



OFFICE OF THE ASSISTANT SECRETARY
FOR FAIR HOUSING AND EQUAL OPPORTUNITY

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-2000

March 7, 2001

MEMORANDUM FOR: All Fair Housing and Equal Opportunity Hub Directors

FROM: Floyd O. May, Deputy Assistant Secretary for Operations and Management, EG

SUBJECT: Limitations on Accepting as Dual-Filings FHAP Cases That Implicate First Amendment

This memorandum addresses how HUD will handle housing discrimination cases with First Amendment implications that arise in jurisdictions served by Fair Housing Assistance Program (FHAP) agencies.¹

BACKGROUND

On April 3, 1995, the Office of Fair Housing and Equal Opportunity (FHEO) issued a notice entitled "Substantive and Procedural Limitations on Filing and Investigating Fair Housing Act Complaints That May Implicate the First Amendment" (the FHEO Notice). On April 27, 2000, the effective date of the FHEO Notice was extended through April 30, 2001 (see Notice FHEO 2000-1).

The FHEO Notice provides guidance to Field and Headquarters staff on handling cases brought under Section 818 of the Fair Housing Act (the FHAct) to ensure that HUD's investigative process does not chill speech protected by the First Amendment. Section 818 makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise of enjoyment" of rights under the FHAct.

Specifically, the FHEO Notice states that HUD will not accept for filing or investigation any case under Section 818 of the FHAct that involves public activities that:

- are directed toward achieving action by a governmental entity or official; and
- do not involve force, physical harm, or a clear threat of force or physical harm to one or more individuals.

¹ In addition, a letter is attached which advises FHAP Agency Directors of HUD's policies and procedures regarding cases with First Amendment implications. Hub Directors should forward this memorandum to FHAP agencies located in their Hubs.

The FHEO Notice gives the following examples of activities that are directed towards achieving action by a governmental entity or office:

- distributing fliers, pamphlets, brochures, posters, or other written materials to the public at large;
- holding open community or neighborhood meetings;
- writing articles or letters to the editor or making statements in a newspaper;
- conducting peaceful demonstrations;
- testifying at public hearings; and
- communicating directly with a governmental entity concerning official governmental matters.

PROCEDURES WHEN FHAP AGENCY CASES HAVE FIRST AMENDMENT IMPLICATIONS

The FHEO Notice clearly sets forth HUD's policy when there is an interplay between the First Amendment and the FHAct. Where an allegation involves activities that on their face implicate free speech protections, HUD believes these guarantees weigh against the initiation of an investigation except in those instances noted above. *HUD has extended this policy to situations where a HUD Field Office is asked to accept and dual-file a case that may implicate the First Amendment.*

Effective immediately, when a FHAP agency submits a complaint alleging a Section 818² violation for dual-filing or an individual files allegations of a Section 818 violation and the matter occurred in a jurisdiction served by a FHAP agency, HUD Field Offices will follow these procedures:

- 1) **Initial Review:** The Field Office shall conduct a prompt, initial review for possible first Amendment implications (i.e., consider whether complaint/allegations involve public activities that are directed toward achieving action by a governmental entity and do not involve force, physical harm, or a clear threat of force or physical harm to one or more individuals). When reviewing, great care must be taken to avoid chilling the First Amendment rights of speakers. The Field Office should limit initial review to an analysis of the complaint form itself, discussions with the complainant, review of public records, application of factors set forth in the FHEO Notice and consultation with counsel³. The respondent must not be contacted during the initial review.

² Or the equivalent provision in the State or local law.

³ The FHEO Notice (at page 6) states that “any investigation necessary to obtain information

- 2) **Submission to Headquarters:** If the initial review indicates possible First Amendment implications, the Field Office shall not accept the case as dual-filed⁴. Instead, the Field Office should submit to Headquarters a copy of the complaint/allegations, any supporting documents and a memorandum identifying possible First Amendment implications and any special time considerations. All situations involving claim that litigation amounts to a violation of Section 818 must be submitted to Headquarters. Headquarters will review the complaint/allegations and inform the Field Office of its determination in a timely manner. The Field Office should mail package to:

Diana Ortiz, Director
 Office of Enforcement
 Office of Fair Housing and Equal Opportunity
 U.S. Department of Housing and Urban Development
 451 Seventh Street, SW, Room 5226
 Washington, DC 20410

- 3) **Notification to FHAP Agency and Complainant:** If Headquarters determines there are First Amendment implications sufficient to warrant that HUD not accept the case as dual-filed, it will not be a dual-filed complaint. HUD will not monitor the case nor provide complaint processing funds for the case. The Field Office should notify the FHAP agency and the complainant of HUD's determination in writing. If HUD Headquarters determines there are no First Amendment implications, it will advise the Field Office to accept the case as dual-filed. The Field Office should then inform the FHAP agency and the complainant of HUD's determination to accept the case as a dual-filed complaint.

about the extent to which the First Amendment may be applicable should be prompt, narrowly tailored to gather sufficient preliminary data to allow such a decision to be made and conducted in close consultation with counsel.”

⁴ The Field Office should notify the FHAP agency and the complainant in writing that, for now, the case has not been dual-filed due to possible first Amendment implications. The Field Office should also inform the FHAP agency and the complainant that Headquarters will make a final determination of dual-filing and, once that determination is made, HUD will promptly notify the complainant and the FHAP agency of its decision. In addition, the FHAct requires that an aggrieved person must file a complaint with HUD no later than one year after the alleged discriminatory act. In addition, 24 CFR § 103.35 states that the complainant must notify HUD within one year of last incident of discrimination. The Field Office should inform the complainant that the time it takes HUD to make a final determination of First Amendment implications will not be included when calculating the one-year limitation. Finally, if an individual (as opposed to a FHAP agency) submitted *the* allegations to HUD and an initial review indicates possible First Amendment implications, the Field Office should promptly forward the allegations to the FHAP agency so it may determine whether to process the case under its law. The Field Office should then submit the allegations to Headquarters for the final determination on a HUD filing.