

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 721 Emotional Support Animals

SPONSOR(S): Judiciary Committee, Killebrew

TIED BILLS: **IDEN./SIM. BILLS:** SB 1128

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N	Frost	Poche
2) Children, Families & Seniors Subcommittee	15 Y, 0 N	Christy	Brazzell
3) Judiciary Committee	17 Y, 0 N, As CS	Frost	Poche

SUMMARY ANALYSIS

The federal Americans with Disabilities Act of 1990 (ADA) prohibits discrimination in public accommodations based on disability, and requires a public entity to make necessary modifications when serving a person with a disability, including accommodating a service animal. The ADA defines service animal as a dog trained to do work or perform tasks benefitting a person with a disability. An emotional support animal (ESA) is not a service animal under the ADA. If an animal's service tasks are not obvious, a public entity may only ask if a person needs an animal because of a disability and what work or tasks the animal is trained to perform.

The federal Fair Housing Act (FHA) prohibits discrimination in housing access based on a person's disability and requires reasonable accommodations to ensure a person with a disability has equal opportunity to enjoy and use a dwelling, including accommodating a service animal. Unlike a public accommodation under the ADA, a housing provider must also make reasonable accommodations for an ESA, which is an animal providing emotional support to a person with a disability. A housing provider may ask a person to submit reliable documentation of a disability and his or her disability-related need for an ESA, including a written certification from a medical professional.

Florida law mirrors ADA and FHA requirements for service animals, but specifically leaves out ESAs in its housing accommodation requirements for a person with a disability. As such, a person complying with Florida law relating to ESAs may be violating federal law.

CS/HB 721 amends Florida's housing requirements for a person with a disability to match federal law requiring reasonable accommodations for ESAs. The bill defines ESA, requires a housing provider to offer equal access to a person with an ESA, and prohibits any additional fee associated with an ESA. The bill permits a housing provider to request additional information regarding an ESA, including written documentation:

- From a listed type of licensed health care practitioner;
- Verifying the applicant's disability or disability-related need; and
- Verifying the ESA provides support alleviating one or more symptoms or effects of a disability or disability-related need.

The bill authorizes a housing provider to deny an accommodation request if an ESA poses a direct threat to the safety, health, or property of another, which another reasonable accommodation cannot eliminate.

The bill requires the Department of Health (DOH) to establish the format a health care practitioner must follow when providing ESA documentation to a patient and grants rule-making authority to DOH relating to ESA documentation requirements.

The bill creates the misdemeanor crime of falsifying documentation or otherwise misrepresenting information relating to using or being qualified to use an emotional support animal.

The bill may have an indeterminate positive impact on jail beds.

The bill provides an effective date of July 1, 2019.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0721e.JDC

DATE: 4/17/2019

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA)¹ prohibits discrimination in public accommodations based on disability. The ADA provides similar protection to a disabled person as the protection provided to a person based on his or her race, color, sex, national origin, age, and religion. The ADA contains five sections known as “titles,” each relating to a different area of public life:

- Title I – Employment;
- Title II – State and Local Government;
- Title III – Public Accommodations;²
- Title IV – Telecommunications; and
- Title V – Miscellaneous Provisions.

A business or entity falling under Title II or Title III must make reasonable modifications to its policies, practices, and procedures when serving a person with a disability, including a reasonable modification necessary to accommodate a service animal.³

Service Animals

The ADA defines a service animal in Title II and Title III as a dog trained to do work or perform tasks benefitting a person with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.⁴ A service dog is not considered a pet, and other species of animals may not be service animals, except an entity must provide reasonable accommodations or policy modifications to allow a disabled person to use a miniature horse⁵ if the horse is trained to do work or perform tasks for a disabled person. Common tasks a service animal may perform include:

- Pulling a wheelchair;
- Retrieving dropped items;
- Alerting a person to a sound;
- Reminding a person to take medication; or
- Pressing an elevator button.⁶

Examples of animals meeting the ADA’s definition of service animal, include a:

- Guide dog trained to serve a visually impaired person;
- Hearing or signal dog trained to alert a hearing impaired person;
- Psychiatric service dog trained to detect and lessen the effect of a psychiatric episode;
- Sensory signal dog trained to assist an autistic person; and
- Seizure response dog trained to assist a person with a seizure disorder.⁷

¹ 42 U.S.C. s. 12101, *et seq.*

² 42 U.S.C. s. 12181(7).

