] *Iniestra*, 886 F. Supp. 2d at 1164.
[xlii] *Dumas*, 2014 WL 585630 at *5.
[xliii] *Weber*, 993 F. Supp. at 1992-93.
[xliv] *Iniestra*, 886 F. Supp. 2d at 1168.
[xlv] *Rojas*, 2014 WL 260597 at *2.
[xlvi] *Id.* at *2.
[xlvii] *Id.* at *2.
[xlviii] *Sonoma Bay Cmty.*, 2015 WL 5737346 at *1.
[xlix] *Landesman*, 2004 WL 2370638 at *6.
[l] *Id.*
[li] *Plaza Mobile Estates*, 273 F. Supp. 2d at 1090.
[lii] *Id.*
[liii] *Rojas*, 2014 WL 260597 at *2.
[liv] *Id.*
[lv] *Weber*, 993 F. Supp. at 1292.
[lvi] *Id.*
[lvii] *Dumas*, 2014 WL 585630 at *1.
[lviii] *Id.* at *4.

[lix] *See Plaza Mobile Estates*, 273 F. Supp. 2d. at 1092 ("Moreover, rather than being connected to such ages, bicycle and pool safety would be better served with a proficiency requirement.").
[lx] Memorandum from Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law, to All Regional Counsel, *Re: Fair Housing Act Enforcement: Safety issues as defenses to familial status discrimination* (August 6, 1992).
[lxi] *Id.* at p. 1.
[lxii] Id. at p. 16 (citing Fernandez v. Kastes, Case No. 04-89-0350-1 (Jan. 9. 1990).
[lxiii] Id. at 16
[lxiv] Id. at 17.
[lxv] See supra pp. 2–3.
[lxvi] Id. at 17 (citing HUD v. Murphy, Fair Housing-Fair Lending (P-H) 25002 at 25053 (July 13, 1990).
[lxvii] *Occupancy Standards Notice of Statement of Policy*, 63 Fed.Reg. 70256–01, 70257 (Dec. 18, 1998). The Keating Memo was issued in 1991, but on December 18, 1998, Congress legislated the Keating Memo into official law through the Quality Housing and Work Responsibility Act and by publishing the Keating Memo in the Federal Register. *See id.*
[lxviii] *Id.*
[lxix] For example, the Keating Memo provides the hypothetical example that HUD might be more likely to bring charges against a housing provider who prohibited three persons (two parents plus an infant) from living in a one bedroom apartment versus three persons (two parents plus a teenager) from similarly living in a one bedroom apartment, because the age of the child is a relevant consideration factor. *Id.*
[lxx] *Id.*
[lxxi] Memorandum from Nelson A. Diaz, General Counsel, HUD, to All Field Assistant General Counsel (July 12, 1995).
[lxxii] *See* Tim Iglesias, *Moving Beyond Two-Person-Per-Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards*, 28 GA. ST. U. L. REV. 619, 662 (2012).
[lxxiii] 2015 WL 4868904, at *12 (D.R.I. Aug. 13, 2015).
[lxxiv] 801 F. Supp. 2d 12, 14-15 (D. Conn. 2011).
[lxxv] *Id.* at 18.
[lxxvi] *Id.*
[lxxvii] HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs (November 2013) at Ch. 3-23 p. 3-68.
[lxxviii] Id at 3-69.
[lxxix] Id.
[lxxx] Id. at 3-70.
[lxxxi] Id.
[lxxxii] Sierra v. City of New York, 579 F. Supp. 2d 543, 544 (S.D.N.Y. 2008).
[lxxxiii] *Id.* at 543.
[lxxxiv] *Id.* at 431 (quoting Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 936 (2d Cir. 1988)).
[lxxxv] *Sierra*, 579 F. Supp. 2d. at 551. The City put forward evidence about the dangerous risks of parents not being able to child-proof a shared kitchen and the development risk for adolescents of sharing a bathroom with dozens of strangers. Id. at 550–51.
[lxxxvi] *Id.* at 554.
[lxxxvii] *Iniestra*, 886 F. Supp. 2d at 1169. The ordinary listener is "neither the most suspicious nor the most insensitive of our citizenry." *Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991).
[lxxxviii] *Weber*, 993 F. Supp. at 1293-94.
[lxxxix] Williams v. Am. Homestead Mgmt., No. 4:04-CV-56, 2005 WL 7853400 (W.D. Mich. Mar. 3, 2005).
[xc] United States v. Grishman, 818 F. Supp. 21, 23 (D. Me. 1993).
[xci] United States v. Wren, No. 1:13-cv-8284 (N.D. Ill. Aug. 24, 2015).