

## OCCUPANCY BY WHO'S STANDARD, PART I

By Jo Becker

Some time ago I read an article penned by a senior member of a property management firm in my area. The topic was screening practices and in that piece he referenced the company's stock occupancy standard for all units as "Maximum occupancy of no more than two (2) persons per bedroom." That line both piqued my interest and raised huge red flags.

You should know that housing providers – private landlords, professional managers, condo / homeowners' associations, manufactured home parks, etc. – have lost cases in which they've had two-people-per-bedroom policies.

The two-plus-one formula (i.e., two people per bedroom plus one more for the unit as a whole) was advised over the two-per formula by many fair advocates for quite some time. And while it is more liberal and can help insulate housing providers from fair housing violations based on occupancy in some situations, that too is suspect if it does not take into account several other factors. ***Case law tells us that housing providers should avoid formulaic policies all together and opt, instead, to thoughtfully consider a separate occupancy standard for each, individual floor plan.***

Over my years in the industry – the housing *and* the fair housing industry – I've also come across a couple stunning reports detailing the legal context and historic origins of occupancy standards.

What follows is the first in a two-part series detailing research and commentary by two occupancy policy experts and fair housing advocates.

**PART I:** In this article, we'll look at the work of Tim Iglesias of the University of San Francisco School of Law as he explores the legal implications and disparate impact of overly restrictive occupancy policies, including the two-per formula.

**PART II:** In the second article, the work of Ellen Pader, an anthropologist and Professor Emeritus at the University of Massachusetts Amherst provides revealing historical origins and cultural perspectives behind our country's occupancy policies.

### THE ISSUE

Tim Iglesias states clearly that "overly restrictive private ROS [residential occupancy standards]... substantially reduce the housing choices." As such, it is a fair housing concern that negatively impacts more than one federally protected class. What's more, there are profound societal implications, regardless of the intentions of individual housing providers.

Iglesias proffered some suggestions to the Dept. of Housing and Urban Development (HUD) in a document entitled *Recommendations to HUD Regarding Application of the Fair Housing Amendments Act to Residential Occupancy Standards*.

In Iglesias' *Recommendations to HUD* he states:

"...the two-person-per-bedroom standard discriminates against families. New empirical evidence demonstrates that this finding applies to substantial proportions of studios and one-bedroom apartments..." He cites a study that "found that families with children run afoul of the standard more than ten times as often as other [household configurations]. Ten percent of families with children live in one-bedroom units, and nearly three-quarters of those families exceed the two-person-per-bedroom standard."

"In addition, regardless of the type of unit to which it is applied, the two-person-per-bedroom standard has a disparate impact across racial lines. National studies show that the proportion of African Americans excluded by this occupancy standard is statistically significantly higher than for whites; the proportion of Asians excluded is higher than the proportion of blacks; and the proportion of Hispanics excluded is the highest of all. Indeed, more than one-third of all Hispanic children living in one-, two-, or three-bedroom apartments in the United States in 2007-

2009 would have been displaced by rigorous application of the two-person-per-bedroom standard.”

Iglesias asserts in a 2011 *Memo to Fair Housing Advocates* that, “[t]his problem is particularly acute in nicer housing in neighborhoods with attractive amenities (e.g., good schools, access to shopping, jobs and medical care).”

He also explains that the two-per formula “has a dubious origin:

1. There is no objective evidence that the two-people-per-bedroom standard was calibrated in any way to be a standard which presumptively avoided discrimination.
2. and, the two-people-per-bedroom standard *predates* the 1988 FHAA [Fair Housing Amendments Act], which was intended to be *remedial* legislation to address previous discriminatory practices against families.
3. ...research examining the historical origins of the two-person-per-bedroom standard has found that it was neither scientific nor otherwise objectively grounded, but merely the product of classist and ethnocentric paternalism.

According to Iglesias, “there is no objective evidence that the two-people-per-bedroom standard is necessary – much less uniquely suited – to protect landlords’ reasonable interests.

1. Rather, [it] is merely the housing industry’s traditional standard.
2. It’s really a prophylactic policy that errs widely on the side of protecting landlords’ interests and is not designed to avoid discrimination.
3. Moreover, in jurisdictions where FHAPs [Fair Housing Assistance Programs] employ a “two-persons-per-bedroom-plus-one” enforcement guideline, there is no objective evidence that landlords using this more generous standard have suffered any so-called “overcrowding effects.”

He goes to say that arguments that the two-per formula has legal force are weak. Most are based on an internal HUD memo issued by previous Regional Counsel Mr. Keating. “Even if the Keating Memo has some legal force, it would be the *whole* memo, not the [two-person-per-bedroom] standard standing alone.” The memorandum “provides that a two-person-per-bedroom standard is ‘presumably reasonable’ (ambiguous but apparently meaning presumptively compliant with FHAA), but that *all* private residential occupancy standards are subject to a multi-factor analysis to determine whether or it violates the FHAA.” [Emphasis added.]