³ ADA National Network, *Service Animals and Emotional Support Animals Where are they allowed and under what conditions* <https://adata.org/publication/service-animals-booklet> (last visited April 16, 2019).

⁴ 28 C.F.R. ss. 35.104 and 36.104.

⁵ A public accommodation may use certain assessment factors to determine if reasonable modifications may be made to allow a miniature horse (horse) into a facility, including: The type, size, and weight of the horse relative to the facility’s ability to accommodate these features, whether the horse’s handler is able to sufficiently control the horse, whether the horse is housebroken, and whether the horse’s presence in the facility compromises legitimate safety requirements; 28 C.F.R. ss. 35.136(i) and 36.302(c)(9).

⁶ ADA National Network, *Service Animals and Emotional Support Animals Where are they allowed and under what conditions* <https://adata.org/publication/service-animals-booklet> (last visited April 16, 2019).

⁷ *Id.*

If an animal's service tasks are not obvious, a public accommodation such as a restaurant, store, theater, or health care facility may only ask:

- If the person needs the animal because of a disability; and
- What work or tasks the animal is trained to perform.

A public entity may not request documentation or proof showing an animal is certified, trained, or licensed as a service animal, nor may the entity request an access fee or surcharge to accommodate a service animal.⁸ A service animal is exempt from a local law prohibiting a certain dog breed.⁹

An emotional support animal (ESA) is not a service animal under the ADA;¹⁰ as such, access to or reasonable modifications for ESAs is not required under the ADA.

Emotional Support Animals

According to the United States Department of Housing and Urban Development (HUD),¹¹ an emotional support animal is not a pet, but includes any animal providing emotional support to a person with a disability.¹² Unlike a service animal, an ESA is not trained to work or perform certain tasks, but provides emotional support alleviating one or more symptoms or effects of a person's disability.¹³ The most common type of ESA is a dog; however, other species of animals may be an ESA.

According to HUD, "[ESAs] provide very private functions for persons with mental and emotional disabilities. Specifically, [ESAs] by their very nature and without training, may relive depression and anxiety, and help reduce stress-induced pain in persons with certain medical conditions affected by stress."¹⁴

Emotional support animals provide therapeutic support to relieve symptoms of psychiatric disabilities, including depression, anxiety, and post-traumatic stress disorder.¹⁵

Federal Fair Housing Act

The Fair Housing Act (FHA) prohibits discrimination in housing access based on a person's disability.¹⁶ The FHA includes most housing types, with limited exceptions,¹⁷ and requires a landlord or homeowner's association to provide reasonable accommodations to a person with a disability, to ensure he or she has an equal opportunity to enjoy and use a dwelling. As such, a housing provider must offer reasonable accommodations to a service animal meeting the ADA definition. A person with a service animal in his or her dwelling is liable for any damage to the dwelling or to another person on the premises caused by the animal, and a housing provider may request proof that the service animal complies with vaccination requirements.

⁸ *Id.*

⁹ *Id.*

¹⁰ 28 C.F.R. ss. 35.104 and 36.104.

¹¹ HUD is the Federal agency responsible for national policy and programs addressing America's housing needs, improving and developing the Nation's communities, and enforcing fair housing laws, including violations of the Fair Housing Act. HUD.GOV, *Questions and Answers about HUD*, <https://www.hud.gov/about/qaintro> (last visited April 16, 2019).

¹² U.S. Department of Housing and Urban Development (HUD), *FEHO Notice: FHEO-2013-01*, (Apr. 25, 20013), https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF (last visited April 16, 2019).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Brazelon Center for Mental Health Law, *Right to Emotional Support Animals in "No Pet" Housing*, (Jun. 16, 2017), <http://www.bazelon.org/wp-content/uploads/2017/04/2017-06-16-Emotional-Support-Animal-Fact-Sheet-for-Website-final.pdf> (last visited April 16, 2019).

