Legal Opinion: GME-0010

Index: 9.206
Subject: Fair Hsg Act Enforcement: Safety Issues--Discrimination

August 6, 1992

MEMORANDUM FOR: All Regional Counsel

FROM: Carole W. Wilson, Associate General Counsel for Equal Opportunity and Administrative Law

SUBJECT: Fair Housing Act Enforcement: Safety issues as defenses to familial status discrimination

In several pending familial status cases, the respondents admit that they exclude families with children, or subject them to terms, conditions, or privileges different from other families. They assert, however, that their actions are not unlawfully discriminatory because they believe their dwellings or the associated facilities have conditions which are not, or might not be, safe for families with children. In some of these cases, the respondents claim that an otherwise available dwelling is not safe for children because, inter alia, the dwelling has a balcony, the dwelling is on an upper floor of a building, or the building is near a heavily trafficked street. In others, respondents claim that children's use of certain facilities associated with their housing, such as swimming pools or hot tubs, must be limited to protect the children's health or safety.

Because respondents' alleged concern for safety is a recurring theme, the Fair Housing Division of the Office of General Counsel has reviewed the legislative history of the Fair Housing Amendments Act of 1988 ("Fair Housing Amendments Act" or "Amendments") and case law on the issues of safety and waivers of liability in fair housing cases and other areas. The General Counsel has reviewed and concurred in the Fair Housing Division's analysis. The analysis leads the Fair Housing Division to conclude that, except where specific exemptions apply, the Fair Housing Act ("Act") requires housing providers to make all units, including units on upper floors and units with balconies, available to families with children, and that it prohibits housing providers from requiring families with children to sign waivers of liability which the providers do not require of others. However, the Division believes the 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). It also concludes that, under some circumstances, property owners' factual statements about perceived hazards of their property are not prohibited by the Act, as long as they are not misleading or discouraging and do not steer families with children away from the property.

A copy of the Fair Housing Division's analysis is attached.

Please circulate it to your staff for guidance in developing recommendations regarding whether reasonable cause exists to believe discrimination has occurred in cases raising safety issues as defenses to fair housing complaints.

Attachment

cc: Gordon Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity

MEMORANDUM
FAIR HOUSING ACT ENFORCEMENT:
SAFETY ISSUES AS DEFENSES TO FAMILIAL STATUS DISCRIMINATION
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5. CONCLUSION: In the absence of a specific statutory exemption, HUD should continue to interpret the Act to prohibit, with respect to any dwelling, both the exclusion of families with children and the imposition of different terms and conditions on families with children; HUD also should continue to construe the Act to permit housing providers to address safety and liability concerns through reasonable rules regarding the use of facilities associated with housing and/or by informing parents of potential hazards in a non-discriminatory manner

1. The Fair Housing Act contains no specific exemption to its prohibitions against familial status discrimination for situations where a housing provider professes concern for the safety of families with children

The Fair Housing Act ("Act") makes it unlawful to refuse to sell or rent because of familial status, and to discriminate against any person in the terms, conditions, or privileges of sale or rental because of familial status. 42 U.S.C. 3604(a) and (b). The Act creates an explicit exception to the prohibitions

against familial status for "housing for older persons." 42 U.S.C. 3607(b). Congress did not create a similar exception for housing which a provider contends is unsafe for families with children. Similarly, the Act specifies that it does not limit the applicability of reasonable governmental occupancy standards, id., but it contains no parallel language regarding the applicability of a housing provider's safety standards. A leading principle of statutory construction is that:

> Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. ... Thus, where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.

2A Sutherland Statutory Construction 47.11 (Sands 4th ed. 1984 & Supp. 1990) ("Sutherland") (footnotes omitted). This important statutory construction principle leads to the conclusion that Congress intended no "unsafe for children" exception. This conclusion is strengthened by a review of other traditional tools of statutory construction.

2. The traditional tools of statutory construction demonstrate that Congress intended no "unsafe for children" exception

Two of the traditional tools of statutory construction are a review of a statute's legislative history and a comparison of the statute's provisions to other language in the statute and comparable statutes. The general legislative history of the Fair Housing Amendments Act of 1988 ("Fair Housing Amendments Act" or "Amendments"), as well as the legislative history pertaining to the specific provisions against familial status discrimination, demonstrates that Congress intended that the Act not contain an "unsafe for children" exemption. An analysis of other provisions of the Act and its Amendments, as well as a comparison of the Act with other anti-discrimination statutes, further demonstrates that Congress intended to create no such exemption.

a. The legislative history shows that Congress heard and addressed housing providers' explicit concerns about the safety of families with children and related costs, but that Congress created no exemption as a consequence

Prior to enacting the Amendments, Congress heard testimony from housing providers and other witnesses regarding alleged concerns that children would not be safe in certain types of units and that requiring housing providers to admit families with children to such units could be dangerous and costly. In written testimony presented to the House Subcommittee hearing H.R. 1158, Scott L. Slesinger, Executive Vice President, National Apartment Association, spoke of the Amendments' potential for causing landlords to take expensive steps to avoid increases in both direct and vicarious liability, unless they could exclude families with children. He testified:

> Another cost factor if all adult buildings are outlawed would be in the construction or renovation required to make an all adult building safe for minor children. Lakes, streams and pools would have to be fenced. Lifeguards would have to be hired. Access to balconies on higher floors would have to be closed. Children do not recognize the danger of falling off balconies. Nor do they recognize the danger to others of throwing things off balconies.

Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the Comm. of the House Judiciary Comm. 601 (1987) ("1987 House Hearings"). In enacting the Amendments, Congress did not amend the bill to provide exemptions to address Mr. Slesinger's concerns.

Senator Sanford raised the safety issue during the floor debate. He stated:

> My main concern in this area is that the bill's requirement that all housing units, other than those in elderly communities, be made available for families with children may go too far and may force families into units without adequate facilities or safeguards for children. As many people are well aware, in passing the Housing and Community Development Act of 1977, the Congress prohibited the use of high-rise elevator projects for families with children unless no alternative housing was available. This prohibition was based on significant studies and a great deal of testimony on the best living environment for families with children. My concern is that this bill could turn its back on those findings by preventing high-rise apartment owners from limiting the number of families with children in their buildings. I would hope that the Department of Housing and Urban Affairs sic , in adopting regulations to implement this important Fair Housing legislation, would keep in mind the lessons learned in the public housing arena regarding the best environment for families. Indeed, while I might have favored legislation that would forbid discrimination against families with children but which would permit owners to reserve some small percentage of their units for all-adult living if those units were considered inappropriate for children, I understand that this bill represents a hard-fought compromise and I do not intent sic to upset its balance.

134 Cong. Rec. 19,889 (1988). Senator Sanford's comment is important because it states his conclusion that the Act prohibits the exclusion of families with children from units which arguably are "inappropriate for children." While Senator Sanford expressed disappointment with this result, he clearly believed it was required to protect the "balance" which Congress had reached as a result of a "hard-fought compromise."