## THE HARM

Iglesias explains that, “The problems with overly restrictive occupancy policies are numerous, leaving a multitude of households with few options. Many are harmed as they are forced to ‘reconfigure their household composition, [and] split up and deprive its members of their desired living situation. Splitting up the family can conflict with deeply held cultural preferences / norms to live closely as a way of life and to keep together the intergenerational family, the extended family, or both.” If unwilling to reconfigure its composition, then the family must either:

- secure more housing than desired which imposes additional costs,
- accept inferior quality housing, such housing often poses health risks to residents or
- accept an inferior location, “...typically in an area with worse schools, more crime, and decreased access to jobs, transportation, shopping, and other amenities. Cumulatively, movement to these inferior locations increases economic and racial segregation.”

“Finally, the denial of housing choice by the application of a restrictive residential occupancy standard may also constitute illegal discrimination.” Iglesias goes on to cite a multitude of cases that reference the discriminatory harms incurred by ROS<sup>1</sup>.

## THE JUSTIFICATION

Why do landlords impose restrictive occupancy policies? Iglesias asks then answers the question:

1. “They do this for a variety of reasons. Some are legitimate some of the time, but they are often overstated. And landlords have a hard time documenting a clear and direct linkage between a legitimate business reason and a particular ROS.

2. Landlords' traditional arguments for imposing a ROS are summarized by the phrase 'overcrowding' and include:
  - a. preventing a variety of economic costs caused by so-called 'overcrowding,' including concerns about future property value and profits, increases in 'wear and tear' costs..., extra expenses for utilities and garbage, increased (risk of) damage to the property, increased insurance costs, and increased management costs;
  - b. preventing nuisance-type harms to other tenants and neighbors from 'overcrowding,' including noise and increased demands for parking;
  - c. to promote often paternalistic concerns about the habitability / quality of life of tenants, including the safety and appropriateness of facilities for children and purported psychological harm to tenants from living in 'overcrowded' spaces, and
  - d. to avoid overtaxing the carrying capacity of one or more systems of the housing unit (e.g., water or sewage)."

### **THE PROBLEMS WITH THE KEATING MEMO**

Iglesias argues that HUD's enforcement practices have enabled the two-person-per-bedroom standard to become *de facto* law, but that new empirical evidence demonstrates this standard is often discriminatory.

As Iglesias notes, "[s]ometimes defendants seek to use HUD's Keating Memorandum as a 'defense' of two-person-per-bedroom standards because the Keating Memo states that this standard is 'presumptively reasonable.' While many courts have made reference to the Keating Memo and the two-person-per-bedroom standard, no court has ever properly analyzed whether it owes any deference to the Keating Memo. Even if the Keating Memo is due some deference, such deference would be to the whole memo including its factors analysis..."

The Keating Memo is problematic for many reasons, including its lack of clarity on how to apply the factors it advises housing providers to consider, such as the size of bedrooms and the unit, the configuration of unit, other physical limitations of the housing, state or local law, and other relevant factors.

Iglesias notes that, "any private residential occupancy standard – including two-persons-per-bedroom – is subject to review using the factors stated in the memo... [T]he misunderstanding among many that the Keating Memorandum provides a 'safe harbor' for landlords who impose a two-person-per-bedroom standard" has caught a growing number of housing providers by surprise.

Among other things, Iglesias urges HUD to "adopt a regulation to define the appropriate liability standard and defenses and to establish a true safe harbor for landlords. The Keating Memorandum provides a useful form for this standard, but specifics need to be worked out." He goes on to theorize that "[i]f studies were conducted, they are likely to show that 2.5 people per bedroom or 3 people per bedroom is a more appropriate safe harbor, at least for studio and one-bedroom units. The Keating factors must be further specified, e.g. setting the square footage of a regular-size bedroom and defining when additional habitable space requires allowing additional occupants."

### **BEST PRACTICE ADVISE**

Read the Keating Memo in full; you can find it at [https://www.hud.gov/sites/documents/DOC\\_7780.PDF](https://www.hud.gov/sites/documents/DOC_7780.PDF). Then, review your own occupancy policies. If they are formulaic – two-per-bedroom or two-plus-one – it is advised you update them a new, thoughtful policy for each unique floor plan. Document your rationale, using all the factors in the Keating Memo as your guide.

1 U.S. v. Lepore, 816 F.Supp. 1011, 1013-1014 (D.C. Pa 1991)(reciting facts of effects of threatened eviction); U.S. v. Hover, 1995 WL 55379, 2-3 (N.D. Cal. 1995)(resiting facts of denial); Sams v. HUD, 76 F.3d 375 (Table)(1996); HUD v. Patricia Trucksess, FHEO Nos. 03-10-0065-8, 03-10-0068-8, 5-6 (alleging injuries from the discrimination, including loss of connections to siblings living in same/nearby apartment house)