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Re: House Bills 4910-4911 and Senate Bills 608-610

Dear Representatives and Senators,

As organizations committed to protecting and preserving the fair housing rights of persons with disabilities, we write to present our concerns about Senate Bills 608-610 and House Bills 4910- 4911. These bills would infringe on the rights of disabled persons under federal and state fair housing laws to obtain emotional support animals (ESA) as reasonable accommodations of their disability in residential housing, including apartments, condominium units, and dorm rooms.

These bills would make it a criminal misdemeanor and create new grounds for eviction when a person falsely represents having an ESA to a housing provider. They would also make it a criminal misdemeanor for a health care provider, in making a prescription for an ESA, to falsely represent that a person has a disability and needs an ESA to alleviate the effects of that disability.

In testimony during House and Senate committee hearings on these bills, the sponsors and the rental housing industry identified as their target online entities that abuse the ESA reasonable accommodation process by casually certifying a disability related need for an ESA for nearly anyone willing to pay their price. We have no sympathy for these bad actors, and agree that they compromise the integrity of the ESA reasonable accommodation process. The problem is that these bills both fail to effectively target these bad actors, and instead, impose undue and wrongful conditions on the legitimate and honest exercise of the right of persons with disabilities to make ESA reasonable accommodation requests under fair housing law.[1i]

By placing these conditions and constraints on the exercise of rights under the controlling federal Fair Housing Act ("federal Act"), these bills would be inconsistent with, if not directly conflict with that Act, and so, face federal preemption. They would also lay a liability trap for housing providers by making them think compliance with the enacted bills would satisfy their ESA obligations. It would not; providers would remain subject to liability under the federal Act.

[1] For information about fair housing reasonable accommodation generally, see the Joint Statement of the U.S. Departments of HUD and Justice – "Reasonable Accommodations under the Fair Housing Act", https://www.hud.gov/sites/documents/DOC_7771.pdf. For specific treatment of ESA issues, see HUD FHEO Notice 2013-01, https://www.hud.gov/sites/dfiles/FHEO/documents/19ServiceAnimalNoticeFHEO_508.pdf. See also, the endnote.

Section 3 of SB 610 and HB 4911 require a "health care provider that prescribes an [ESA]" to:

- be a "health care provider…licensed" in Michigan or another state;
- "maintain a physical office space where patients are regularly treated", including "the individual for whom an emotional support animal is prescribed ;
- upon a request by a housing provider, document that he or she has treated the person with a disability for "not less than 6 months" before that request;
- document the way an ESA provides an equal "opportunity to use and enjoy" the housing; and
- provide such documentation "in the form of a notarized letter or a completed and notarized questionnaire."

These requirements would apply to all ESA accommodation situations, not just those where a false representation is suspected. They go beyond what the law interpreting the federal Act permits, and are unreasonable, arbitrary and unsound on their own. For example, according to the U.S. Departments of HUD and Justice, the agencies responsible for administration and enforcement of the federal Act, verification of disability (and presumably, the need for an ESA accommodation) can be provided not only by licensed health care providers, but also others, such as "a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability. (See HUD-DOJ *Joint Statement*, at p. 14).

Similarly, requiring a verifier to establish, as would Sec. 3 (4)(c)(v), "the manner in which the [ESA] provides the person with a disability the same opportunity to use and enjoy the dwelling as would a nondisabled person" exceeds the verification requirements of the federal Act. So, too, does the notarization requirement, which verifiers are generally not equipped to meet.

The bills overreach in other ways, including making a violation of them a new basis for eviction, and using the ADA definition of "disability", rather than the applicable definition in the federal Act. Federal and state fair housing law recognizes ESA accommodations. The ADA does not.

Neither is there any authority in the federal Act or the law interpreting it that recognizes the "at least 6 months" treatment mandate that the bills would impose. This waiting period would not only be inconsistent with existing law, but also be unduly harsh, arbitrary, and excessive. It could deny the benefit of an ESA to a person who endures a sudden traumatic disabling event.

For a perceived phony request for an ESA reasonable accommodation, there's already a solid remedy that makes these bills unnecessary: denial of the

request. Contrary to their claims, housing providers are not obligated to grant falsely certified ESA accommodation requests.

Another risk the bills present is the confusion and fear they would create for tenants who have a meritorious basis for making an ESA reasonable accommodation request, especially the several vulnerable populations who need ESAs. The bills would have a chilling deterrent effect on their making legitimate ESA requests, not to mention its excessive and extralegal formalistic requirements making qualified verifiers acting in good faith more reluctant to attest to disability and the need for an ESA accommodation. Tenants would also be vulnerable to landlords who misunderstand or misrepresent what the enacted bills would allow, and stray beyond its scope.

HUD is reported to be contemplating issuing some policy or guidance on this issue. Michigan should not enact legislation on this issue before HUD addresses it. If Michigan does legislate this issue, it should look to legislation that other states have enacted which conforms to fair housing law while effectively addressing the online charlatan verifier concern. The Illinois "Assistance Animal Integrity Act" (P.A. 101-0518, see, e.g., its definition and application of "therapeutic relationship") and North Dakota Code § 47-16-07.5. ("Disability documentation for service or assistance animal in rental dwelling") are examples of measured and balanced law.

SBs 608-610 and HBs 4910-4911 extend well beyond their purported purpose. These bills would deter and interfere with legitimate requests for ESA accommodations and verification. They would also be inconsistent with, if not in conflict with the federal Act. Enactment of these bills would be a step backwards for fair housing in Michigan and for its residents with disabilities.

Sincerely yours,

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[i] See also, HUD Memorandum, *New ADA Regulations and Assistance Animals as Reasonable Accommodations under the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973* (Feb. 17, 2011)(available at https://www.equalhousing.org/wp-content/uploads/2014/09/2011-ADA-Regulations-Section-504.pdf)(hereinafter "New ADA Regulations"); Pet Ownership for the Elderly and Persons With Disabilities, 73 FED. REG. 63834 (Oct. 27, 2008)(available at https://www.federalregister.gov/documents/2008/10/27/E8-25474/pet-ownership-for-the-elderly-and-persons-with-disabilities); and U.S. Department of Justice, *Frequently Asked Questions About Service Animals and the ADA* (July 20, 2015)(available at https://www.ada.gov/regs2010/service_animal_qa.pdf).

Notably, courts have relied on the HUD and DOJ guidance in determining liability under the federal Act with respect to ESA reasonable accommodation requests.