Not only does the statute not contain the exemption Senator Sanford desired, but also HUD does not have the authority to upset

this Congressional "balance," despite his expressed "hope" that it would do so. Senator Sanford was not a sponsor of the Amendments, and his "hope" that HUD would adopt regulations allowing owners to set aside a "small percentage" of units for adults if those units were inappropriate for families with children is not consistent with the express language of the statute, reflected in the House Report, or reflected in other legislators' statements. See Chrysler, 441 U.S. at 311-12.

The Senate Judiciary Committee's Subcommittee on the Constitution ("Senate Subcommittee") heard testimony that "the rationale for exclusion of children according to landlords is greater maintenance costs, noise, and higher expenses for utilities and insurance." Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary 86 (1987) ("1987 Senate Hearings") (statement of Irene Natividad, chair of the National Women's Political Caucus); see also id. at 92 (Ms. Natividad's written testimony). However, no evidence was introduced during the 1987 hearings or the 1988 floor debates which showed that the asserted potential increase in liability or insurance costs would occur. Indeed, there was testimony that:

> Some landlords believe that renting to families with children causes higher maintenance costs and problems with noise and unsupervised children. Little objective evidence, however, exists on the relationship between the operating costs and renting to families with children. One study has concluded, after an exhaustive search, "that there is no empirical data which compares maintenance costs in buildings which do and do not allow children." On the general issue of operating costs, this same study found that "the insurance industry, with its enormous amounts of data on claims, does not consider the presence of children a significant factor in setting rates for apartment buildings."

1987 Senate Hearings at 179-80 (testimony of James B. Morales, Staff Attorney for the National Center for Youth Law) (footnotes omitted and emphasis added).

Despite the testimony about safety concerns during the 1987 House and Senate Hearings, legislators specifically made clear Congress' intent that the Act prohibit the segregation of families with children to certain floors in a building or certain buildings in a complex or development. Representative Coelho, for example, stated that allowing "families with children to live only on the third floor or to confine any one other group to a specific location in a housing unit" would be discrimination. 134 Cong. Rec. 15,668 (1988). Representative Guarini stated that the Amendments would open "all forms of housing to parents with children under 18 except those which are designed for persons aged 55 or over." Id. at 16,507 (emphasis added).

Although this memorandum does not focus on vicarious liability (e.g., a landlord's potential liability if he/she rents a unit with a balcony to a family with children and a child injures a third

party by dropping an object off the balcony), we note that a housing provider who adopts an "unsafe for children" policy may have been motivated to do so, at least in part, because of his/her fear of increased vicarious liability, as opposed to direct liability (e.g., the potential liability if a landlord rents a unit with a balcony to a family with children and one of the children is injured by falling off the balcony). Legislators made clear, however, Congress' conclusion that the Amendments' extension of equal housing opportunities to individuals with handicaps and families with children would not increase property owners' vicarious liability. During the Senate floor debates, Senator Specter and Senator Kennedy engaged in a discussion pertaining to the Amendments' potential effect on the vicarious liability of housing providers. When Senator Specter sought confirmation that Congress did not intend the Amendments to increase property owners' vicarious liability, Senator Kennedy explained that:

> Congress does not intend to alter vicarious or secondary State tort law through the provisions of this bill. There is no objective evidence to link concerns about increased liability with any of the protected classes, and none should be assumed. Thus, we are stating, as a matter of clarification, that there is no relationship between this bill and existing State vicarious and secondary liability tort laws.

134 Cong. Rec. 19,887-88 (1988) (emphasis added). The portion of Senator Kennedy's language emphasized above was quite broad, and, taken alone, would be strong support for the position that Congress did not intend the Amendments to create an "unsafe for children" exemption, despite any claim respecting a housing provider's increased potential liability. Senator Specter's inquiry and the other portions of Senator Kennedy's response, however, were limited to potential increases in a housing provider's vicarious liability, not a housing provider's direct liability. Even if the emphasized portion of the response was intended only to reflect Congress' view on the Amendment's effect on a landlord's potential for increased vicarious liability, it clearly would indicate that Congress intended that such an effect should not limit the application of the Amendments' prohibitions.

In sum, a review of the legislative history shows that Congress heard testimony that some housing providers believed that some housing was not safe for children and that it would be expensive to house families with children safely in such housing. Congress did not limit in any way the protections afforded to families with children based on that testimony, nor did it grant HUD authority to limit those protections. Accordingly, the legislative history of the Amendments supports HUD's rejection of an "unsafe for children" exemption.

b. The legislative history regarding individuals with handicaps demonstrates Congress' conclusion that allowing providers to impose special limitations or rules on members of protected classes, based on the assumption that housing such persons on an equal basis with others would increase housing providers'

liability, would be inconsistent with the purposes of the Amendments

The legislative history demonstrates that Congress intended the Amendments to prohibit actions based on housing providers' overprotective assumptions. This history specifically pertains to assumptions often made with respect to individuals with handicaps. Nevertheless, the rationale underlying it is equally applicable to assumptions housing providers often make with respect to families with children and the providers' consequent discriminatory actions, such as excluding families with children from certain units or permitting them to occupy such units only upon execution of a waiver of liability.

On several occasions, members of Congress declined to amend the Fair Housing Amendments Act to limit the liability of housing providers whom the Act would require to rent to individuals with handicaps. In 1987, the House Subcommittee heard testimony from the Executive Vice President of the National Apartment Association that that association was concerned about the liability implications of "the mentally handicapped person's ability to appreciate a potentially dangerous condition such as a balcony, a garbage disposal, or gas oven." 1987 House Hearings at 590 ("Slesinger testimony"); see also note 7, supra. Accordingly, on behalf of the National Apartment Association, Mr. Slesinger requested that Congress adopt an amendment "like a law that passed in Minnesota, that no additional liability is placed on the apartment owner or his employees, that he has to take a higher standard of care for that individual." Id.; see also id. at 602-03 (written testimony, including the Minnesota law). However, when Representative Edwards asked whether Mr. Slesinger could provide examples of the asserted increase in liability, Mr. Slesinger stated that he could not. Id. at 591. The House Subcommittee did not vote on Mr. Slesinger's request and did not adopt any such amendment. Such inaction suggests that the Subcommittee believed that even if some harm might result from the claimed increase in landlords' liability, it would be outweighed by the need for the protections Congress intended the Amendments to provide to individuals with handicaps.

In addition, on June 29, 1988, Representative Dannemeyer offered the following amendment, which is similar to the Minnesota law Mr. Slesinger had appended to his written testimony:

> Title VIII is amended by adding at the end thereof the following new section:
>
> "RULE OF CONSTRUCTION
>
> "Nothing in the title shall be construed to require any person or group of persons selling, renting, or leasing property to exercise a higher degree of care for a person having a disability than for a person who does not have a disability; nor shall this title be construed to relieve any person or group of persons of any obligation generally imposed on all persons regardless of any disability in a written lease, rental agreement,

or contract of purchase or sale."

