



## Disability and Guardianship Project

1717 E. Vista Chino A7-384 • Palm Springs, CA 92262  
(818) 230-5156 • [spectruminstitute.org](http://spectruminstitute.org)

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February 18, 2020

Fair Employment and Housing Council  
2218 Causen Drive, Suite 100  
Elk Grove, CA 95758

Re: Request to Revise Proposed Regulations for Government Code § 11135  
(Online: <https://spectruminstitute.org/fehc-11135-recommendations.pdf>)

Dear Councilmembers:

At its meeting on February 25, 2020, the Fair Employment and Housing Council will be considering proposed regulations to Government Code § 11135.

Attached you will find comments and suggested amendments intended to remove ambiguities in the proposed regulations by clarifying the obligations that covered entities have to service recipients, beneficiaries, and participants with cognitive and communication disabilities.

Our remarks are informed by [research](#) over the last several years showing a pattern and practice of violations of the Americans with Disabilities Act and Government Code § 11135 by officers, employees, and appointed professionals within the Judicial Branch in connection with probate conservatorship proceedings. Nearly all respondents in such proceedings have actual, documented, or perceived cognitive or communication disabilities that substantially impair their ability to have effective communication or meaningful participation in their cases. Despite this reality, the personnel processing these cases have not taken appropriate steps to implement the rights of these litigants under the ADA and Government Code § 11135.

Because of administrative policy flaws that cause a lack of judicial accountability, and because of systematic displays of indifference to the needs of these litigants by many judicial officers, court employees, and appointed professionals, the proposed FEHC regulations should more clearly define the obligations of such personnel to litigants and witnesses who have serious cognitive and communication disabilities.

Please reserve some time for me on your agenda on February 25 so that I may present this request and answer any questions you may have.

Very truly yours,

Thomas F. Coleman  
Legal Director

# Proposed FEHC Regulations

## Government Code Section 11135

### *Comments and Recommendations*

The proposed regulations are intended to implement Government Code § 11135 which prohibits discrimination in state-supported programs and activities. While they do explain that § 11135 prohibits discrimination by a covered entity against individuals who have a mental disability and while they do clarify that a covered entity includes the California Judicial Branch, they do not contain enough specificity to ensure compliance with the mandates of § 11135 by courts, judicial officers, judicial employees, and professionals who are appointed by courts to assist with the administration of justice in judicial proceedings.

Spectrum Institute recommends that the Fair Employment and Housing Council amend the proposed regulations prior to their adoption in order to more clearly define the duties of employees, officers, and agents of the Judicial Branch toward individuals with mental disabilities who are involved in judicial proceedings.

**Recommendation #1:** Clarify that the mandates of § 11135 apply to all activities of judicial officers, court personnel, and professionals who are appointed by a court or compensated, directly or indirectly, with state funds in connection with judicial proceedings, whether the activities are conducted inside or outside of a courtroom or courthouse.

§ 14020. Definitions. (m) “Covered entity” includes: (1) the state or a state agency, including the California Judicial Branch; (2) any entity or individual involved in carrying out any program or activity that is conducted, operated or administered by the state or by any state agency; (3) any entity or individual, including local agencies, recipients, contractors, and grantees, that is funded directly by the state, or receives any state support; (4) a local agency, and any entity or individual involved in carrying out any program or activity of a local agency if any part of the local agency receives state support.

Comment: The definition of “covered entity” is broad enough that, in connection with judicial proceedings, it should be understood to include judicial officers such as judges and commissioners, court employees, and all *court-appointed* professionals such as mediators, conciliators, investigators, evaluators, expert witnesses, guardians, conservators, guardians ad litem, and lawyers. However, because courts have not generally been aware of their duties under § 11135, a subdivision should be added to the definition of “covered entity” to clarify the court personnel and court-appointed professionals have obligations under § 11135 and implementing regulations.

Add subdivision (10) to subdivision (m) of § 14020. “(10) in connection with judicial proceedings, any judge, court commissioner, court employee, and or professionals appointed by a court to assist with such proceedings, including mediators, conciliators, investigators, evaluators, expert witnesses, guardians, conservators, guardians ad litem, and lawyers appointed to represent litigants.”

**Recommendation #2.** Clarify that the term “program or activity” includes judicial proceedings, including ancillary services provided by court personnel and court-appointed professionals as defined in § 14020, subdivision (10).

Comment: Since judges, court staff, and court-appointed professionals are generally unaware that § 11135 applies to their activities in connection with judicial proceedings, a sentence should be added to subdivision (ii) of § 14020 defining “program or activity” to clarify that the services of these participants in judicial proceedings are covered by § 11135 and implementing regulations.

