CIVIL RIGHTS COUNCIL

GOVERNMENT CODE SECTION 11135 ET SEQ. REGULATIONS

FINAL STATEMENT OF REASONS

UPDATE TO FINAL STATEMENT OF REASONS

The below revisions constitute an update to the final statement of reasons. To the extent they diverge from the Council's responses in this document relating to the below-mentioned sections, these updates are controlling. Upon further discussion with the Office of Administrative Law, the Council made the following non-substantial changes:

- Removed proposed §§ 14000(d) (first two sentences), 14001, 14003(b) and (d), 14050(c).
- Renumbered proposed §§ 14002-14008 to §§ 14001-14007.
- § 14020(c) – Revised the first sentence such that the definition of "age" is the same definition set forth in Government Code section 12926.
- § 14020(ss) – Revised the first sentence such that the definition of "sexual orientation" is the same definition set forth in Government Code section 12926.
- §§ 14101, 14126, 14153, 14300, 14326, 14338 – for each, added (a) prior to first sentence, and re-lettered / renumbered following subsections accordingly.
- §§ 14342 and 14343 – references to federal guidance and regulations described as "examples" of federal law with which covered entities must comply rather than being incorporated by reference.

DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].

The Council considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; no specific alternatives were considered prior to issuance of the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council's response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing Government Code Section 11135 et seq.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the state. The Council anticipates that adoption of these regulations will benefit the state, state agencies, entities receiving

financial assistance from the state, and others by clarifying and streamlining the operation of the law, making it easier for the state, state agencies, entities receiving financial assistance from the state, and all other persons to understand their rights and obligations and reducing litigation costs.

NONDUPLICATION STATEMENT [1 CCR Section 12].
For the reasons stated below, the proposed regulations partially duplicate or overlap state or federal statutes or regulations, which are cited as "authority" or "reference" for the proposed regulations, and the duplication or overlap is necessary to satisfy the "clarity" standard of Government Code section 11349.1(a)(3).

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)] AND ADDITIONAL REVISIONS

General Comments:

Comment: We commend the Civil Rights Council for developing new regulations to implement Government Code Section 11135. Our comments and proposed amendments are intended to strengthen the regulations as they relate to judicial services for adults with mental and developmental disabilities, especially those who find themselves involuntarily entangled in probate conservatorship proceedings.

We are pleased the regulations clarify that Title II of the Americans with Disabilities Act and the disability nondiscrimination provisions of Section 11135 apply to the Judicial Branch. The judiciary is largely out of compliance with these provisions in terms of judicial services involving people with mental and developmental disabilities.

The Judicial Council is out of compliance by promulgating Rule 1.100 that misinforms court users that a request must be made in order to be entitled to reasonable accommodations for a disability that impairs equal access to court proceedings. The complaint system of the State Bar, an arm of the Supreme Court, is not accessible to many clients of legal services who have serious mental or developmental disabilities. The superior courts do not train or involve ADA coordinators to initiate an interactive process for conservatees and proposed conservatees, all of whom have serious mental or developmental disabilities that may interfere with effective communications and meaningful participation in conservatorship proceedings. Attorneys appointed by superior courts to represent conservatees and proposed conservatees often deliver substandard legal services to these litigants as a result of poor training and lack of monitoring by the appointing courts. Some engage in unethical practices with these clients – practices they would never consider doing with non-disabled clients.

We hope that you will amend the proposed rules to incorporate our suggestions. Doing so will improve the chances that this vulnerable population will have access to justice in these legal

proceedings. Adopting our proposed amendments will also assist officers and employees of the Judicial Branch to comply with the requirements of the ADA and Section 11135.

Council Response: The Council appreciates this comment and responds to the particular suggestions made by the commenter in the appropriate sections below.

Comment: Government Code Section 11135 prohibits discrimination on the basis of mental disability and other personal characteristics by any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. These comments pertain to discrimination by entities within the Judicial Branch against litigants with mental disabilities, especially adults who are involved in probate conservatorship proceedings.

Section 11135 further explains that, "[w]ith respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions." As a result, Judicial Branch entities must, at a minimum, obey the requirements of Title II of the ADA and federal rules and regulations implementing Title II in order to comply with Section 11135.