134 Cong. Rec. 16,505. Representative Dannemeyer provided two examples of the concern this amendment was offered to address: the landlord's liability if an alcoholic rents a second story apartment and falls off a railing (direct liability), and the landlord's liability if a tenant with a mental disability injures a third party (vicarious liability). Representative Swindall supported the amendment, arguing that "without this amendment, the landlord's liability is substantially increased. ... They will simply take out more insurance which will cost them more money which will be passed along to the tenants in the form of rent increases." Id. at 16,506 (1988). Representative Morrison, a co-sponsor of H.R. 1158, opposed the amendment, arguing, inter alia, that "it undercuts the protections that we have already endorsed and adopted with respect to the handicapped." Id. Representative Sensenbrenner also opposed it, contending that "the argument that failure to adopt this amendment is going to raise insurance rates is a complete red herring.... T his amendment ... will allow for backdoor discrimination simply by saying there is a higher standard of care that is required or not required for a protected class." Id.

The House rejected the Dannemeyer amendment. Id. That action suggests that the House concluded that the proposed amendment would have weakened the protections which Congress intended the Amendments to provide and permitted discrimination which Congress intended to prohibit. "Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment." 2A Sutherland, 48.18 (footnote omitted). Here, such a conclusion is clearly supported by the arguments of the Representatives quoted above.

The asserted increased liability to landlords caused by expanding the Act to include individuals with handicaps as a protected class also was raised in the Senate. In floor debate, Senator Helms expressed concern that "Landlords would also remain liable for injuries to the handicapped themselves if landlords knew or should have known the mentally handicapped would not be able to appreciate the dangers posed by balconies, garbage disposal, gas ovens, or other features of the premises." 134 Cong. Rec. 19,893 (1988). The Senate did not take any action based on this asserted increased liability. This inaction suggests that the Senate believed that extending the prohibitions in the Act to individuals with handicaps would not increase housing providers' liability for injuries to occupants, or at least that the public good of extending the Act to individuals with handicaps outweighed any such increased costs.

Finally, Senator Hatch introduced S. 867, an alternate bill which would have amended Title VIII of the Civil Rights Act of 1968 by, inter alia, adding individuals with handicaps to the classes protected by the Act but excluding "alcohol, drug abuse, or any other impairment which would be a threat to the safety or the property of others" from the Act's definition of handicap. 134 Cong. Rec. 7,178 (1987). In testimony regarding S. 588, Bonnie Milstein, former Deputy Assistant General Counsel for Civil Rights

in the Departments of HEW and HHS and former counsel to the Consortium of Citizens with Developmental Disabilities, explained that Senator Hatch's bill would "permit landlords to refuse to rent an apartment to a tenant with cerebral palsy because of the landlord's belief that the tenant would fall down stairs, or would strike another tenant involuntarily, or would be incapable of maintaining the property." 1987 Senate Hearings at 525. The Senate Subcommittee's decision not to use language such as that in Senator Hatch's bill lends further support to the conclusions that: (1) Congress did not intend to provide for affirmative defenses based on assumptions about members of protected classes and the risks those individuals might pose to themselves and/or others; and (2) Congress did not intend HUD to create or recognize such affirmative defenses.

In addition to rejecting the bill and amendments described above, Congress indicated its intent that the Amendments bar actions based on overprotective assumptions in discussions of the types of discrimination the Amendments were designed to redress. For example, the House Judiciary Committee noted that applying or enforcing "otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities ... often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose." H.R. REP. No. 711, 100th Cong. 2d Sess. 24 (1988) (emphasis added) ("House Report"). In explaining the need for protecting individuals with handicaps, the House Report also noted that individuals "with mental retardation have been excluded because of stereotypes about their capacity to live safely and independently." Id. at 18 (emphasis added and footnote omitted). Congress' intent to prohibit actions based on overprotective assumptions also was reflected in the description by Representative Owens, a co-sponsor of H.R. 1158, of a refusal to rent an apartment to a blind woman, for fear she would start a fire while cooking a meal, and a refusal to rent a second floor apartment to a man who used a wheelchair, because he could not exit the building without the elevator. 134 Cong. Rec. 16,501 (1988). Because the rationale underlying Congress' expressed dismay concerning overprotective assumptions about individuals with handicaps applies equally to other protected classes, the legislative direction seems clear: Congress did not create, and did not intend HUD to create, exceptions to the Amendments' prohibitions against discrimination for actions based on a housing provider's fear that a member of a protected class might be unsafe in the provider's housing.

Each legislative body failed to amend the bill before it to address the explicit concerns the witnesses and individual legislators raised regarding the safety risks which the bill's protections for individual with handicaps might create. Because Congress rejected specific proposed amendments to the Act, the presumption is strong that Congress did not intend that HUD unilaterally read such limitations into the Amendments. This presumption applies not only to the protected class of individuals with handicaps, but, a fortiori, also to the protected class of families with children, where the witnesses' and legislators' concerns were not presented as starkly. See 24 C.F.R. Subtitle B,

Ch. I, Subch. A, App. I at 691 (1991) (hereinafter "Preamble") ("the legislative history ... support s the position that persons with handicaps and families with children must be provided the same protections as other classes of persons").

c. A comparison of the Act's language protecting families with children to that of other parts of the Act and to other civil rights statutes demonstrates that Congress intended HUD to create no exemption to its familial status protections based on safety or liability costs

The Amendments contain an explicit exception related to health and safety risks; other civil rights statutes do also. Consequently, Congress clearly knows how to write civil rights statutes to limit covered entities' obligations for what Congress considers unreasonable health and safety risks, undue financial burden, or other reasons. That Congress did not do so with respect to perceived safety risks created by housing families with children is strong evidence that it did not intend HUD to read such limitations into the Act.

The Act includes several specific limitations designed to prevent unreasonable health and safety risks which arguably could have increased housing providers' direct or vicarious liability. For example, paragraph 804(f)(9) of the Act states that nothing in the protections for individuals with handicaps "requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. 3604(f)(9); see also 24 C.F.R. 100.202(d). In addition, paragraph 807(b)(1) states that "Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1); see also 24 C.F.R. 100.10(a)(3). Such governmental occupancy limits serve in part to prevent overcrowding, unsanitary conditions, and excessive demand on electrical, septic, or other systems, all of which can endanger occupants' health and safety.

Even language as explicit as that in paragraph 804(f)(9) does not authorize HUD or housing providers to assume that individuals with handicaps pose risks to others or their property. The House Report stated that, in interpreting 42 U.S.C. 3604(f)(9), "Any claim that an individual's tenancy poses a direct threat and a substantial risk of harm must be established on the basis of a history of overt acts or current conduct." House Report at 29. It also stated, "Generalized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others." Id. As such assumptions, fears, and speculation are insufficient to justify excluding individuals with handicaps in the context of the explicit statutory exception of paragraph 804(f)(9), they are clearly insufficient to justify excluding families with children in a manner not authorized by express statutory language. Further, in addition to the limitations discussed in this paragraph, Congress created an express exception to the familial

status prohibitions for housing for older persons. Given the creation of these limited exceptions and the remedial nature of the Act and the Amendments, HUD should be extremely reluctant to create additional exceptions. See generally 2A Sutherland, 47.11 (discussed in part 1).