¹⁶ 42 U.S.C. s. 3601, *et seq.*

¹⁷ In limited circumstances, the FHA exempts: owner occupied buildings with no more than four units; single-family houses sold or rented by an owner without using an agent; and housing operated by religious organizations and private clubs limiting occupancy to members; HUD.GOV, *Housing Discrimination under the Fair Housing Act*, https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview#_What_Types_of (last visited April 16, 2019).

Similar to the limitations under the ADA, a housing provider evaluating a reasonable accommodation request relating to a service animal may not ask a housing applicant about the existence, nature, or extent of his or her disability; however, a housing provider may ask an individual with a disability to provide documentation enabling the provider to properly review an accommodation request, including documentation certifying the:

- Tenant or a member of his or her family is a person with a disability;
- Need for a service animal to assist the person with that specific disability; and
- Person with that disability is actually assisted by the service animal.¹⁸

The ADA rules may take precedence in some housing accommodations, such as student housing, where requiring documentation or certification for a service animal is not permitted.¹⁹

Unlike a public accommodation under the ADA, the FHA also requires a housing provider to make reasonable accommodations for an emotional support animal (ESA).²⁰

The FHA requires a housing provider to treat a reasonable accommodation request for an ESA in the same manner the housing provider treats any other reasonable accommodation request;²¹ however, a housing provider may ask an individual whose disability is not readily apparent or known to the provider to submit reliable documentation of his or her disability and disability-related need for an ESA.²² According to HUD, reliable documentation may include written certification from a physician, psychiatrist, social worker, or other mental health professional, indicating the ESA provides emotional support alleviating one or more identified symptoms or effects of a person's existing disability.²³

Reasonable accommodation requests for an ESA may be evaluated by a housing provider on a case-by-case basis, and a housing provider may deny a request if the animal in question:²⁴

- Poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation; or
- Would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation.

A determination that an assistance animal poses such a threat of harm or would cause such damage to property must be individually assessed based on objective evidence about the specific animal's actual conduct; the determination may not be based on:²⁵

- Speculation or fear about the type of harm or damage the animal may cause; or
- Evidence of harm or damage caused by another animal.

Florida Law

Section 413.08, F.S., lists a person with a disability's rights and responsibilities relating to:

- Using a service animal;
- Discrimination in public employment;
- Public accommodations; and
- Housing accommodations.

¹⁸ ADA National Network, *Service Animals and Emotional Support Animals Where are they allowed and under what conditions* <https://adata.org/publication/service-animals-booklet> (last visited April 16, 2019).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ HUD, *Supra*, at 3.

²⁵ *Id.*

Florida law mirrors ADA and FHA requirements relating to service animals, but specifically excludes ESAs in its housing accommodation requirements for a person with a disability. As such, a person complying with Florida law relating to ESAs may be violating federal law.

Service Animals

Florida defines a service animal similarly to the ADA and provides comparable requirements and restrictions regarding access to public accommodations with a service animal.²⁶ A person knowingly and willfully misrepresenting himself or herself as being qualified to use a service animal commits a second degree misdemeanor, punishable by up to 60 days in county jail and a \$500 fine.²⁷

Florida's housing accommodation requirements are comparable to the FHA in that:

- A housing provider must offer a person with a disability the same access to housing as a person without a disability,²⁸ except a person with a disability may reside with a service animal in a location which may not normally permit pets and may not be charged an additional fee relating to a service animal;²⁹
- A disabled person is liable for any damage done to the housing accommodation or to another person on the premises by his or her service animal; and
- A housing accommodation may request proof a service animal complies with vaccination requirements.³⁰

Although the FHA does not define reasonable accommodation, Florida courts have held that an accommodation is unreasonable if it:³¹

- Poses an undue financial and administrative burden on a housing provider; or
- Fundamentally alters the nature of the housing provider's operations.

