



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

January 24, 2017

MEMORANDUM FOR: Joseph A. Pelletier, Director, FHAP Division, FHEO

FROM: Allen W. Levy, Deputy Assistant General Counsel for Fair Housing Enforcement

SUBJECT: Proposed Act to Amend Virginia Fair Housing Law Regarding Assistance Animals

BACKGROUND

This memorandum responds to your January 13, 2017, request for an analysis of how the substantial equivalency of Virginia's Fair Housing Law with the federal Fair Housing Act (Act) might be impacted by passage of Virginia Senate Bill 1228 ("SB 1228"), which was introduced in the Virginia General Assembly on January 11, 2017. SB 1228 would amend section 36-96.1.1 of the Code of Virginia to add definitions for the terms: (1) "assistance animal"; (2) "major life activities"; and (3) "physical or mental impairment." SB 1228 would also add to Virginia's Fair Housing Law a section numbered 36-96.3:1, entitled "Rights and responsibilities with respect to the use of an assistance animal in a dwelling," which addresses the types of documentation that may be requested by a housing provider to verify an individual's disability and/or disability-related need for an assistance animal and the circumstances in which a reasonable accommodation request to maintain an assistance animal may be denied.¹

As explained below, several provisions in § 36.96.3:1 would authorize restrictions on the ability of individuals with disabilities to request and maintain assistance animals that are inconsistent with the rights afforded under the Act.

ANALYSIS

Subsections A, C, and D of section 36.96.3:1, which are analyzed below, would authorize restrictions on the ability of persons with disabilities to request or maintain assistance animals that are inconsistent with the Act's requirements.

Authorization of Restrictions on Assistance Animals: § 36-96.3:1.A

Under the Act, housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation, nor may they impose other conditions or restrictions on a granted accommodation.² Therefore, conditions or restrictions that

¹ House Bill 2006 was introduced in the Virginia House of Representatives on the same day as SB 1228 and contains identical provisions.

² See Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations under the Fair Housing Act ("Joint Statement"), Question & Answer No. 11,

housing providers may lawfully apply to pets may not lawfully be applied to assistance animals.

Subsection A of § 36-93.3:1 authorizes housing providers to apply “any reasonable regulations applicable to pets” to persons “who maintain an assistance animal.” However, as the definition of “assistance animal” in SB 1228 recognizes, assistance animals are not pets. Applying generally applicable pet rules or regulations to assistance animals may have the effect of denying persons with disabilities an equal opportunity to use and enjoy a dwelling, which is inconsistent with the Act.³ For example, the application of a rule prohibiting pets in common use facilities to persons requiring an assistance animal, such as a seeing eye dog, may deprive such persons the ability to use those facilities.⁴

Authorization of Restrictions on Who May Verify an Individual’s Disability and/or Disability-Related Need for an Assistance Animal: § 36-96.3:1.C and 1.D

Under the Act, if a person’s disability is not obvious or if the person’s need for a requested accommodation is not readily apparent, a housing provider may request information that verifies the person’s disability and/or need for the accommodation. In such circumstances, the Act affords persons with disabilities the right to verify their disability and disability-related need for an accommodation in any reliable manner. A person may verify his or her need for a reasonable accommodation by providing reliable information himself or herself, or by providing information from a health professional, a peer support group, a non-medical service agency, or any reliable third-party who is in a position to know about the individual’s disability.⁵

Subsection C of § 36-96.3:1 authorizes housing providers to require third-party verification of an individual’s disability and/or need for an assistance animal in any case where the individual’s disability and/or need for the requested accommodation is not obvious or readily apparent. Specifically, subsection C provides that, in such circumstances, housing providers “may request reliable documentation from a third-party verifier who has a therapeutic relationship with the person who has a disability to verify the disability or the disability-related need for ... a service [sic]⁶ animal.” It then defines “therapeutic relationship” as:

the provision of medical care, program, or personal care services, in good faith, to

available at: <https://www.hud.gov/offices/fheo/library/huddojstatement.pdf> and Notice FHEO-2013-01, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs (April 25, 2013), at 3, available at: https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf.

³ A housing provider may, however, require a tenant to cover the cost of repairs for damage an assistance animal causes to the tenant’s dwelling unit or the common areas, reasonable wear and tear excepted, if it is the provider’s practice to assess tenants for any damages they cause to the premises. *See* Joint Statement, Question & Answer No. 11.

