

# NEW HUD ANIMAL GUIDELINES DISAPPOINTINGLY MISS TARGET

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HUD's been talking about new guidelines to address the overwhelming amount of ESA fraud for years. The wait is over. HUD published new guidelines (the "Guidelines") on January 28, 2020. People will talk and write a lot about the Guidelines but here is what you need to know in the short run. The Guidelines are complicated and lengthy at nineteen pages. TS evaluated well over a thousand ESA reasonable accommodation animal requests for clients in 2019. For the most part, the Guidelines do not fix or address the significant problems with the current reasonable accommodation (ESA) system. Tenants frequently ask landlords "what information do I need to provide to get an ESA"? The Guidelines do provide a template that can be sent to tenants. Unfortunately, the Guidelines do nothing to address the substantial amount of ESA fraud or even clarify when and under what circumstances landlords can challenge obviously bogus ESA documentation. Finally, several parts of the Guidelines may result in even greater confusion for the rental industry when it comes to evaluating animal reasonable accommodation requests.

The stated purpose of the Guidance is fantastic! The purpose is to provide "guidance to help housing providers distinguish between a person with a non-obvious disability who has a legitimate need for an assistance animal and a person without a disability who simply wants to have a pet or avoid the costs and limitations imposed by housing providers' pet policies, such as pet fees or deposits." Unfortunately, the Guidance does not achieve its stated purpose because it gives landlords zero tools or clarification to fight the enormous amount of existing ESA fraud. Everyone knows there is a ton of fraud. In fact, all of the ESA internet letter mills acknowledge the significant fraud, but all claim they are the one legitimate provider.

ESA internet letter mills are big business. One ESA website that we frequently encounter has churned out over 65,000 ESA letters. This website is responsible for generating 1000s of ESA letters per month according to their own admission. At \$149 per letter, this website is generating hundreds of thousands of dollars per month in revenue. Their letters are professional and check all the boxes. Arguably, they will check all of the boxes under the new Guidance.

The new Guidance doesn't differ much from the original 2004 HUD DOJ Joint Statement - Reasonable Accommodations Under the Fair Housing Act ("Joint Statement"). The Guidance requires that the person making the request provide "information that reasonably supports that the person . . . [is disabled]". Similarly, the person making the request must provide "information which reasonably supports that the animal . . . provides therapeutic emotional support with respect to the individual's disability". ESA mill letters are written by attorneys to specifically meet these requirements. The new Guidance requirements are literally the same requirements set forth in the Joint Statement. Thus, in sixteen years, nothing has changed despite the overwhelming need to address the titanic amount of fraud.

We've shopped countless ESA letter websites. Most ESA websites operate the same. The person requesting an ESA letter takes a five minute prescreen, has a fifteen minute or less consultation with a Licensed Mental Health Professional Online, and then receives an ESA letter. In some

cases, the consultation has been minutes, and in other cases our shoppers have received a letter with no consultation. Arguably, letters based on this scant information do not “reasonably support” the conclusion that the individual is disabled or has a disability related need.

However, the Guidance makes this argument problematic. Under the Guidance, information about disability may include information confirming disability from a health care professional. Similarly, reasonably supporting information confirming disability-related need for an assistance animal often consists of information from a licensed health care professional “general to the condition but specific as to the individual with a disability and the assistance or therapeutic emotional support provided by the animal”. This leaves the door wide open for ESA mills to hire unscrupulous mental health professionals to simply opine that I’m a professional, I say the person is disabled, and I say that the animal provides emotional support so therefore the person making the request has disability related need.

At the end of the day, all landlords have to combat ESA fraud are the same tools referenced in the Joint Statement and available under the case law (that the document provided must be reliable and must be based on personal knowledge). Per the Joint Statement, “a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act’s definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person’s disability and the need for the requested accommodation.” (Emphasis Added). Similarly, the Guidance states that “under the Fair Housing Act, a housing provider may request reliable documentation when an individual requesting a reasonable accommodation has a disability and disability-related need for an accommodation that are not obvious or otherwise known.”

The Joint Statement also requires that the person providing the information be “in a position to know about the individual’s disability”. Similarly, the Guidance states that “when providing this information, health care professionals should use personal knowledge of their patient/client – i.e., the knowledge used to diagnose, advise, counsel, treat, or provide health care or other disability-related services to their patient/client.”

Despite the requirement that the person providing the information must have personal knowledge and the information must be reliable, the Denver HUD Office currently does not allow landlords to question the provider of information if the provider simply states that the tenant has a need for an ESA. This means that questions directed at the reliability of a provider’s methodology for arriving at their opinions and their personal knowledge of the tenant’s disability and need for an ESA are not allowed even when the questions have nothing to do with the medical history, specific medical conditions, or diagnosis of the tenant. This would include whether or not the provider arrived at their opinions in accordance with professional and ethical standards governing mental health professionals. Unbelievably, no questions are allowed even when the landlord has shopped the ESA website and has uncontroverted evidence that the ESA website is a farce and a fraud.

As a result, Colorado landlords are in between a rock and hard place. They either have to roll over and accept the fraud or have to commit to spend tens of thousands or even hundreds of

thousands of dollars to prove the fallacy of the Denver HUD Office's position in federal court. Not exactly great options. Ironically, the Guidance flat out acknowledges the fraud of certificate and registration websites. "Some websites sell certificates, registrations, and licensing documents for assistance animals to anyone who answers certain questions or participates in a short interview and pays a fee . . . In HUD's experience, such documentation from the internet is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal."