Unlike the FHA, Florida specifically leaves ESAs out of housing accommodation requirements.³² Although a savings clause prohibits Florida's disability laws from being interpreted in a manner limiting the rights or remedies under federal law,³³ precluding ESAs in housing accommodations directly conflicts with the FHA. As a result, courts have found some housing providers in violation of federal law despite the providers' compliance with Florida law.³⁴ In addition to legal confusion, a lack of guidance relating specifically to ESAs leads tenants to unqualified online providers issuing false ESA certification documentation in exchange for a fee.³⁵

Effect of Proposed Changes

CS/HB 721 amends Florida law relating to housing accommodations for ESAs to match federal law. The bill defines ESA as an animal that, by its presence, provides support alleviating one or more identified symptoms or effects of a person's disability. An ESA does not require training to work or perform special tasks.

The bill requires a housing provider to offer the same access to housing to a person with an ESA as offered to an individual without a disability, except a person with a disability may reside with an ESA at

²⁶ S. 413.08(1)(c)–(3)(f), F.S.

²⁷ Ss. 775.082 and 775.083, F.S.

²⁸ *Id.*

²⁹ S. 413.08(6), F.S.

³⁰ S. 413.08(6)(b), F.S.

³¹ *Schwarz v. City of Treasure Island*, 544 F. 3d 1201, 1218-19 (11th Cir. 2008).

³² S. 413.08(1)(d), F.S.

³³ S. 413.08(6)(c), F.S.

³⁴ *See Warren v. Delvista Towers Condominiums Ass'n, Inc.*, 49 F. Supp. 3d 1082 (SD Fla. 2014); *Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc.*, 6 F. Supp. 3d 1272 (SD Fla. 2014); *Bone v. Vill. Club, Inc.*, 233 F. Supp. 3d 1203 (MD Fla. 2016).

³⁵ Patricia Marx, *Pets Allowed*, *The New Yorker*, (Oct. 20, 2014), <https://www.newyorker.com/magazine/2014/10/20/pets-allowed> (last visited April 16, 2019).

no additional cost and in a location which may not normally permit pets. A person is liable for damages caused by his or her ESA and must submit vaccination records upon request.

However, unlike a service animal, and in keeping with permissions under the FHA, a housing provider may request additional information from a person regarding an ESA, including written documentation:

- From a listed type of health care practitioner licensed in Florida or similarly licensed in another state;
 - Excluding any practitioner hired exclusively to provide such documentation;
- Verifying the applicant's disability or disability-related need; and
- Verifying the ESA provides support alleviating one or more symptoms or effects of the disability or disability-related need.

Additionally, in keeping with the procedures under the FHA, the request may be denied if the ESA in question poses a direct threat to the safety, health, or property of another that cannot be reduced or eliminated by another reasonable accommodation.

The bill requires the Department of Health (DOH) to establish a format a health care practitioner must follow when providing ESA documentation to a patient and grants rule-making authority to DOH relating to ESA documentation requirements.

The bill creates the misdemeanor crime of falsifying documentation or otherwise misrepresenting information relating to using or being qualified to use an emotional support animal. A violation of the crime is a second degree misdemeanor, punishable by up to 60 days in county jail and a \$500 fine. A person sentenced under this provision must complete 30 community service hours for an organization serving persons with disabilities, or another organization the court may choose.

The bill provides an effective date of July 1, 2019.

B. SECTION DIRECTORY:

Section 1: Amends s. 413.08, F.S., relating to rights and responsibilities of an individual with a disability; use of a service animal; prohibited discrimination in public employment, public accommodations, and housing accommodations; penalties.

Section 2: Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate positive impact on the number of jail beds by creating a new misdemeanor offense for falsifying documentation or otherwise misrepresenting information relating to using or being qualified to use an emotional support animal.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county of municipal government.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill grants rule-making authority to DOH relating to administering ESA documentation requirements.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 16, 2019, the Judiciary Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Permitted a similarly licensed out-of-state health care practitioner to provide required documentation for a an ESA accommodation request; and
- Authorized a housing provider to deny a reasonable accommodation request for an ESA if it poses a direct threat to the safety, health, or property of another which cannot be reduced or eliminated by another reasonable accommodation.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.