Add this sentence at the end of subdivision (ii) of § 14020. “In connection with judicial proceedings, ‘program or activity’ includes the functions performed by judicial officers, court personnel, and professionals appointed by a court to assist with the administration of justice, including the services of court-appointed attorneys, guardians ad litem, investigators, conciliators, mediators, evaluators, guardians, conservators, and court-appointed professionals.

**Recommendation #3.** Clarify in § 14327 that a duty to provide reasonable accommodations or modifications may exist even without a request when a covered entity knows or reasonably should know that a service participant, recipient, or beneficiary has a qualified disability that may preclude meaningful participation in the service or full benefit of the service without such accommodations or modifications.

Comment. As currently worded, proposed § 14327 creates an erroneous impression that a covered entity need only provide accommodations or modifications upon request. This premise contradicts [federal law](#) which clearly specifies that even without a request a public entity must engage in an interactive process to determine whether an accommodation or modification is necessary when the entity knows or reasonably should know that an individual with a qualified disability may be deprived of meaningful participation in a service without such accommodation or modification. The current wording of § 14327 diminishes the protections of federal law.

Add this sentence at the end of § 14327. “Even without a request, when a covered entity knows or reasonably should know that a qualified individual with a disability may be denied equal access to or meaningful participation in a service, the entity shall engage in a good faith interactive process to determine an effective reasonable accommodation.”

**Recommendation #4.** Clarify in subdivision (pp) of § 14020 that in the context of judicial or administrative law proceedings, “auxiliary aids and services” for litigants with mental disabilities may include the appointment of counsel or a legal advocate and for witnesses it may require the appointment of a process interpreter.

Comment. Since California courts have a history of failing to provide necessary accommodations to ensure that litigants with cognitive disabilities have meaningful participation in judicial proceedings, especially in situations where the fundamental liberties

of such individuals are placed at risk by a proceeding, it is important for regulations to be more specific in providing examples of accommodations that may be necessary for litigants or witnesses with cognitive disabilities. Other states have recognized the need for appointment of counsel, a legal advocate, or a process interpreter if such services are necessary to ensure meaningful participation in a judicial or administrative law proceeding.

An Oregon Attorney General [opinion](#) explains that in some circumstances a court should provide a “process interpreter” or “cognition assistant” for someone with a mental disability that prevents meaningful participation in a legal proceeding. In Washington State, [General Rule 33](#) indicates that appointment of counsel may be necessary to ensure that a proceeding “is readily accessible to and usable by a person with a disability.” Similarly, the Office of Administrative Hearings in Washington State has adopted a [rule](#) requiring an ADA accommodation inquiry as to the need for appointment of a legal advocate if, during any part of a proceeding, “the administrative law judge or any party has a reasonable belief that an otherwise unrepresented party may be unable to meaningfully participate in the adjudicative proceeding because of a disability.” FEHC regulations should provide such guidance to judges in court proceedings and administrative law proceedings.

Add these two sentences at the end of subdivision (pp) of § 14020. “In a judicial or administrative proceeding involving a litigant or witness with a mental disability, a reasonable accommodation may include appointing counsel for a litigant or providing a process interpreter or cognition assistant for a witness. A process interpreter or cognition assistant is an individual who assists someone with a mental disability to understand and participate in a legal proceeding.”

**Recommendation #5.** Clarify in subdivision (a) of § 14050 that a complaint may be filed by a third party who becomes aware of a violation if the aggrieved person has a cognitive, communication, or other disability that prevents or substantially impairs his or her ability to file a complaint on his or her own behalf.

Comment. As currently written, § 14050 assumes that the victim of discrimination is aware of the violation and has the ability to file a complaint on his or her own behalf. This may be true for the majority of people with disabilities, but it ignores the reality that some cognitive and communication disabilities prevent a victim either from knowing they are a victim or being able to file a complaint.

For example, seniors and other adults with cognitive disabilities who are involved in probate conservatorship proceedings may be unable to comprehend when their rights have been violated or understand how to file a complaint. In many cases, their immediate family members may be complicit in a violation of their rights or they may have a conflict of interest which makes it unlikely they would file a complaint to challenge the violation. However, a third party may become aware of the violation and may be the only person practically able to file a complaint.

This regulation should mirror the policy of the [California State Bar](#) which allows anyone

aware of professional or ethical misconduct to file a complaint against an offending attorney. The right to file a complaint is not limited to a client of the attorney. The same is true for criminal complaints with law enforcement agencies. Anyone with information that a person with a cognitive disability has been a crime victim can file a complaint with the police. The police do not limit the filing of complaints to the victim.

Since Government Code § 11135 is supposed to be liberally construed to effectuate its purposes, and since the primary goal of the statute is to protect victims with disabilities from discrimination or denial of equal access to government-funded services, and since people with cognitive disabilities may not be able to file a complaint on their own, § 14050 should clarify that [third parties](#) with knowledge of a violation may file a complaint when an alleged victim with a cognitive disability is not able to do so. Not allowing third parties to file a complaint under these circumstances would constitute a failure by the FEHC to provide a reasonable procedural accommodation to victims of discrimination who have cognitive disabilities.