Another example of explicit Congressional limitations on civil rights obligations is found in the Americans with Disabilities Act ("ADA"). Under the ADA, unlawful discrimination includes a failure to remove architectural barriers in public accommodations and public transportation "where such removal is readily achievable." See 42 U.S.C. 12182(b)(2)(A)(iv), 12184(b). Subsection 301(9) of the ADA provides:

> The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include --
>
> (A) the nature and cost of the action needed under this Act;
>
> (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
>
> (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. 12181(9) (emphasis added).

If Congress had had similar concerns about the costs of making buildings safe for families with children, it could have acted similarly by prohibiting exclusion of families with children except when removal of features which were dangerous to children was not "readily achievable." Alternatively, it could have added language permitting otherwise prohibited action, if the lack of minor children were a bona fide necessity for the normal operations of the housing provider. Cf. 29 U.S.C. 623(f)(1) (establishing bona fide occupational qualification exception for Age Discrimination in Employment Act); 42 U.S.C. 2000e-2(e)(1) (establishing bona fide occupational qualification exception for Title VII). In the absence of such language, HUD should not read such exceptions into the Act.

d. CONCLUSION: Analysis of the Act's language and

examination of the Amendments' legislative history demonstrate that Congress intended HUD to create no "unsafe for children" exemption to the Act's familial status prohibitions

The statute's legislative history, a traditional tool of statutory construction, demonstrates that Congress was aware of the safety and liability concerns which respondents often raise during HUD's investigations. Despite being aware of those concerns, Congress did not make any exception to the Amendments' familial status prohibitions based on them. This inaction persuades us that Congress did not intend for HUD, on its own, to limit the fair housing rights of families with children in response to a respondent raising those concerns in the context of a complaint. Congress' intent is made even clearer by comparison of this inaction to Congress' creation of explicit exceptions in the Fair Housing Act and other civil rights statutes, another traditional tool of statutory construction.

3. HUD has interpreted the Amendments to prohibit limitations based on alleged safety or liability concerns, and Congress has not expressed disapproval of this interpretation

In issuing its implementing regulations, and in its determinations of reasonable cause or no reasonable cause, HUD consistently has interpreted the Amendments to prohibit housing providers from excluding families with children from some or all dwellings because of alleged safety concerns. Congress has not expressed disapproval of HUD's interpretation, which was published in the Federal Register. The lack of any disapproval is evidence that Congress intended that HUD arrive at that interpretation. See generally 2A Sutherland, 49.10.

a. In the Preamble to the implementing regulations, HUD rejected commenters' suggestions that it create safety-based exemptions to the protections for the new protected classes

During the process of promulgating the implementing regulations, HUD received a significant number of comments suggesting that a regulation (1) requiring full access by handicapped persons and children to all facilities and (2) requiring the rental of dwellings on upper floors of high rise buildings to persons with handicaps or families with children would result in increased tort liability for landlords. With respect to the first suggestion, HUD stated that it did not believe Congress intended the Amendments to "limit the ability of landlords or other property managers to develop and implement reasonable rules and regulations relating to the use of facilities associated with dwellings for the health and safety of persons." Preamble at 691. However, HUD rejected the premise behind the second suggestion, explaining that "there is no support for concluding that it is permissible to exclude handicapped persons or families with children from dwellings on upper floors of a high-rise, based on the assertion that such dwellings per se present a health or safety risk to such persons." Id. at 691. See generally R. Schwemm,

supra, 11.6(2)(a) at 11-68 to -70 (Act prohibits housing providers from excluding families with children from the upper floors of a high-rise building because of a perceived safety risk). A number of commenters also urged HUD to issue regulations exempting high rise buildings from the Act's familial status provisions, if they were certified as not providing a safe and healthful living environment for children. Preamble at 691-92. HUD noted in response, "There is nothing in the Fair Housing Act to indicate that Congress in any way sought to limit the ability of families with children to obtain dwellings in a building other than those specifically exempted under the Act." Id. at 692.

HUD's interpretation is entitled to special consideration because HUD participated in the hearings, has responsibility for administering and enforcing the Act, and issued the Preamble and regulations shortly after enactment of the Amendments. See 2A Sutherland, 49.04, 49.05, 49.08; 3A Sutherland, 74.07 (1986 & Supp. 1990) ("Interpretation by agencies charged with enforcement are given great weight); see also 2 K. Davis Administrative Law Treatise (2d ed. 1979 & Supp. 1989) (courts give extra weight to agency interpretations which, inter alia, are made contemporaneously with statute's enactment). HUD's regulatory interpretation of the Act "commands considerable deference" because HUD is primarily assigned to implement and administer the Act. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 107 (1979). Further, to date, Congress has taken no action expressing disagreement with HUD's interpretation of the scope of the Amendments on these points. " L egislative inaction following a contemporaneous and practical interpretation is evidence that the legislature intends to adopt such an interpretation." 2A Sutherland, 49.10.

Commenters also expressed fear that the limitations in proposed 24 C.F.R. 100.202(c) (respecting the types of questions housing providers could ask) would prevent them from determining which applicants would pose threats to the safety of others. The commenters asked HUD to alleviate this fear, either by revising the proposed regulation to permit inquiry into an applicant's "history of antisocial behavior or tendencies" or by promulgating "a regulation that absolves a property owner or manager of liability for any injury caused by reason of a condition of a person with a handicap." Preamble at 706. HUD declined to take either step, explaining:

> Language such as this permitting the inquiries suggested by the commenters might be seen as creating or permitting a presumption that individuals with handicaps generally pose a greater threat to the health or safety of others than do individuals without handicaps. Such a presumption is unwarranted and would run counter to the intent and purposes of the Act. House Report at 28. Likewise, a regulatory provision that housing providers shall not be liable for personal injury or property damages caused by reason of another person's handicap could also be seen as creating a presumption that persons with handicaps are more likely to pose a threat to persons or property than are other persons and would run

counter to the intent of the Act, since Congress made no such presumption. For example, the House Committee on the Judiciary stated that it did not "foresee that the tenancy of any individual with handicaps would pose any risk, much less a significant risk, to the health or safety of others by the status of being handicapped * * *." Id.

Preamble at 707. Because HUD determined that Congress had not intended HUD to make presumptions about the alleged risks individuals with handicaps create, it declined to make such presumptions. To date, Congress has taken no action expressing disagreement with HUD's approach to this issue. Accordingly, HUD should continue to decline to make such presumptions about the alleged risks families with children create.

b. HUD has issued charges of discrimination where respondents excluded members of protected classes and asserted the exclusions were based on their concerns about the safety of members of protected classes

HUD has issued several charges of discrimination in cases which raised safety and waiver of liability issues. In HUD v. Edelstein, Fair Housing-Fair Lending 25,018 (Initial Decision and Order, Dec. 9, 1991) ("Edelstein"), app. pending on other grounds, No. 92-3025 (6th Cir.), the General Counsel charged, and the Administrative Law Judge ("ALJ") concluded, that, despite the respondent's claim that he was concerned about children's safety based on automobile accident ten years earlier involving a child, discouraging families with children over the age of five from renting was unlawful discrimination. In dictum, the ALJ emphatically stated, "As a general rule, safety judgments are for informed parents to make, not landlords." Id. at 25,239.