Mental disability is defined as "[h]aving any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity." Gvt. Code § 12926. Mental disability also includes any mental condition that requires special education services. It also includes having a record or history of such conditions that are known to an entity covered by Section 11135 or being regarded by such entity as having such a condition. "Major life activities" include physical, mental, and social activities and working.

Courts are public entities subject to Title II of the ADA. *Tennessee v. Lane* (2004) 541 U.S. 509. Legal proceedings are the primary service activity of courts. As a result, Title II and Section 11135 apply to probate conservatorship proceedings – litigation in which every case involves an adult with an actual, recorded, or perceived mental disability.

California courts need clear guidance on their nondiscrimination duties to the 7,000 or more adults who are targeted by new conservatorship petitions annually, and to the 70,000 or more adults who have ongoing cases in which they are living under an order of conservatorship. These comments suggest ways to strengthen the regulations to provide such guidance.

Council Response: The Council appreciates this comment and responds to the particular suggestions made by the commenter in the appropriate sections below.

Comment: We appreciate the opportunity to register our support for the Council's comprehensive proposal to clarify the protections afforded by California's ban on discrimination in programs and activities conducted, operated, administered, or funded by the state, as well as to suggest changes to portions of the proposed rules.

[Specific comments regarding various sections, which are addressed below.]

The extensive package of proposed rules touches on many issues of interest to the [commenter], but this comment letter focuses primarily on the domains of racial and economic justice; educational equity; technology & civil liberties; and gender, sexuality, and reproductive justice.

[Specific comments regarding various sections, which are addressed below.]

In sum, we support the overall project of adopting rules to implement the protections of Government Code 11135 *et seq*. and the vast majority of specific provisions in the proposed rules, but we ask the Council to revise portions of the language as specified to ensure clarity as well as effective, broad protection of civil rights and progress toward equity for all Californians.

Council Response: The Council appreciates this comment and responds to the suggestions made by the commenter in the appropriate sections below.

Comment: [A coalition of commenters writes:] The following comments regarding the Civil Rights Council's (the Council's) proposed regulations regarding Government Code sections 11135-11139.8 are respectfully submitted on behalf of the undersigned coalition of attorneys and organizations. Although our comments may appear extensive at first blush, it is important to recognize at the outset that the proposed regulations are overwhelmingly positive and well-grounded in the law. Despite the long delay in the issuance of the proposed regulations, we commend the Council's thoughtful approach and look forward to working with you to ensure the adoption of meaningful regulations that provide clear and needed guidance.

In addition to the recommendations we provide below, we wish to draw the Council's attention to the following critical suggestions:

1. To ensure the proposed 11135 regulations align with existing federal and state language rights mandates and reflect well-established best practices, we prioritize amendments to 14101(a) and (d), as well as changes to the definitions at 14020(ll), 14020(bbb), and 14100(b) - (f).

2. To ensure effective enforcement and strong protections against discrimination, we urge the Council to adopt regulations requiring data collection, analysis, and reporting, as well as robust monitoring and enforcement mechanisms.

Council Response: The Council appreciates this comment and responds to each suggestion made by the commenter in the appropriate sections below.

Comment: We also strongly encourage the Council to take this critical opportunity to affirm that Section 11135 protects against educational discrimination. Unfortunately, a decision arising from the Fifth District Court of Appeal in 2019 incorrectly held educational equity claims, as a categorical matter, may not be brought under Section 11135. This is deeply alarming to students and their advocates statewide who rely on Section 11135 to challenge educational civil rights violations, particularly disparate impact discrimination that fosters segregation and school exclusion on the basis of race and ethnicity.

In 2019, the Fifth District Court of Appeal in *Collins v. Thurmond* held that a 2017 legislative amendment modifying Government Code Sections 11136 and 12930(f)(4) had the effect of categorically excluding all educational equity claims from the reach of Section 11135.1 The court focused on amendments passed in 2017 that placed authority for implementing regulations for Section 11135 to the Department of Fair Employment and Housing ("DFEH"). The amendments added a provision to California Government Code Section 12930 granting DFEH the authority to implement regulations under Section 11135 and the power to:

> [R]eceive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1, *except for complaints relating to educational equity brought under Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code and investigated pursuant to the procedures set forth in Subchapter 5.1 of Title 5 of the California Code of Regulations*, and not otherwise within the jurisdiction of the department.

