Concerns of the Michigan Poverty Law Program about HBs 4910 and 4911

HB 4910 would make it a misdemeanor and HB 4911 a grounds for eviction for a person to falsely represent having an emotional support animal (ESA) to a current or prospective landlord (or other housing provider). But, these bills do much more than that, by imposing 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.

By placing these conditions and constraints on the exercise of rights under the federal Fair Housing Act ("federal Act"), HB 4910 would interfere with and be inconsistent with, if not directly conflict with the federal Act. Under the Supremacy Clause of the U.S. Constitution, the federal Act take precedence over conflicting state and local laws. The act states that "[i]t is the policy of the United States to provide, within constitutional limits, for fair housing throughout the United States." 42 U.S.C. 3601

In its Section 3, HB 4910 would 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;
- 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 alleged. They also go well 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 federal agencies primarily 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."[1]

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 legal verification requirements. So, too, does the notarization requirement.

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[1] See Joint Statement of the Department of Housing and Urban Development and the Department of Justice – Reasonable Accommodations under the Fair Housing Act, https://www.hud.gov/sites/documents/DOC_7771.pdf. , p.14 See also, HUD FHEO Notice 2013-01, https://www.hud.gov/sites/dfiles/FHEO/documents/19ServiceAnimalNoticeFHEO_508.pdf

Neither is there any authority in the federal Act or the law interpreting it that supports the "at least 6 months" treatment mandate that HB 4910 would impose. In the case of a person who has a sudden disabling injury for which an ESA would alleviate (or to use the language of fair housing law, "ameliorate") the effects of that disability, the 6 month treatment waiting period would not only be inconsistent with existing law, but also unduly harsh, arbitrary, and excessive.

In the case of a perceived phony request for an ESA reasonable accommodation, landlords already have a solid remedy that makes HB 4910 unnecessary: denial of the request. The landlord lobby claims that denying a request puts them at risk of being sued. The only genuine risk of litigation arises when a legitimate request for an ESA is wrongly denied. The risk of a landlord being sued for denying a phony request is very low. The greater risk would be facing litigation for denying a request using the HB 4910 conditions that run counter to federal law.

An even greater risk HB 4910 presents is the confusion and fear it would create for tenants and applicants who have a legitimate basis for making an ESA reasonable accommodation request, especially considering the several vulnerable populations who need ESAs. HB 4910 would likely have a chilling deterrent effect on their making legitimate ESA requests, not to mention its excessive and extralegal formalistic requirements making verifiers 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 bill would allow, and stray beyond its scope.

HB 4910 overreaches in other ways as well, including its making a violation of it a grounds for eviction. HB 4911 would effectuate this change by amending the landlord-tenant eviction statute to establish a new cause of action on this grounds.

HUD is reported to be contemplating issuing some policy or guidance on this issue. The State of Michigan should not enact legislation on this issue before HUD addresses it. If Michigan does legislate this issue, it should follow the example of states that have enacted laws that conform to fair housing law and more narrowly, but effectively cover 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 (N.D. Code § 47-16-07.5) statutes are examples

HB 4910 extends well beyond its stated purpose, and would deter and interfere with legitimate requests for ESA accommodations, and their verification. It would also be inconsistent with, if not in conflict with the federal Act. Enactment of HBs 4910 and 4911 would be a step backwards for fair housing civil rights in Michigan and for its residents with disabilities.