However, then HUD goes on to practically legitimize the ESA website letter mills. "By contrast, many legitimate, licensed health care professionals deliver services remotely, including over the internet. One reliable form of documentation is a note from a person's health care professional that confirms a person's disability and/ or need for an animal when the provider has personal knowledge of the individual." This statement totally ignores the fact that there is essentially no difference between the certificate/registration sites and the ESA letter mill sites. Many ESA certificate/registration sites also hawk ESA letters. Regardless, both types of websites sell documents for assistance animals to anyone who answers certain questions and/or participates in a short interview and pays a fee.

In addition to finally stating that a registration or certificate is insufficient to document disability and need for an ESA, the new Guidance does provide detailed information for tenants. Specifically, tenants frequently ask landlords what information do I need to provide to get an ESA? The new Guidance devotes several pages to answering this question. "To assist the person requesting the accommodation to understand what information the housing provider is seeking, the housing provider is encouraged to direct the requester to the "Guidance on Documenting an Individual's Need for Assistance Animals in Housing" Section. This Section further states that "it is intended to help individuals with disabilities explain to their health care professionals the type of information that housing providers may need to help them make sometimes difficult legal decisions under fair housing laws."

Specifically, the Guidance's goal is to "help an individual with a disability and their health care provider understand what information may be needed to support an accommodation request when the disability or disability-related need for an accommodation is not readily observable or known by the housing provider. Housing providers may not require a health care professional to use a specific form (including this document), to provide notarized statements, to make statements under penalty of perjury, or to provide an individual's diagnosis or other detailed information about a person's physical or mental impairments. Housing providers and the U.S. Department of Housing and Urban Development rely on professionals to provide accurate information to the best of their personal knowledge, consistent with their professional obligations."

HUD's "reliance" on mental health professionals to provide accurate information based on their personal knowledge is unreasonable. Given the current reality and HUD's own acknowledgements and actions, many would argue HUD's stated reliance is misplaced. The current reality is that the vast majority of ESA documentation comes from ESA websites. ESA websites are literally churning out thousands of ESA letters monthly for significant profit without following professional and ethical standards and without any significant personal

knowledge of the person requesting the ESA. Additionally, other non-qualified medical professionals routinely provide ESA documentation without any knowledge of legal requirements.

In November of last year, HUD requested the FTC to investigate the ESA websites because of the overwhelming amount of fraud. In that letter HUD states that “housing providers, fair housing groups, and disability rights groups have brought to HUD’s attention their concern that certain websites may be misleading consumers with disabilities into purchasing assistance animal documentation that is unreliable and unnecessary. According to these groups, the websites also may be selling assistance animal documentation to people who do not have disabilities substantially limiting a major life activity, enabling such people to claim that their pets are assistance animals in order to evade housing providers’ pet restrictions and pet fees. HUD shares these concerns.” The Guidance itself states that much of the internet documentation “is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal.” Given all of this, how can HUD possibly rely on professionals and not acknowledge housing provider’s legal right to individually assess requests by asking legitimate, non-medically intrusive questions?

The Guidance also states that “[f]or non-observable disabilities and animals that provide therapeutic emotional support, a housing provider may ask for information that is consistent with that identified in the Guidance on Documenting an Individual’s Need for Assistance Animals in Housing (\*see Questions 6 and 7) in order to conduct an individualized assessment of whether it must provide the accommodation under the Fair Housing Act. The lack of such documentation in many cases may be reasonable grounds for denying a requested accommodation.”

In theory, this sounds great. But again questions 6 and 7 simply are about disability and need. Does the person meet the definition of disability and does the person have a disability related need for an ESA? Since all ESA mill letters are going to address both issues (disability and need), this doesn’t help landlords. Even more frustrating is that the Guidance acknowledges case law, i.e. landlords have the right to make an individual assessment of every ESA request. However, the Denver HUD office’s position ignores the plain meaning of the word assessment. Assessment means the evaluation or estimation of the nature, quality, or ability of someone or something. When landlords have to accept every letter from every ESA mill or from every unqualified provider on its face without any ability to question the nature or the quality of that letter, they are deprived of the right to make an “individual assessment”.

The Guidance provides a best practice regarding general information that should be provided in connection with assistance animal requests. However, this is just another example of HUD missing a great opportunity to address ESA mill fraud by requiring disclosure of the requesting party’s relationship with the person providing the documentation. The Guidance suggests that as a best practice the person providing the documentation should state “whether the health care professional has a professional relationship the information entitled “Guidance on Documenting an Individual’s Need for Assistance Animals in Housing”. This information states that “housing providers may not require a health care professional to use a specific form.” Thus, many more health care professionals may refuse to complete forms.

Overall, the HUD 2020 Guidance is highly disappointing and does not address the huge ESA fraud problem. Approximately, ninety percent of all reasonable accommodation requests are for ESAs. HUD had a golden opportunity to fix the ESA status quo by ensuring that ESA documentation complied with mental health professional and ethical standards. The Guidance completely fails in this regard. The Guidance also fails to resolve or provide any insight on the several fundamental issues. One, what constitutes personal knowledge and when does a provider have sufficient personal knowledge to issue ESA opinions? Two, what makes a provider's ESA opinion reliable? Similarly, what type of documentation "reasonably supports" that a tenant is disabled and has a disability related need for an ESA? Does documentation that checks all of the boxes but was issued after an internet mental health provider talked to a tenant for five minutes "reasonably support" an ESA request? Three, what non-medical inquiries are landlords allowed to make to determine the documentation is reliable (reasonably supports) and is based on personal knowledge? As noted, the Guidance is lengthy and complicated. Thus, TS will provide more extensive analysis of the Guidance in the future.