The *Collins* court incorrectly interpreted this amendment to mean that all educational equity claims were now excluded from the scope of Section 11135; but the text of Section 12930 excludes only "educational equity claims" brought under California Education Code Section 200 *et seq*. - not educational equity claims brought under California Government Code Section 11135. The *Collins* court improperly interpreted the reference to Education Code Section 220 to encompass all educational equity claims, by adding a "such as" that does not exist in the statutory text. The *Collins* interpretation does not follow well-settled canons of interpretation, which instruct "when the language of a statute is clear and unambiguous, there is no need for interpretation and we must apply the statute as written."

The Legislative history of the 2017 amendments to Government Code Sections 11136 and 12930(f)(4) affirms that the statutory changes were intended to be technical and not substantive. A June 2016 Assembly Judiciary Report, released after the amendments passed through the Senate, and an August 2016 Committee Report declared that "the purpose of this measure is simply to reorganize the statutory framework and transfer portions of the Code of Regulations from one jurisdiction to another, *but the bill seeks to do that by keeping the substance of existing rights, remedies, and regulations intact*." This confirms that the

amendments were not intended to take away what everyone agrees was a prior available cause of action for educational equity claims under Section 11135.

Unfortunately, the harm to students from this decision has already been done, as lower courts bound by the precedent set by the Fifth District Court of Appeal continue to dismiss claims challenging educational discrimination under Section 11135, stripping students of these crucial civil rights protections. For example, a recent order of the Contra Costa Superior Court notes that since the *Collins v. Thurmond* decision "is the only published Court of Appeal opinion on the subject...this Court must follow it." We request that the regulations dispel this ambiguity and affirm students' ongoing civil rights to bring educational equity claims under Section 11135.

Council Response: The Council declines to make any changes based on this comment because the proposed regulations are sufficiently clear without such changes and implementing the changes would likely lead to undue delay in the rulemaking.

Comment: We suspect that many Californians are unaware of the existence of Government Code 11135 *et seq.* and are unsure of what to do if they experience a denial of full and equal access to the privileges or benefits of a state or state-supported program. Once the proposed rules become final, we trust the Council and California Civil Rights Department will invest in written materials and outreach efforts with an emphasis on reaching members of protected groups. We are open to uplifting such efforts or otherwise collaborating with the Council and Department as needed to help ensure information about relevant protections and discrimination response options reaches the communities where it is most needed.

Council Response: The Council appreciates this comment.

Comment: Because the practical value of adopting implementing regulations for Government Code Section 11135 *et seq.* is so clear, we encourage the Council to move forward as soon as practicable with an analogous comprehensive package of implementing regulations for the Unruh Civil Rights Act. Based on the requests for legal and technical assistance we receive, we believe that the need for clarification of rights and obligations in the context of private sector business establishments is at least as great as the that in the context of state and state-supported programs and activities.

Council Response: This comment is outside the scope of this rulemaking. No further response is required per Government Code section 11346.9(a)(3).

Comment: [A coalition of commenters writes:] [W]e continue to appreciate the thoughtful consideration the Council has already afforded the proposed regulations, as well as the opportunity for public input and engagement during this process.

Council Response: The Council appreciates this comment.

Comment: These comments address the specific issue that Fair Housing Regulations are not recognized as legal obligations by licensed senior congregate housing administrators as applying to their resident-tenants living in "independent living" level of care - because this housing sector is not specifically named in existing regulations- this subjecting the elderly- our most vulnerable citizens to unbridled discrimination.

Residential Care Facility for the Elderly-Continuing Care Retirement Community (RCFE-CCRC), which operate only after receiving a state license, and (some) receive State medicaid funds, all receive medi-care funds. CCRCs offer a long-term continuing care contract that provides for housing, residential services, and nursing care, usually in one location, and usually for a resident's lifetime.

[…]

Currently in California, there are:

109 authorized (licensed) continuing care retirement communities (CCRC)

3 applications (for license) for new communities (CCRC)

6 authorized for commencement of construction (CCRC)

28 Licensed For-profit provider CCRCs and three applications (for licensure)

6 authorized to accept deposits (CCRC)

10 (Licensed) care facilities (CCRC)

23 Conversions

A random sampling review of the above-referenced facilities' websites, found **NO nondiscrimination statements for their residents**.

