Complaint #1 to Sacramento County Superior Court

ADA Title II Regulations
Sections 35.104, 35.107, 35.170(a)

Section 504 of the
Rehabilitation Act of 1973

California Government
Code Section 11135

The Failure of the Court to Appoint Counsel to Represent Conservatorship Respondents Violates State and Federal Disability Laws

Filed by:

Spectrum Institute

with The Arc of California

To the Sacramento County Superior Court:

1. This complaint is brought by Spectrum Institute, The Arc of California, and California Siblings Leadership Network. Each is a nonprofit organization dedicated to protecting the rights and advancing the well-being of people with intellectual and developmental disabilities.

2. The complaint is filed on behalf of individuals with intellectual and developmental disabilities who have conservatorship cases pending in the Sacramento County Superior Court at this time and on behalf of individuals with such disabilities who will have such proceedings initiated against them in the superior court in the future.

3. Individuals with such disabilities, due to the nature and extent of cognitive and communication challenges they experience because of their disabilities, are unable to file complaints with the superior court – either as individuals or as a class – for violations of their statutory and constitutional rights caused by the policies and practices of the superior court.

4. In order for these individuals to have their rights protected and in order to have violations of their rights corrected, these three organizations are filing this complaint on their behalf as their "next friend" and as surrogate advocates for them. State and federal laws prohibiting disability discrimination by public entities allow for third-party standing to file complaints on behalf of involuntary litigants with intellectual and developmental disabilities who are victims of discrimination committed by public entities.

5. The Sacramento County Superior Court is a public entity within the meaning of Title II of the Americans with Disabilities Act. It is a recipient of federal funding within the meaning of Section 504 of the Rehabilitation Act of 1973. It is also a public entity that is part of the judicial branch of state government within the meaning of California Government Code Section 11135.

6. Title II of the ADA and Section 11135 prohibit discrimination on the basis of mental or physical disability by any program or activity that is conducted, operated, or administered by the state or any public entity of state or local government. Section 504 prohibits such discrimination by any program or service operated by an entity that receives federal funding.

7. Conservatorship proceedings are a program, activity, or service operated by the superior court as a public entity. The superior court receives federal funding and is therefore subject to the mandates of Section 504. Courts are public entities subject to the mandates of the ADA.

8. Each year, the superior court issues a "Citation for Conservatorship" to many adults with intellectual and developmental disabilities – perhaps hundreds of them – commanding them to appear before the court in proceedings that will determine whether their right to make major life decisions will be taken away from them, with authority to make such decisions for them given to another person. These proceedings place at risk the statutory and constitutional rights of such individuals to make decisions about where they live, how they spend their money, whether or where they will work or attend school, what medical procedures they will have, with whom they will or will not socialize, whether or with whom they will have sexual relations, and whether they will marry,

cohabit, or remain single. Once served with a citation, they become involuntary litigants.

9. There are two types of conservatorship proceedings in California – each of which is governed by different statutes. Limited conservatorship proceedings may be initiated solely for persons with developmental disabilities. General conservatorship proceedings may be initiated for all adults who are alleged to be unable to make major life decisions, regardless of whether the cognitive challenge arises from a medical illness, an accident, or is developmental in origin.

10. Proposed conservatees do not choose whether the petition filed against them is for a general conservatorship or a limited conservatorship. It is the petitioners who make that decision.

11. A significant number of petitions filed against individuals with developmental disabilities in the Sacramento County Superior Court are for general, not limited, conservatorships. The decision to file for a general conservatorship carries with it implications for the rights of proposed conservatees who are cited to appear in the proceedings.

12. If a petition for a limited conservatorship is filed, an attorney must be appointed by the court to represent the proposed conservatee in the proceeding. There are no exceptions. If a petition is filed for a general conservatorship, appointment of an attorney is not required unless the proposed conservatee requests an attorney or the court makes the determinations specified by Probate Code Section 1471(b).