⁴ *See, e.g., Petty v. Portofino Council of Coowners, Inc.*, 702 F. Supp.2d 721, 731 (S.D. Tex. 2010) (upholding claim under section 804(f) of the Act based on defendant’s limiting areas where plaintiff’s service dog could be used).

⁵ *See* Joint Statement, Question & Answer Nos. 17-18.

⁶ Section 36-96.3:1 addresses rights and responsibilities regarding reasonable accommodation requests for *assistance animals*. Subsection C incorrectly refers to “service animals” in this sentence.

the person with a disability by (i) a mental health services provider as defined in § 54.1.2400.1; (ii) an individual or entity with a valid, unrestricted state license, certification, or registration to serve persons with disabilities; (iii) a person from a peer support or similar group that does not charge service recipients a fee or impose any actual or implied financial requirement and who has actual knowledge about the requester's disability; or (iv) a caregiver with actual knowledge of the requester's disability.

Subsection C is inconsistent with the rights afforded under the Act in several ways. First, it would authorize housing providers to require third-party verification of an individual's disability and/or disability-related need for an accommodation, even if the requesting individual could provide reliable verifying information himself or herself. Under the Act, if an individual is able to provide such information himself or herself, a housing provider is not entitled to require additional third-party verification.⁷

Subsection C would also authorize housing providers to refuse to accept verifying information provided by otherwise reliable third-parties who do not fall within definition of "therapeutic relationship." For example, a previous housing provider or an employer would not fall within one of the four enumerated categories of therapeutic relationship. Additionally, subsection C requires an ongoing therapeutic relationship between a health or other service provider and the individual requesting a reasonable accommodation. Thus, subsection C would even limit the ability of persons with disabilities to provide reliable verifying information from former health care or other service providers in circumstances in which the individual has a disability-related need for an assistance animal, but does not require ongoing health care or other service provision.

Subsection D of § 36-96.3:1 is also inconsistent with the FHA for similar reasons. Subsection D would authorize housing providers to deny a reasonable accommodation request if "the third-party verification does not state that the requested assistance animal will (a) perform tasks or services for the benefit of the requester or (b) provide emotional support that alleviates one or more of the identified symptoms or effects of the identified therapeutic relationship with the requester." This provision would authorize housing providers to deny requested accommodations where such third-party verification is not provided, even in situations where the need for the assistance animal is readily apparent or where the individual can provide verifying information himself or herself, such that third-party verification is not needed.

Authorization to Deny Reasonable Accommodation Requests Without a Case-Specific Assessment of Whether the Request Would Impose an Undue Financial and Administrative Burden: § 36-96.3:1.D

The Act permits a housing provider to deny a request for a reasonable accommodation if providing the requested accommodation would impose an undue financial and administrative burden on the housing provider.⁸ The determination of whether a requested accommodation would

⁷ See Joint Statement, Question & Answer No. 17; see also *Castillo Condo. Ass'n v. HUD*, 81 F.3d. 92, 99 (1st Cir. 2016) (citing Joint Statement in recognizing that an individual can verify his or her own disability status).

⁸ See Joint Statement, Question & Answer No. 7.

impose an undue financial and administrative burden must be made on a case-by-case basis involving various factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs.⁹ Additionally, if an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the provider must grant it.

Subsection D(vii) of § 36-96.3:1 provides that a housing provider may deny a reasonable accommodation request to maintain an assistance animal if:

the insurance carrier for the owner of the dwelling would (a) cancel the owner's insurance policy, (b) substantially increase the costs of the owner's insurance policy, or (c) adversely change the owner's insurance policy terms because of the presence of a certain breed of dog or a certain animal such that it would constitute an undue financial and administrative burden on the owner of the property and that the insurance carrier declines a request from the owner of the property to make a reasonable accommodation for such assistance animal.

This provision would allow housing providers to deny a reasonable accommodation request for an assistance animal without engaging in a full, case-by-case assessment of whether providing the accommodation would impose an undue financial and administrative burden. In particular, this provision would allow housing providers to deny a requested accommodation based on an insurer's policy coverage limitations without first assessing whether equivalent insurance coverage could be secured from a different insurance provider that does not apply the same coverage limitation.

CONCLUSION

If adopted, SB 1228 would authorize restrictions on the ability of persons with disabilities to maintain assistance animals that are inconsistent with the Act.

If you have questions or wish to discuss, please contact me at 202-402-4733 or Casey Weissman-Vermeulen at 202-402-4370.

⁹ *See id.*