The absence of a housing nondiscrimination statement is a critical omission as CCRC senior housing provides unique and extensive benefits and services to its elderly residents - the most vulnerable people of California **- yet compliance with fair housing is not recognized as a legal housing requirement/obligation.**

While some CCRCs receive state funding from Medi-Cal - the state's Medicaid program, others do not accept Medi-Cal, (but) ALL receive federal Medicare, as well as all are licensed by the State Of California, without which the CCRC could not operate within the State.

The absence of a *clear statement* stating that CCRCs are required to comply with Fair Housing as it pertains to civil rights, has resulted in **sixty years of statutory and regulatory non compliance by this housing-provider sector**. The CCRC accrediting agency requires compliance with Federal ADA REQUIREMENTS, but not with federal and state housing laws or housing regulations.

Please note that the following examples are not an exhaustive list of discriminatory practices.

[Commenter describes examples of CCRCs with no nondiscrimination statements as well as discrimination by CCRCs, including on the bases of gender, age, marital status, and disability.]

In summary, licensed CCRCs in California, some of whom receive State Medicaid funding; all of whom receive Medi-care, all of whom must have a State License that permit them to operate in California, do not comply with California Fair Housing as it pertains to protected classes and civil rights. CCRCs are strictly compliant with clearly identified regulations that apply to other areas of their housing and services. For example, specific and clearly identified regulations pertaining to employees, resident safety and care in assisted living and skilled nursing levels of care; *but not independent housing/living. [One CCRC oversees 280 independent housing residences.]*

By clearly stating that CCRCs (and other senior congregant living facilities) must be compliant with California Fair Housing and civil rights, history suggests that, in most cases, compliance will happen in the industry. It poses an undue hardship for seniors to have to navigate these issues alone or to hire an attorney to assist them. Including the legal obligations for CCRCs in a clearly identifiable manner in this set of regulations is consistent with the stated objective as set forth in the "**MODIFIED NOTICE OF PROPOSED RULEMAKING. - INFORMATIVE DIGEST/ POLICY STATEMENT OVERVIEW**:

"In compliance with the Administrative Procedure Act, the Council proposes to adopt these rules as duly noticed, vetted, and authorized regulations. The overall objective of the proposed regulations is to fix typographical and grammatical errors and *provide clarity regarding compliance* with the fair housing regulations. This action has the specific benefit of ensuring that tenants, prospective tenants, owners, housing providers, and other relevant individuals better understand their respective rights and obligations with regard to fair housing rights and obligations. Ultimately, the proposed action furthers the mission of the CRD by protecting Californians from housing discrimination."

AND

Results of the economic impact assessment/analysis:

"….by clarifying and streamlining the operation of the law, making it easier to understand respective rights and obligations, and reducing litigation costs.

Council Response: The Council declines to adopt the statement recommended by the commenter regarding CCRC compliance with various civil rights laws. Such a broad statement would not be appropriate to add to regulations limited to the implementation of Article 9.5, which does not include all fair housing laws and other civil rights protections. Further, the Council declines to adopt the change suggested by the commentator because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [The commenter suggests the following revision to the "result of the economic impact assessment/analysis" in the Council's Initial Statement of Reasons]:

"The Council anticipates that the adoption of the regulations will not impact the creation or elimination of jobs within the state, the creation of new businesses or the elimination of existing businesses within the state, or the expansion of businesses currently doing business within the state. To the contrary, adoption of the proposed amendments is anticipated to benefit the health and welfare of California residents as well as state-funded and state-administered programs, and State licensed senior congregant housing, and activities by clarifying and streamlining the operation of the law, making it easier to understand respective rights obligations, and reducing litigation costs. These regulations would not affect the environment."

Council Response: This comment addresses the Initial Statement of Reasons, not the text of the proposed regulation, and therefore is not responsive to the text noticed for the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: Regulations should be helping to implement the law. A lot of this scheme of regulations is not implementation but rather reiteration. However, at times, this selectively changes the text of the law in the regulations to make them inconsistent or broader than the law allows. That inconsistency and using the regulations to expand law will itself spark litigation. Therefore, this entire scheme should have a critical review by the CRC to not reiterate the law, but only include guidance for implementation that is deemed absolutely necessary and supported by the statutory language.

Council Response: The Council addresses the commenter's specific comments in the appropriate sections below.

