



October 17, 2019

SUBMITTED VIA WWW.REGULATIONS.GOV

Office of the General Counsel, Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0500

**Re: Comments in Response to HUD's Implementation of the Fair Housing Act's
Disparate Impact Standard, HUD Docket No. FR-6111-P-02**

Dear Sir/Madam:

On behalf of the Children's Defense Fund (CDF), we write to offer our strong opposition to the Department of Housing and Urban Development's ("HUD") Implementation of the Fair Housing Act's Disparate Impact Standard, published in the Federal Register on August 19, 2019 (RIN 2529-AA98; HUD Docket No. FR-6111-P-02) ("Proposed Rule"). CDF appreciates the opportunity to submit comments on behalf of children in the United States, especially low-income children, young children, children of color, children with disabilities, immigrant children and children and youth involved in the child welfare or juvenile justice systems. CDF has been advocating for children for 45 years and seeking strong support for families through passage of laws and implementation of rules, programs and services in their best interest. CDF's Leave No Child Behind® mission is to ensure every child a Healthy Start, a Head Start, a Fair Start, a Safe Start and a Moral Start in life and successful passage to adulthood with the help of caring families and communities.

CDF strongly opposes any changes to HUD's current Disparate Impact Rule. The existing Disparate Impact Rule is a critical tool in combatting discriminatory housing policies that appear neutral on their face but often have a devastating impact on children and their families. The Proposed Rule will fundamentally weaken this longstanding enforcement tool to the detriment of children and their families across the country.

HUD's Proposed Rule Will Make it Harder for Families with Children to Find Safe, Stable, Affordable Housing.

Access to quality affordable housing is a prerequisite for positive outcomes in every facet of a child's life. Housing is crucial for children's health, educational achievement, and long-term earning potential. Children in families with unaffordable or unstable housing are more likely to be sick and hospitalized; parents are more likely to make sacrifices on things like health care and nutritious food when the rent eats up a disproportionately large share of family income.¹ Families with children that fall behind on paying their rent face a higher risk of fair or poor health

¹ National Low Income Housing Coalition. 2017. "A Place to Call Home: The Case for Increased Federal Investments in Affordable Housing." <https://nlihc.org/sites/default/files/A-Place-To-Call-Home.pdf>

for the children and their caregivers.² Poor families with children who are severely cost burdened—meaning more than half of their family income goes toward housing—spend 46 percent, or \$354 per month, less on food, transportation, and healthcare than poor families who are not housing cost-burdened.³

Children’s cognitive development and academic achievement also suffer when families lack stable, affordable housing. Children in rent-burdened families—those that spend more than 30 percent of their income on housing—perform worse on cognitive development tests than children in families in affordable housing, likely because rent-burdened families have fewer resources to devote to child enrichment.⁴ Families that fall behind on their rent may be more likely to experience forced moves because of eviction or fear of eviction. This housing instability disrupts learning and negatively impacts academic achievement, especially among elementary and middle-school students.⁵

When families are not burdened by housing costs, their children benefit even into adulthood. Young adults who lived in low-income families that had their rent burden alleviated by federal housing assistance experience higher adult earnings and lower incarceration rates than their counterparts whose families were rent-burdened.⁶ When children have access to affordable housing in low-poverty neighborhoods they are significantly more likely to go to college and earn more as adults.⁷

A lack of access to affordable housing puts children at increased risk of homelessness.⁸ On a single night in 2018, more than 180,000 people in more than 56,000 families with children were homeless.⁹ At some point during the 2016-2017 school year, 1.4 million children experienced homelessness.¹⁰

² Sandel, M., Sheward, R., Ettinger de Cuba, S., Coleman, S., Frank, D.A., Chilton, M, Cutts, D. 2018. “Unstable Housing and Caregiver and Child Health in Renter Families.” *Pediatrics*, 141(2).

<https://pediatrics.aappublications.org/content/141/2/e20172199>

³ Joint Center for Housing Studies of Harvard University. 2018. “The State of the Nation’s Housing.” http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf

⁴ See Newman, S.J. & Holupka, C.S. 2014. “Housing Affordability and Investments in Children.” *Journal of Housing Economics*, 24(June), 89-100.

<https://www.sciencedirect.com/science/article/pii/S1051137713000600> See also Newman, S.J. & Holupka, C.S. 2015. “Housing Affordability and Child Well-Being.” *Housing Policy Debate*, 25(1), 116-151. <https://www.tandfonline.com/doi/full/10.1080/10511482.2014.899261>

⁵ Cunningham, M. & MacDonald, G. 2012. “Housing as a Platform for Improving Education Outcomes among Low-Income Children.” Urban Institute.

