

## **Occupancy Standards Under the Fair Housing Act**

Housing and Urban Development

**Washington, D.C. 20410-2000**

**July 12, 1995**

MEMORANDUM FOR: All Field Assistant General Counsel Standards Under the Fair Housing Act

Standards for occupancy of dwellings under the Fair Housing Act and the implication of those standards for families with children is one of the most important questions which has arisen during my tenure as General Counsel. As you know, guidance was issued to you on March 20, 1991 describing circumstances which might be considered in determining whether facially neutral occupancy standards discriminated against families with children. (This memorandum does not apply to occupancy standards which, on their face, explicitly indicate a limitation or criteria which applies to children. For example, a rule which says that occupancy by more than two children is not permitted. In those instances, the intent to discriminate against families is clear on its face and reference to facially neutral maximum occupancy standards is not necessary.) This guidance has frequently been misinterpreted to set a "bright line" standard of two persons per bedroom, but in fact required consideration of a variety of factors in determining whether a maximum occupancy standard discriminated against families with children, including bedroom size and configuration, and the age and sex of children.

The previous guidance, in my opinion, created more problems than it resolved. First, it failed to establish a clear rule by which occupancy standards could be assessed to determine whether they would (or would not) violate the Act. Because the previous standards were flexible, there have been situations where housing providers have applied a two person per bedroom standard which has disproportionately excluded families with children, and, in some cases, where application of the standard has allowed occupancy by fewer persons than would have been allowed under state or local occupancy standards. I also believe that consideration by a housing provider of the sex of the children in establishing occupancy standards violates the provisions of the Fair Housing Act with respect to sex discrimination.

I have decided to correct the confusion that exists, and, with the approval of the relevant program assistant secretaries, to rescind all previous guidance relating to the occupancy standard issue as it might affect families with children. The Department will be issuing official guidance in the future on this subject. In the interim, the following standards will be applicable:

If a housing provider (or other person who is identified as a respondent in a complaint) has established maximum occupancy standards which are as broad as those provided in the current version of model code published by Building Officials and Code Administrators (the "BOCA" code), a challenge to that occupancy standard as constituting discrimination on the basis of familial status will not be pursued by the Department.

This code provides occupancy guidance based on square footage of a housing unit and various portions of such units rather than on such generalities as bedroom configuration. It is therefore more objective than past guidance. It also provides maximum occupancy criteria which will allow reasonable occupancy by families with children, as well as extended families and others. Moreover, the standard contained in the BOCA Code was generally established by experts in housing construction as being reliable occupancy maximums. Compliance with this standard will provide a "safe harbor" for housing providers.

The applicable provisions of the Code are as follows:

Every dwelling unit must contain a minimum gross floor area not less than 150 square feet for the first occupant and 100 square feet for each additional occupant. Every room occupied for sleeping purposes by one occupant shall contain at least 70 square feet of floor area, and every room occupied for sleeping purposes by more than one person shall contain at least 50 square feet of floor area for each occupant.

In determining floor areas for rooms occupied for sleeping purposes, the term "floor area" shall not include floor area of halls or walkways, bathrooms, stairs, kitchens, laundry areas, closet or other storage areas, but may include dining room areas where consistent with other provisions of the BOCA code.

Any occupancy standard which requires occupancy by fewer persons than would be allowed by this standard will be carefully examined under the disparate impact theory of discrimination. Justifications by respondents for such policies will be evaluated to determine whether or not they constitute a business necessity and whether there are less discriminatory, alternative means to accomplish the business necessity justifications, based on existing Departmental guidance on application of the disparate impact theory.

In those few cases where a local, state or federal restriction (other than federal restrictions issued by this Department, which will be governed by this memorandum) requires a maximum occupancy which is lower than that authorized under the BOCA code, the restriction will be evaluated to determine whether it is reasonable, consistent with Section 807(b)(I) of the Act.

Please contact Harry L. Carey, Assistant General Counsel, Fair Housing Enforcement Division at (202) 708-0570 if you should have any questions.