HUD also issued a charge of discrimination in HUD v. Davis, HUDALJ 10-90-0023-1 (Jan. 28, 1992), a case in which a resident manager refused to permit tenants to move from a first floor, one bedroom apartment to a third floor, two bedroom apartment after the birth of their child. The manager cited an unwritten policy against renting apartments on the upper floors to families with children because the children might fall through the railings on the upper floor balconies. The manager did not offer any solution to the safety problem. Indeed, he rejected the complainants' offer to install a protective wire mesh barrier so that the child could not fall through the railing, allegedly out of concern for the physical appearance of the complex.

In HUD v. Rowland, HUDALJ 09-91-1200-1 (Nov. 5, 1991), respondents enforced a policy of limiting families with children to ground floor units, allegedly because the three story apartment complex had an elevator, stairs, balconies, and floor-to-ceiling plate glass windows, and the respondents were concerned that children could fall and be injured. The respondents offered no solutions to their perceived safety problems other than excluding families with children from the units which were not on the ground floor. HUD issued a charge alleging that the housing providers'

policy of not renting units on upper floors to families with children violated the Act.

In HUD v. Gelber, HUDALJ 07-90-0611-1 (Aug. 26, 1991), respondents refused to rent a single family home to a family with three children, explaining that the home was adjacent to a shopping center parking lot respondents owned and they were afraid the children would get hurt in the lot. The respondents offered to keep the complainant's application and rent to her family if a home on a dead end street became available. HUD charged that the refusal to rent and the restrictive policy were unlawful discrimination.

In HUD v. Community Homes-Western Village, 10-90-0049-1 (Dec. 27, 1990), respondents refused to rent a multi-story dwelling to the legally blind complainant. Allegedly they were concerned that she could fall down the stairs and injure herself. They later offered to rent the unit to her if she would execute a "hold harmless" agreement, i.e., a waiver of liability. Because the respondents imposed neither the limitation nor the waiver requirement on individuals without handicaps, HUD issued a charge alleging that respondents violated the Act in two ways: first, by refusing to rent a multi-story unit to the complainant and, second, by later stating that she could rent such a unit, but only if she signed a waiver of liability. The charge was resolved by a consent order in which the Administrative Law Judge characterized "prohibiting handicapped persons from residing in multi-story units" as discrimination.

In contrast, in Fernandez v. Kastes, Case No. 04-89-0350-1 (Jan. 9. 1990) ("Fernandez"), HUD found no reasonable cause to believe discrimination had occurred when an apartment complex prohibited children under 18 from using any of the three swimming pools in the complex, unless they were accompanied by a parent. HUD's General Counsel determined that because one pool, which was only a few feet from the buildings, had an unusual design with sharp edges and corners and was not fenced, and because there was no lifeguard at any of the pools, the danger the respondents perceived was real and their rule was a reasonable means to provide for the health and safety of all residents. Further, the Secretary concluded that the rule had not discouraged families with children from living there, as families with children occupied about two-thirds of the units.

This determination is consistent with this memorandum's analysis and with HUD's position in the Preamble. In the Preamble, HUD stated that it "does not believe that, in enacting the Fair Housing Amendments Act, the Congress sought to limit the ability of landlords or other property managers to develop and implement reasonable rules and regulations relating to the use of facilities associated with dwellings for the health and safety of persons." Preamble at 691 (emphasis added). The Preamble provides two bases for distinguishing the determination in Fernandez from the other cases discussed above. First, the rule must be reasonable, i.e., it must decrease a real risk to occupants' health or safety. In Fernandez, the Secretary found that the safety rule was a reasonable method of addressing an actual potential danger to

children and thus was justified. In contrast, the Edelstein ALJ specifically found that the "stated safety concerns appear baseless."

Second, as discussed in section 3.a, supra, the Preamble acknowledges that housing 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. See also HUD v. Guglielmi, Fair Housing-Fair Lending (P-H) 25,004 at 25076 (Sept. 21, 1990) ("Guglielmi") (rule excluding children from utility building which contained water pumps, shutoff valves, and electrical units, unless accompanied by parents, was not discriminatory); HUD v. Murphy, Fair Housing-Fair Lending (P-H) 25002 at 25053 (July 13, 1990) ("Murphy") (rule prohibiting children under 14 from using the pool or clubhouse without an adult and rule prohibiting children between 14 and 18 from using the billiard room without a parent were legitimate rules to maintain safety and the condition of the facilities, and did not discriminate because of familial status). Thus, Fernandez, Guglielmi, and Murphy, all concluded that a reasonable limitation on the ability of families with children to use facilities associated with the housing was a proper, non-discriminatory means to assure the health and safety of the children.

In cases where respondents exclude families with children from certain dwellings, such as those above the ground floor, based on alleged safety concerns, they ask HUD to expand this narrow health and safety exception to permit the total exclusion of families with children from certain dwellings. Such an expansion would preclude parents from the role the Act contemplates for them in obtaining housing and protecting their children in connection with such housing. Presumably, parents have more control over perceived dangers within their individual dwellings than they do over perceived dangers in the common areas of a complex. The Preamble implicitly recognizes this difference in control. It is our view that it would be most consistent with the Act's language, the Amendments' legislative history, and past Departmental interpretation (both administrative and judicial) for HUD to continue to construe the Act as prohibiting all rules which on their face exclude or otherwise restrict families with children from some or all dwelling units (which are not otherwise specifically exempt, e.g., housing for older persons), but allowing the housing provider to set reasonable rules regarding the use of facilities associated with dwellings, as long as the rules are narrowly tailored and do not, in effect, amount to an exclusion of families with children from the property. By adopting this analysis, in cases of complaints regarding rules relating to such facilities, HUD's decision makers should evaluate the

reasonableness of the rules prior to issuing a determination.

4. Case law supports the conclusion that Congress did not intend that a housing provider's safety or liability concerns create exceptions to the Act's prohibitions against familial status discrimination

Case law construing the Act and other civil rights statutes has consistently rejected the creation of affirmative defenses based on concerns about either the safety and health of protected class members or the potential increase in liability of entities or individuals covered by the statutes.

a. Under the Fair Housing Act, courts have rejected housing providers' concerns about safety of members of other protected classes and potential increases in liability as affirmative defenses

Housing providers have not limited their concern about the safety of dwellings to families with children. For example, a housing provider may attempt to justify a refusal to sell or rent first floor units to women by asserting a concern that, because such units are more readily accessible to intruders, the women could be raped, thereby injuring the tenant and subjecting the provider to potential liability. Similarly, a housing provider may attempt to justify a refusal to sell or rent units on upper floors to blind individuals by asserting concern that such persons could not safely navigate the stairs and, if they fell, they might be injured and might seek to hold the housing provider liable. Courts have refused to recognize similar concerns as defenses. Cases considering such defenses, even those decided before the Amendments, are relevant to determining the scope of the familial status protections, because: "The legislature is presumed to know the prior construction of the original act or code and if previously construed terms in the unamended sections are used in the amendment, it is indicated that the legislature intended to adopt the prior construction of those terms." 1A Sutherland, 22.35 (1985).