Add this sentence at the end of subdivision (a) of § 14040. “A third party who is aware of facts that may constitute a violation may file a complaint when the alleged victim has a cognitive disability that may impair the ability to file a complaint on his or her own behalf.”

**Recommendation #6.** As currently written, § 14333 does not indicate whether the duty of a covered entity to ensure effective communications is dependent upon a request. The section should be modified to clarify that a request is not necessary when the entity has actual or imputed knowledge that an accommodation may be needed to ensure effective communication.

Comment. [Federal ADA law](#) imposes duties on a covered entity, even without a request for an accommodation, when the entity knows or reasonably should know that a service recipient, beneficiary, or participant has a disability that may require an accommodation in order to ensure effective communication or meaningful participation in the service. There should be a modification made to § 14333 to clarify that the duty to ensure effective communication is not dependent on a request when a covered entity has actual or imputed knowledge that an accommodation may be necessary for this purpose.

Add this sentence at the end of subdivision (a) of § 14333. “The duty to take appropriate steps to ensure effective communication is not dependent upon a request for an accommodation when a covered entity knows or reasonably should know that a service recipient, beneficiary, or participant has a disability that, without accommodation, may impair effective communication.

Submitted by:  
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Re: Addendum to Request to Revise Proposed Regulations for Government Code § 11135  
<https://spectruminstitute.org/fehc-regs-11135-addendum.pdf>

Dear Councilmembers:

After submitting a request to revise proposed regulations for Government Code § 11135, I noticed some other aspects of the regulations that should be made more specific.

According to § 14000 of the proposed regulations, they are intended to increase efficiency and ensure that the ultimate beneficiaries of Article 9.5 have a clear understanding of their rights and the means by which to enforce them. There are sections of the regulations that are ambiguous and should be clarified to accomplish this objective.

### **Define “Responsible State Agency”**

The term “responsible state agency” is used 10 times in the regulation. Unfortunately, that term is not defined.

A subdivision should be added to § 14020 to define this term as “a state agency providing funding to the covered entity or that has statutory responsibilities for oversight or administration of the program or activity alleged to be in violation of Article 9.5.”

### **Clarify Complaint Options**

Under state law, a victim of discrimination under Government Code § 11135 has various administrative options. The aggrieved person may file a complaint directly with DFEH. Alternatively, under Government Code § 11136 (and implicit in regulation § 14051) the person may file a complaint with a state agency that administers the program or activity in question. However, some covered entities receive state funding from a variety of state agencies. Service recipients are often not aware of which state agencies are funding the covered entity in general or which one is funding the particular program or activity in which the discrimination allegedly occurred.

Language should be added in appropriate places of the regulations to require a covered entity, including any recipient of state funds: (1) to disclose to the public, on its website or

otherwise, all state agencies from which it receives state funding and identify the specific state agency from which it receives the majority of its state funding; and (2) to disclose the names of the state agencies other than DFEH to which an administrative complaint may be filed for alleged violations of Government Code § 11135.

### **Government Code § 11136**

This statute requires a state agency “administering” a program or activity funded by the state to take specific actions when it has reasonable cause to believe that a covered entity to which it is connected has violated Government Code § 11135. The most likely way in which the state agency would obtain reasonable cause to believe a violation has occurred would be a complaint from an aggrieved party or notification from a third party who is aware of the violation. The statute implicitly contemplates complaints being filed with the oversight agency but it does not specify the procedures for filing such a complaint.

Language should be added to the regulations to require a covered entity with 15 or more employees to notify the public and service recipients, on its website or otherwise, of the procedures an aggrieved person should use to file a complaint with the entity or that a third party should use to notify the entity of alleged violations of Government Code § 11135. Service recipients or third parties should not have to guess as to where or to whom they should file a complaint or whether there are administrative procedures within the agency for such complaints.

### **Self-Evaluation Process**

Under § 11334 of the proposed regulations, a recipient with 15 or more employees should be required by the responsible state agency to evaluate its current policies and practices and the effects thereof that may not meet the requirements of Government Code § 11135 or its regulations pertaining to persons with disabilities. Such self-evaluation is laudable but unlikely to occur without prodding from the responsible state agency. Which agency would do the prodding? Also, if a disability rights organization wants to participate in that process, but the recipient does not have one, to whom should the organization complain?

Language should be added to § 14334 to clarify, when a recipient receives funding from one or more state agencies, which agency or agencies has authority to ensure that a self-evaluation process occurs. Language should also be added to require recipients with 15 or more employees to notify the public and service recipients when and how such self-evaluation process will occur and who to contact to request participation in that process.

Very truly yours,



Thomas F. Coleman  
Legal Director