13. If a petition for a limited conservatorship is filed, the regional center must be notified and it must conduct an assessment of the proposed conservatee and file it with the court for consideration in its evaluation of his or her capacity to make decisions. If a petition is filed for a general conservatorship, a regional center report is not mandatory.

14. Whether it is due to official court policy, or due to customary practices of one or more of the judges of the court, attorneys are not being appointed for a significant number of adults with developmental disabilities when a petition for general conservatorship is filed. In some general conservatorship proceedings, the regional center is not being notified or the court proceeds to judgment without the benefit of a regional center report for proposed conservatees with developmental disabilities.

15. Complainants are informed and believe that many petitioners are choosing to file for a general conservatorship rather than a limited conservatorship in order to avoid the delay, and possible additional cost of additional court hearings, that may be caused by the requirements of an attorney being appointed for the proposed conservatee and the regional center being notified and being required to file a report. Some of these petitioners are advised to file for general conservatorships by attorneys or self-help centers, or school personnel, or others.

16. In those cases where a general conservatorship petition is filed and an attorney is not appointed to represent the proposed conservatee, individuals with intellectual and developmental disabilities are required to represent themselves in these legal proceedings. In the event that a regional center is not notified or the court proceeds to enter a judgment without receiving a regional center report,

these individuals are deprived of the benefit of an assessment of their capacities by an objective agency with specialized knowledge that would assist the court.

17. By virtue of the allegations in the petition, and information contained in the medical capacity declaration and other documents associated with the petition, judges are told that proposed conservatees have significant cognitive and communication disabilities that impair their ability to understand and make significant decisions necessary for daily living. Judges are informed that the cognitive impairments are so significant that a major intervention is necessary and that the court should transfer authority to make decisions to another individual. This information, in and of itself, places the judges on notice that accommodations may be needed in order for the proposed conservatee to have meaningful participation and effective communication in the legal proceeding.

18. Judges in these cases are aware, or reasonably should be aware, that such proposed conservatees may not be able to understand what a lawyer is, or what an attorney does, or why having an attorney to represent them may be important for them to have justice in the proceeding. Judges, therefore, are placed on notice that many or most of these proposed conservatees lack the ability to make an informed decision on whether or not to request an attorney. Even if they are informed of the right to an attorney by a court investigator or other person, many of these proposed conservatees may not understand the significance of what they are being told. Therefore, their failure to request an attorney could not realistically be considered to be a knowing and voluntary waiver of legal representation.

19. Judges in these cases are aware that, historically and statistically speaking, the overwhelming majority of petitions for conservatorship are granted by the court. Judicial notice of this fact and this procedural pattern should inform the judges that the proposed conservatee before them in a particular case may very well have disabilities that would impede meaningful participation and effective communication in the case without the appointment of counsel.

20. The ADA, Section 504, and Section 11135 require a public entity – including a court – to provide accommodations for a known disability in order to ensure meaningful access and effective communication in the program or service operated by the entity. This knowledge may come to the attention of the public entity through a request or because the disabling condition is obvious, or through information that comes to the court from a court investigator or from any other source. The petition, confidential questionnaire, medical capacity declaration, and other documents filed by the petitioner are such sources of information.

21. In each and every case that is filed for a conservatorship, the judges know that the proposed conservatees have alleged, perceived, or actual cognitive and communication disabilities that may impair their ability to have meaningful participation and effective communication in the proceeding. Despite having this knowledge, judges in a significant number of cases fail to appoint an attorney to represent the proposed conservatee. Many of them also fail to notify the regional center and require the filing of a regional center report prior to any hearing on the petition.

22. Without the assistance of an attorney, and without the filing of a regional center report, many

proposed conservatees are being denied access to justice in violation of due process, equal protection, the ADA, Section 504, and Section 11135.

23. Judges are failing to follow the mandate of Probate Code Section 1471(b) that implicitly requires a determination, if counsel is not going to be appointed, on whether counsel is necessary to protect the interests of the proposed conservatee. If counsel is not going to be appointed, such a determination needs to be made.