In United States v. Reece, 457 F. Supp. 43 (D. Mont. 1978) ("Reece"), the defendant had refused to rent certain apartments to single women unless they had cars, although she would rent the same apartments to single men who did not have cars. She explained that she adopted this policy to protect the single women. The United States filed a complaint alleging that the defendant's conduct violated the Act. In ruling on the government's motion for summary judgment on its claim under 42 U.S.C. 3604(a), the court stated:

The defendant attempts to justify this approach by stating that single women without cars are excluded from renting the apartments in question because the neighborhood in which the apartments are situated is poorly lit, and that the risk of assault or rape "or worse" against these women in walking to and from the apartments is great. I find this defense to be insufficient as a matter of law. ... A n allegedly benign motivation, especially one as paternalistic and

overbroad as the one presented here, cannot provide a defense.

Reece at 48.

Another case in which safety-related concerns were raised in defense to an alleged violation of the Act, Resident Advisory Board v. Rizzo, 564 F.2d 126, 146-50 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978) ("Rizzo"), involved allegations that defendants had delayed construction of a low-income housing project for racially discriminatory reasons. The court stated that plaintiffs had established a prima facie case of discriminatory effect, and that the only justification any of the defendants had offered for their conduct was the City of Philadelphia's expressed concern about the threat of violence at the site if construction resumed. The court stated unequivocally that "the threat of violence cannot justify a deprivation of civil rights" and concluded that defendants had made housing unavailable or denied housing to black families in violation of 42 U.S.C. 3604(a). Rizzo at 150; see also id. at 149 n.38.

In Cason v. Rochester Housing Authority, 748 F. Supp. 1002 (W.D.N.Y. 1990), the Rochester Housing Authority ("Authority") denied housing to individuals with handicaps on the basis of their perceived inability to live independently, while it did not deny housing to any non-handicapped individuals on that basis. Three individuals with handicaps who were rejected because of their perceived inability to live independently claimed the provider had violated the Act and section 504 of the Rehabilitation Act of 1973. Some of the reasons the Authority had given for their rejections related to its concern respecting the ability of individuals with handicaps to live safely on their own: it told one plaintiff that it denied her application because she could not live independently as she needed a wheelchair or walker, adult diapers, and daily aide service; it told a second plaintiff that the "main reason for the denial was her perceived inability to live independently"; and it told the third that she was rejected because she "required a higher level of care than the Authority could offer." Id. at 1005-06.

The court did not discuss explicitly the legality of rejecting applications based on concern that these individuals' handicaps would prevent them from living safely on their own, except to say that it found the Authority's justifications for the rejections "to be without merit." Id. at 1007. The only specific justification it discussed was the provider's assertion that the intrusive medical and personal inquiries were necessary to ensure that tenants would respect the property and rights of other tenants. The court recognized this as a valid goal, but noted that the housing provider was satisfied with a less intrusive method of assessing any similar threat posed by non-handicapped individuals. It concluded: "Without any objective evidence to indicate otherwise, it appears that the difference in treatment of the handicapped stems from unsubstantiated prejudices and fears regarding those with mental and physical disabilities. This is precisely the sort of situation that the fair housing laws were designed to prohibit." Id. at 1008. See also Elliott v. City of Athens, 960 F.2d 975 (11th Cir. 1992) (Amendments reject

generalized perceptions about disabilities and unfounded speculation about threats to safety as a grounds for excluding individuals with handicaps from housing).

These fair housing cases support the conclusion that Congress did not intend the Act to contain an exemption that would allow a housing provider either to exclude families with children or to require a waiver of liability before permitting such families to occupy a dwelling, on the ground that there are potential hazards to children in the dwelling. Consequently, such a purported justification is insufficient as a matter of law, and HUD need not analyze the factual basis for the provider's alleged safety concern.

b. Under other fair housing and civil rights laws, courts have rejected concerns about safety or increased liability as affirmative defenses

Decisions under other civil rights laws, including other fair housing laws, support the conclusion that, under the Fair Housing Act, a housing provider's alleged concern for the safety of members of a protected class and/or the provider's own increased liability is, as a matter of law, an insufficient basis for a facially discriminatory policy. This subsection of the memorandum first discusses two state court decisions addressing landlords' concern for the safety of children in the context of state laws prohibiting housing discrimination against families with children, and then turns to a Supreme Court decision addressing employers' safety concerns in the context of Title VII's prohibitions against sex discrimination.

In Arlington Park Race Track Corp. v. Human Rights Commission, 557 N.E.2d 517 (Ill. App.), app. denied, 561 N.E.2d 686 (Ill. 1990) ("Arlington"), a corporation which owned a horse race track and the surrounding land provided dormitory housing facilities (owned by an affiliated entity) for employees of trainers in the backstretch area of the race track. In 1982, the corporation notified trainers that children would not be permitted to live in the dormitories that year, as had been allowed in the past. Some employees filed charges against the corporation and the affiliated entity with the Illinois Department of Human Rights ("IDHR"), alleging that the new exclusionary policy violated the state law's prohibition against discrimination against families with children under the age of 14. The IDHR found that the new policy violated the state law, and the court of appeals affirmed.

The respondents argued that they had offered several legitimate, non-discriminatory reasons for excluding children, including "concern for the health, safety and well-being of the children." Arlington, 557 N.E.2d at 523. The court rejected this claim because the evidence showed that, with the housing providers' acquiescence, families with children had lived in the dormitories for many years, and that the dormitory housing "compares favorably to urban low income areas." Id. at 524. The court further noted that the property owners could not provide evidence that any children had been injured by, or caught diseases from, the horses. Finally, " t he parents of these children have voluntarily adopted

their own rules to insure the safety of their children as they reside" near the race track. Id. at 524.

Arlington is one example of a court rejecting housing providers' efforts to avoid liability for housing discrimination by asserting that they were concerned for the safety of children, and ruling that housing providers cannot lawfully address their child safety concerns by excluding families with children from housing. See also Mass. Comm'n Against Discrimination Release, Pov. L. Rep. (CCH) 20,101 (Nov. 11, 1974) (under state law, landlord must remove lead paint from apartment rather than refusing to rent to woman with children).

In another case brought under a state fair housing law, State v. Parkshore Estates, Inc., 413 N.W.2d 269 (Minn. App. 1987) ("Parkshore"), the owner-operator of a complex discouraged families with children. It regulated the apartments in such a manner that very few families with children over three years old lived on the second and third floors of any building in the complex, stating that this policy was "' b ased on promises to existing tenants and to enhance their quiet enjoyment of the premises.'" Id. at 271 (quoting housing provider). The Minnesota Department of Human Rights ("MDHR") brought an administrative action alleging that the rental policies violated the state's prohibition against discrimination on the basis of familial status. An ALJ concluded that familial status was considered in rental decisions and that such consideration was a "'per se' violation of the statute." Id. at 271. In order to reverse that violation, the ALJ enjoined the owner-operator from telling prospective tenants that units were limited to families with children under the age of three and from preventing families with older children from applying. However, the ALJ's order did permit the owner-operator to consider the ages of children in several ways which stopped short of total exclusion. These included allowing it to: (1) warn tenants whose children were old enough to walk of the hazards to the children's safety, "as long as they make it clear that there are no restrictions"; (2) suggest other nearby housing which might be safer; and (3) consider the age of children in deciding which unit to offer a family with children, if more than one apartment were available. 413 N.W.2d at 271. The MDHR appealed a portion of the order. The Minnesota Court of Appeals affirmed, accepting the ALJ's reasoning that differential treatment based on the age of a family's children was age discrimination, which the state law did not prohibit.