<https://www.urban.org/sites/default/files/publication/25331/412554-Housing-as-a-Platform-for-Improving-Education-Outcomes-among-Low-Income-Children.PDF>

⁶ Andersson, F., Haltiwanger, J., Kutzbach, M., Palloni, G., Pollakowski, H., Weinberg, D. 2016. “Childhood Housing and Adult Earnings: A Between-Siblings Analysis of Housing Vouchers and Public Housing.” National Bureau of Economic Research. <https://www.nber.org/papers/w22721.pdf>

⁷ Chetty, R., Hendren, N. & Katz, L. 2015. “The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment.” *American Economic Review*, 106(4), 855-902. https://scholar.harvard.edu/files/ikatzen/files/chk_aer_mto_0416.pdf

⁸ Glynn, C. & Casey, A. 2018. “Homelessness Rises Faster Where Rent Exceeds a Third of Income.” Zillow Economic Research. <https://www.zillow.com/research/homelessness-rent-affordability-22247/>

⁹ U.S. Department of Housing and Urban Development. 2018. “The 2018 Annual Homeless Assessment Report (AHAR) to Congress.” <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>

¹⁰ National Center for Homeless Education. 2019. “Federal Data Summary School Years 2014-15 to 2016-17.” <https://nche.ed.gov/wp-content/uploads/2019/02/Federal-Data-Summary-SY-14.15-to-16.17-Final-Published-2.12.19.pdf>

Unfortunately, millions of American children don't have access to stable, affordable housing. In total, nearly 23 million children live in households with high housing cost burdens,¹¹ 17.6 million of whom live in low-income households.¹² Families with children make up about one third of all renter households in the United States.¹³ Half of renter households with children are rent-burdened and a quarter are extremely rent-burdened.¹⁴ Families with children constitute the largest share of households with what HUD calls worst case housing needs. Nearly 3 million families with children in 2015 experienced worst case housing needs, meaning those families had income below 50 percent of Area Median Income and faced severe rent burdens or severely inadequate housing and did not receive housing assistance.¹⁵

Underlying this crisis for American families is a nationwide scarcity of affordable housing units. In 2017, HUD wrote that worst case housing needs “result from a shortage of affordable housing.”¹⁶ No state in the country has an adequate supply of rental housing affordable and available for extremely low income households.¹⁷ Nationwide, extremely low-income renters in the U.S. face a shortage of seven million affordable and available rental homes—only 37 affordable and available homes exist for every 100 extremely low-income renter households.¹⁸

The difficulties families face in finding affordable housing is compounded by discrimination against families with children in the rental market. Discrimination based on family status has long limited options for families with children looking for a place to live. More than a fourth of the nation's rental housing was off-limits to families with children before 1988, when the Fair Housing Act was amended to prohibit discrimination based on family status.¹⁹ Until that point, in addition to outright bans of families with children, landlords also often imposed onerous occupancy restrictions on families with children and charged them higher rents.²⁰

Since the 1988 amendment to the Fair Housing Act, this type of overt discrimination has been curbed, but some landlords have resorted to facially-neutral policies to turn away families with

¹¹ The Annie E. Casey Foundation, KIDS COUNT Data Center. 2019. “Children Living Households with a High Housing Cost Burden in the United States.” <https://datacenter.kidscount.org/data/tables/7244-children-living-in-households-with-a-high-housing-cost-burden?loc=1&loct=2#detailed/1/any/false/871,867/any/14287,14288>

¹² The Annie E. Casey Foundation, KIDS COUNT Data Center. 2019. “Children in Low-Income Households with a High Housing Cost Burden in the United States.” <https://datacenter.kidscount.org/data/tables/71-children-in-low-income-households-with-a-high-housing-cost-burden?loc=1&loct=2#detailed/1/any/false/871,870,573,869,36,868,867,133,38,35/any/376,377>

¹³ American Housing Survey Table Creator, United States Census Bureau. 2017. https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=00000&s_year=2017&s_tablename=TABLE8A&s_bygroup1=20&s_bygroup2=1&s_filtergroup1=3&s_filtergroup2=1 (Table creation and calculation by the Children's Defense Fund).

¹⁴ *Id.*

¹⁵ U.S. Department of Housing and Urban Development. 2017. “Worst Case Housing Needs: 2017 Report to Congress” <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>

¹⁶ HUD, “Worst Case Housing Needs” at x.