24. A recent unanimous decision of the California Supreme Court instructs that: [T]he policy of affording indigent litigants meaningful access to the judicial process establishes restrictions not only upon potential barriers created by *legislatively* imposed fees or procedures, but also upon *court*-devised policies or practices that have the effect of denying to qualified indigent litigants the equal access to justice . . . ." The court added: "[T]o be valid a court policy, like a local court rule, must be consistent with the federal and state Constitutions, statutes, rules of court, and applicable case law." Jameson v. Desta, S230899 (July 5, 2018).

25. The policies and practices of the Sacramento Superior Court in not appointing counsel to represent proposed conservatees in each and every case – without making an individualized determination that counsel is not necessary to protect the interests of the litigant, and is not necessary to ensure access to justice and effective communication in the proceedings – violates Section 1471(b), Section 11135, Section 504, and Title II of the ADA.

26. Failure to appoint counsel for proposed conservatees with known cognitive and communication disabilities that are likely to impair their ability to have meaningful access to justice also violates the due process clauses of the state and federal constitution.

27. Failure to appoint counsel when petitioners decide to initiate a general rather than a limited conservatorship proceeding deprives proposed conservatees of equal protection of the law, as does the practice of proceeding to judgment without regional center reports just because a general conservatorship proceeding was chosen by petitioners.

28. The Sacramento County Superior Court has the authority to institute a new policy or court rule requiring the appointment of counsel for proposed conservatees with developmental disabilities in all cases, regardless of whether they are designated general or limited, unless there has been an individualized fact-based determination that: (1) appointment of counsel is not necessary to protect the interests of the proposed conservatee, including the interest in access to justice as required by the ADA, Section 504, and Section 11135; and (2) the proposed conservatee has the capacity to waive the right to counsel and has done so knowingly and voluntarily.

29. The Sacramento County Superior Court should institute such a policy or court rule within 60 days from the receipt of this complaint.

30. Effective January 1, 2017, the California Department of Fair Employment and Housing was given jurisdiction by the Legislature to receive, investigate, and prosecute complaints of disability discrimination by programs or services operated by the state – discrimination that is alleged to

violate Section 11135, including the provision that incorporates the ADA and its implementing regulations.

31. DFEH has a procedure whereby a "Pre-Complaint Inquiry" can be filed with the department to make a preliminary review of policies and practices that may form the basis of a subsequently filed formal complaint against a state-operated program or service. The complainants in this case have filed a pre-complaint inquiry with DFEH regarding the policies and practices of the Sacramento County Superior Court as alleged herein. This complaint, along with declarations and exhibits in support thereof, have been given to the department in connection with that pre-complaint inquiry.

32. It is the intention of the complainants to give the superior court an opportunity to correct the injustices alleged herein before one or more of the complainants file a formal complaint with DFEH or with the United States Department of Justice.

33. Along with this complaint, and in support of its allegations, complainants are submitting to this court a series of declarations on the requirements of the ADA and Section 504 regarding meaningful access to justice. Also being submitted are several exhibits and a "user's guide" to help explain the relevance of those exhibits.

34. Those exhibits include communications from Alta California Regional Center and a Court Appointed Counsel panel attorney, probate notes in 23 conservatorship cases, a citation for conservatorship form, information on Probate Code Section 1471(b), excerpts from the Supreme Court's opinion in Jameson v. Desta, information on Government Code Section 11135, reference materials on the ADA and Section 504, and materials on standing.

35. This administrative complaint is being filed with the superior court pursuant to instructions on the website of DFEH directing that "Complaints should be filed with the State Department or agency alleged to be in noncompliance." It is also being filed pursuant to ADA Title II regulations, Section 35.107, that directs any public entity that employee 50 or more persons to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by Title II of the ADA. These regulations apply to the Sacramento County Superior Court as a public entity that employees hundreds of employees.

Dated: August 16, 2018

Respectfully submitted:

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On behalf of Spectrum Institute,
The Arc of California, and California
Siblings Leadership Network