We do not believe that the same result would be appropriate under the Fair Housing Act. The state law at issue in Parkshore created a variety of exemptions from the prohibitions against familial status discrimination, including specific authority for housing providers to designate up to one third of the units in multi-building complexes as adults only. Under the Fair Housing Act, in contrast, the only exemption unique to familial status discrimination is housing for older persons, 42 U.S.C. 3607(b), and a complex must either be entirely designated for older persons or entirely open to families with children, 24 C.F.R. 100.70(c)(4); Preamble at 714. In the context of this difference, the court's conclusion that the Minnesota legislature did not intend to prohibit housing providers from considering the

age of prospective tenants in determining where to house them within the complex was reasonable. The Act, however, does prohibit steering of families with children and does not authorize housing providers to segregate residents based on familial status. Consequently, we conclude that Congress intended the Act to prohibit housing providers not only from totally excluding families with children, but also from: (a) steering families with children to housing outside the complex or only to certain dwellings in the complex; and (b) taking into consideration the presence of minor children under or over a certain age in the family in determining what unit to offer such a subclass of families with children when more than one unit is available, or steering or excluding such a subclass of families from the complex.

Despite these differences, the Parkshore opinion provides useful support for the distinction HUD already has made by: (a) allowing a housing provider to make reasonable health and safety rules respecting a dwelling's facilities, even though such rules discriminate against families with children; and (b) with respect to dwellings, prohibiting providers from excluding families with children, from steering or discouraging them, and from requiring different terms, such as a waiver of liability. Indeed, in permitting the housing provider to inform parents of potential risks, as long as the parents also are informed that they can live in the housing, the Parkshore ALJ demonstrated another way in which housing providers can protect children without excluding families with children: They can take reasonable steps to ensure that parents are aware of potential dangers to their children, so that the parents can better protect them from those dangers. By informing the parents of possible dangers, while making it clear he or she will not exclude the family or otherwise affect the terms, privileges, or conditions respecting the dwelling because of the family's minor children, the housing provider leaves the decision of whether to rent or buy the dwelling up to the parents.

This is consistent with the ALJ's recognition in Edelstein, discussed in section 3.b, supra, that generally "informed" parents, rather than housing providers, should be making safety judgments respecting their children, and with the Second Circuit decision in Soules v. HUD, discussed in section 4.d, infra, that dangerous conditions can justify inquiries into a prospective occupant's familial status, as long as the inquiries do not indicate an impermissible preference or unlawfully discourage families with children.

International Union, United Automobile, Aerospace & Agricultural Implements Workers v. Johnson Controls, 111 S. Ct. 1196, 1208-09 (1991) ("Johnson"), is a Title VII case in which the Court concluded that the employer's policy excluding women of child-bearing age (but not men) from jobs which would expose them to lead was unlawful sex discrimination, despite the employer's asserted fear that if a female employee were pregnant, the health of her child could be impaired. A three-judge concurrence agreed with the judgment, but expressed concern that an employer which complied with Title VII by hiring women for jobs which exposed them to lead might have increased liability if one of the women had a child that was injured by the lead. The majority, however,

explicitly rejected those concerns for a variety of reasons, all of which seem equally applicable in the context of housing discrimination.

i. The Court noted that the Occupational Safety and Health Administration had established precautions which would minimize the risk of injury, and stated that, under basic tort law, if the employer were not negligent, "it would be difficult for a court to find liability." Johnson at 1208. Further, the Court said, "Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace." Id. at 1209.

The Court's reasoning seems equally applicable in the housing context. For example, if a multi-story dwelling has inherently dangerous balconies, under tort law a landlord would have breached his duty of care to any tenant to whom he rented such a dwelling, and refusing to rent to families with children would not eliminate that breach. At the same time, if the housing provider is not negligent, it would be difficult for a court to hold the provider liable for renting to families with children in compliance with the Act. Similarly to the Court's reasoning in Johnson, the Act should be construed to prohibit illegal familial status discrimination as a method by which a housing provider can avoid its common law (and, perhaps, statutory) obligation to make its housing safe.

ii. The Court also noted that if the employer's position were allowed, State tort law would be allowed to further discrimination, thus impeding Title VII goals. The Court found that it could not allow such a result and construed Title VII to preempt State tort law. Id. at 1208-09. A similar conclusion could be reached here, both under general preemption doctrine and under the specific language of the Act. See 42 U.S.C. 3615 (Any state or local law "that purports to require or permit any action that would be a discriminatory housing practice under the Act shall to that extent be invalid").

iii. The Court finally explained that the employer's fear of large damage awards "reflected a fear that hiring fertile women will cost more" and that this asserted extra cost of employing women "does not provide an affirmative Title VII defense." Johnson at 1209. The Court went on to state that Congress had considered the costs of defining discrimination because of pregnancy as unlawful sex discrimination before it passed the Pregnancy Discrimination Act and had "made the 'decision to forbid special treatment of pregnancy despite the social costs associated therewith.'" Id. at 1209, quoting Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1084 n.13 (1983) (opinion of Marshall, J). Similarly, even if a housing provider must absorb extra costs in order to comply fully with the Act, those costs do not provide an affirmative defense to a complaint of familial status discrimination, because Congress determined to forbid such discrimination despite expressions of concern about the alleged increased costs such a prohibition might cause.

c. Case law has construed other civil rights statutes to prohibit requiring waivers from members of a

protected class only

The cases, legislative history, and administrative interpretations described above lead to a firm conclusion that, as a matter of law, HUD should not recognize a housing provider's expressed concerns about safety and increased liability as an affirmative defense to complaints alleging the provider has excluded families with children from some or all of its housing. There are similar bases for concluding that HUD should not recognize such concerns as affirmative defenses when complaints allege the provider has imposed terms, such as requiring a waiver of liability, as a condition of rental for members of a protected class, but not for others. See Jacobson v. Delta Airlines, Inc., 742 F.2d 1202 (9th Cir. 1984), cert. dism., 471 U.S. 1062 (1985) ("Jacobson").

Jacobson involved an airline's requirement that all its passengers with handicaps sign a release and the Federal Aviation Act's prohibition against unjust discrimination. The release required handicapped passengers to state that they understood that they might have to leave the airplane if necessary for the comfort or safety of others. The airline did not require its non-handicapped passengers to sign the release. The court's conclusion that requiring all handicapped passengers to sign the releases was discrimination rested on the following analysis.