¹⁷ National Low Income Housing Coalition. 2019. “The Gap: A Shortage of Affordable Homes.” https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2019.pdf

¹⁸ *Id.*

¹⁹ U.S. Department of Housing and Urban Development. 2016. “Discrimination Against Families with Children in Rental Housing Markets: Findings of the Pilot Study.” <https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFinalReport.pdf>

²⁰ *Id.*

children. A 2016 study from HUD found no signs of overt discrimination against families with children in the rental market, but did find evidence that landlords were taking more subtle steps to discourage renters with children, including steering families with children toward larger, more expensive units and, on average, showing families with children fewer units.²¹ Those factors, the study noted, “may constrain the choices for some families seeking rental housing.”²²

Advocates have relied on HUD’s existing Disparate Impact Rule to protect families with children against informal and facially-neutral types of discrimination, including some of the following:

- **TWO-PERSON PER BEDROOM REQUIREMENTS:** A married couple in Connecticut resided in a one-bedroom condo. After the birth of their first child, they received a letter from management stating they were in violation of a policy which permitted not more than two persons per bedroom. The couple sued, arguing that the policy had a disparate impact on families with children. The court found that the policy had a disparate impact on families with children in violation of the Fair Housing Act.²³
- **OCCUPANCY LIMITS IN MOBILE HOME PARKS:** A mobile home owner wanted to sell his mobile home to a family with four children. Defendant mobile home operator refused to approve the rental application for residency in the mobile home park, citing occupancy limits under the mobile home park rules and state building code. Defendant operator argued that, while the rules disproportionately impacted families with children, they were based on business necessity, namely the capacity of their septic system and other limitations. The court was unconvinced by the operator’s argument and found in favor of the seller.²⁴
- **FOUR-PERSON OCCUPANCY RESTRICTIONS:** A family of four purchased a condo in Florida. By the time they inquired about moving in, a third child was born. The condo association then sent them a letter informing them they could not move into the unit. They sued under the Fair Housing Act, arguing that the association’s four-person occupancy restriction had a “discouraging effect on families with children.” A court found that the family successfully stated a disparate impact claim.²⁵
- **‘NO PLAYING’ POLICIES:** A Southern California mother was able to demonstrate that a property management and community association had a “No Playing” policy that disproportionately impacted families with children. While there was no formal prohibition against playing in the apartment complex’s rules, the mother showed that she had received letters from the complex stating that her children were in violation of its rules. An employee of the complex even admitted that violation notices regarding “No Playing” affected children more than adults, and the complex could produce only one instance where an adult was cited for violating the “No Playing” policy. The court found that the “No Playing” policy would affect children more than adults. The court determined that the “No Playing” policy was not an outright ban on children as tenants but clearly limited the uses of the complex by children in violation of the Fair Housing Act.²⁶

²¹ *Id.*

²² *Id.* at vii.

²³ *Gashi v. Grubb & Ellis*, 801 F. Supp. 2d 12 (D. Conn. 2011).

²⁴ *Chro ex rel. Rowley v. Ackley*, 2001 Ct. Sup. 9670 (Conn. Super. Ct. 2001).

²⁵ *Housing Opportunities Project for Excellence v. Key Colony No. 4 Condominium Association*, 510 F. Supp. 2d 1003 (S.D. Fla. 2007).

²⁶ *Yazdinian v. Las Virgenes Village Community Association*, No. cv-11-07611 (C.D. Cal. 2012).

Despite these victories, the fight against housing discrimination against families with children is far from finished. In 2017, familial status was the third most common type of discrimination cited in fair housing complaints after disability status and race.²⁷ In total, there were 2,675 familial status discrimination complaints filed that year, the vast majority of which pertained to rental market discrimination.²⁸

If HUD finalizes its Proposed Rule, advocates will no longer be able to rely on the Disparate Impact Rule to protect families with children and their housing. The proposed five-element prima facie case and options for rebuttal would create substantial additional hurdles for these families and make it significantly harder to challenge these unjust policies and practices. HUD's Proposed Rule, therefore, will undermine the vital role that the FHA has served in protecting fair housing for historically marginalized and vulnerable communities—and particularly for families with children.

HUD's Proposed Rule would destroy the protections for families with children offered by the Disparate Impact Rule and should not move forward.

This Proposed Rule directly contradicts HUD's mission to affirmatively further fair housing and prevent discrimination against families with children. Furthermore, the standard outlined in the Proposed Rule upends decades of fair housing case law and HUD's enforcement.

Children and their families should feel protected under the Fair Housing Act. CDF urges HUD to immediately withdraw the Proposed Rule and instead advance housing policies that strengthen—not undermine—the disparate impact theory that allows for stable, safe, and affordable housing for all.

Thank you for the opportunity to respond to the request for comment and for your consideration of our comments. Please do not hesitate to contact CDF's policy team if we can provide further information.

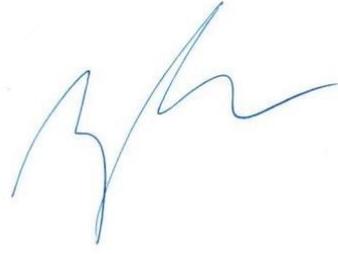
Sincerely,



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²⁷ National Fair Housing Alliance. 2018. "Making Every Neighborhood a Place of Opportunity: 2018 Fair Housing Trends Report." https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf

²⁸ *Id.*



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