First, the court concluded that requiring waivers only of individuals with handicaps was unequal treatment. Second, the court concluded that the airline had failed to offer a legitimate reason for the unequal treatment. The airline had attempted to justify the unequal treatment as a reasonable method of complying with its duty to remove passengers who are unescorted and unable to take care of their physical needs, or whose removal is necessary for the comfort and safety of other passengers. The airline's asserted justification was based on an assumption that an airplane passenger with handicaps was less likely than a non-handicapped individual to be able to take care of his/her physical needs or more likely to disturb the comfort and safety of others. However, the court concluded, inter alia, that, as a legal matter, such an assumption was "precisely the type of stereotype that the Rehabilitation Act forbids." Jacobson at 1206-08. Because the Federal Aviation Act's prohibition against discrimination incorporated the Rehabilitation Act, see note 40, supra, it also prohibited such stereotypes.

By analogy, housing providers should not be permitted to require persons with handicaps or families with children to sign waivers or releases they do not require of others. As a legal matter, they are not permitted to assume that members of a protected class are more likely than persons who are not members of a protected class to be injured or to injure others. Such a stereotyped assumption would violate the Act. See HUD v. Community Homes-Western Village, supra; R. Schwemm, supra, 11.6(2)(a) at 11-70 (footnote omitted) ("The Fair Housing Act requires that families be evaluated on their individual merits and not on the basis of group stereotypes. A housing provider who acts on the belief that all children are ... too risky to make good tenants is

clearly in danger of violating the law.")
In sum, there is no legal basis for HUD to construe the Act to allow a housing provider to require waivers from families with children, which the provider does not require from others.

d. Case law supports the conclusion that housing providers may take reasonable steps to prevent danger to families with children

Neither the cases nor the other authorities discussed above require that HUD ignore legitimate, nondiscriminatory concerns a housing provider may have about the safety of children or the provider's own liability. Instead, this memorandum concludes that those authorities stand for the proposition that the provider cannot address its concerns by excluding families with children from some or all of the provider's dwellings or treating them differently with respect to those dwellings. Moreover, as discussed in section 3.b, supra, the Act does not prohibit a housing provider from developing and implementing reasonable rules to decrease real health and safety risks posed by the use of facilities associated with his or her dwellings, even if those rules restrict children's use of the facilities, as long as the rules do not effectively disqualify families with children from the housing taken as a whole.

Further, in cases where a complainant alleges a violation of subsection 804(c), HUD's decision-makers should examine the challenged notice, statement, or advertisement to determine whether, in the context the housing provider made it, it indicated unlawful discrimination against families with children. As the Second Circuit stated in Soules v. HUD, No. 91-4192 (2d Cir., June 25, 1992) ("Soules"), "the Amendments were not intended to place a straightjacket on landlords or unnecessarily to chill their speech." Slip op. at 9. In Soules, the Second Circuit ruled that an inquiry into whether a prospective tenant has a child, standing alone, does not violate the Act, noting that, " C onditions in the neighborhood known to be either ideally suited to or inherently dangerous to occupancy by families with children might well permit an inquiry about the ages of the family members." Id. at 17. As long as the efforts to learn whether children will be living in the dwelling and to inform the parents of potential dangers are not misleading or discouraging and do not steer families with children away from the dwelling, we do not believe that they violate the Act.

As a matter of standard procedure, if a family with children files a complaint alleging that a housing provider made discriminatorily discouraging statements, and the housing provider contends that it made the statements, not to discourage the family, but rather to put the parents on notice of potential hazards to the children so that they could make an informed decision, HUD should examine the statements and their context to determine "the way an ordinary listener would have interpreted" them. Soules, slip op. at 19.

In addition to being consistent with Soules and Edelstein's emphasis on the parents' right to make informed decisions, this

approach is consistent with HUD's general approach to allegations of subsection 804(c) violations and unlawful steering. See 24 C.F.R. 109.20 (the use of certain words in an advertisement indicate a possible violation requiring investigation, "if it is apparent from the context of the usage that discrimination within the meaning of the act is likely to result"); 24 C.F.R. 100.202(c)(2), (3) (Act does not prohibit housing providers from asking whether applicants are handicapped in certain limited circumstances where the inquiry is for one of the legitimate, nondiscriminatory purposes specified in the regulation); Preamble at 705-06 (in the narrow circumstances specified in 24 C.F.R. 100.202(c)(2) and (3), the benefits of permitting such inquiries outweigh potential for abuse); Preamble at 696 (examples of unlawful steering in 24 C.F.R. 100.70 include exaggerating drawbacks and communicating that certain persons are incompatible; this makes "clear that representing that certain housing would not be appropriate for, or would not be available to families with children would be prohibited under the Act.") Consequently, the same procedure should apply to complaints alleging other violations of paragraph 804(c), such as discriminatory questions or advertisements, and to complaints alleging unlawful steering.

Accordingly, if a housing provider has a genuine and realistic belief that his or her dwellings or associated facilities are not safe for families with children, the Act allows the provider to take several nondiscriminatory approaches to preventing injuries to children, whether for the children's sake alone or merely to reduce the provider's perceived potential liability. First, the provider can make physical changes to make the dwelling or facility safe, such as by putting up railings on balconies. Second, it can adopt reasonable health and safety rules for the use of facilities associated with the dwellings, such as prohibiting young children from using a swimming pool unless a parent or other adult is present. Third, it can ask questions and provide information to ensure that parents are aware of potential risks to their children, as long as (1) the information is truthful and not misleading, (2) the questions and information, taken in context, do not indicate a preference, limitation, or discrimination based on familial status, and (3) an ordinary listener would not interpret the statements as discouraging families with children from deciding to live in the provider's dwelling.

5. CONCLUSION: In the absence of a specific statutory exemption, HUD should continue to interpret the Act to prohibit, with respect to any dwelling, both the exclusion of families with children and the imposition of different terms and conditions on families with children; HUD also should continue to construe the Act to permit housing providers to address safety and liability concerns through reasonable rules regarding the use of facilities associated with housing and/or by informing parents of potential hazards in a non-discriminatory manner

The statutory language, legislative history, administrative interpretation, and case law all support a conclusion that the Act prohibits a housing provider from: (a) refusing to sell or rent

units on upper floors (or other dwellings perceived to be dangerous) to a family with minor children, because of the presence of such children in the family; and (b) refusing to sell or rent such a dwelling to a family with children unless the family signs a waiver of liability, which the housing provider does not require of other families. We recommend that HUD continue to issue charges in such cases. On the other hand, HUD has stated that there is no reason to believe Congress intended the Act to prevent housing providers to address legitimate safety or health concerns through reasonable rules regarding the use of housing facilities and there is sound reason to continue that policy also. Such a construction of the Act allows housing providers to take reasonable steps to protect families with children from actual dangers not within a parent's control, while not undermining the letter or spirit of the Act by excluding families with children from housing, other than housing which the Act specifically exempts, or by imposing discriminatory terms on families with children. Finally, HUD reasonably can interpret the Act to allow housing providers to ask questions and provide non-misleading information designed to ensure that parents make informed decisions about where to live, so long as the questions and information, taken in context, do not indicate a preference, limitation, or discrimination based on familial status and do not result in unlawful steering.