Comment: Thank you for the opportunity to comment on this important rulemaking, which will provide necessary clarification to the protections of Article 9.5, and corresponding duties, now that S.B. 1442 has consolidated Article 9.5 enforcement under the jurisdiction of the Civil Rights Department (CRD). LWDA, whose mission is to ensure safe and fair workplaces, deliver critical worker benefits, and promote good jobs for all, is committed to ensuring full and equal access, without discrimination, to the benefits which are administered by the departments, boards, and panels that it oversees. In general, LWDA supports the approach taken by the proposed regulations, which appear designed to ensure robust protections for beneficiaries of state programs against discrimination. Robust protections from discrimination are critical to ensuring that government benefits reach those most in need. However, LWDA submits these comments to highlight some ambiguities and costs that are not explained or justified in the rulemaking package. The roles and responsibilities of state agencies in carrying out the proposed regulations in Article 9.5 are unclear on several points.

Council Response: The Council appreciates the comment and responds to the commenter's specific suggestions in the appropriate sections below.

Comment: Although the notice states that these rules will not impose any additional costs on state agencies, several provisions within the proposed regulations appear to impose costs on agencies beyond those imposed by existing law. (See Gov. Code 11346.5, subd. (a)(6).) Each additional legal requirement imposed by the regulations carries an administrative cost. As mentioned above, many of these increased compliance obligations would, if applied to state agencies, rather significantly increase costs.

Council Response: The Council will respond to the commenter's more detailed related comments in the appropriate sections below.

Comment: My comments go to the need for prompt action in moving ahead with adoption and implementation of the proposed regulations, in particular with regard to the long overdue need to address environmental justice in the context of civil rights. For too long disadvantaged communities have suffered the consequences of California's lagging in requiring compliance with long standing civil rights laws by agencies and other entities when it comes to protecting environmental and public health of those communities against discriminatory programs, policies and actions.

By way of background, I retired from the U.S. EPA in 2019 following forty years professional work at the Region 9 office in San Francisco based in the air program, the final 21 years with a priority on environmental justice and civil rights, in particular Title VI of the 1964 Civil Rights Act. My work included participating in resolution of Title VI complaints as well as regular and ongoing engagement with the Headquarters environmental justice and Title VI programs in resolving Title VI related issues, policy development etc. Since retiring I have maintained involvement in these issues, working with community advocates as well as continuing engagement with EPA HQ programs. I also belong to the Title VI Alliance, a national network which came together more than 10 years ago to support effective enforcement of Title VI of the Civil Rights Act of 1964.

In the interests of bringing environmental justice and civil rights together in protecting California communities, the following recommendations are provided.

- **Expedite guidance and training.** Guidance should be provided to those affected by the program, for both those subject to the regulations and those whose welfare is at stake. Where formal guidance may require extended efforts and time, informal guidance, FAQs etc. should be expedited. Clarification of roles and responsibilities, complaint and investigatory procedures would be helpful.
- **Leverage current interagency structures.** With regard to environmental justice, coordinated efforts should be prioritized and directed at agencies whose primary mission includes community and public health. For instance many, though not all, agencies implicated in environmental justice reside within the California EPA. Opportunities to integrate and coordinate the missions and capacities of such agencies should be prioritized. For instance, the role of the California Air Resources Board in ensuring compliance in air programs across

the State may benefit from technical assistance from OEHHA, DPR and others. Likewise, efforts at regional air agencies may benefit from an approach coordinated with state and other agencies.

  - Coordination and capacity development across California agencies should be carefully thought out. Legal expertise and programmatic expertise differ and may reside in different offices and agencies. Programmatic expertise is essential for effective understanding of how environmental and other decisionmaking can both hinder and enhance civil rights compliance.

- **Make use of currently available tools.** Emphasize and prioritize use of currently available tools for basic requirements such as equity analyses, consideration of alternatives. CalEnviroscreen and other tools for cumulative impacts are already available and should be put to use immediately in addressing civil rights requirements. Likewise current environmental requirements, for instance clean air permitting requirements, already require systematic consideration of alternatives, and their methodologies can be adapted to address requirements for less discriminatory alternatives.
- **Coordinate with and leverage federal efforts.** Prioritize coordination with and leverage federal civil rights requirements and initiatives. As the Statement of Reasons notes, CDR intends to build on and be "at least as protective" as federal civil rights requirements (p2). Under the Biden Administration, as well as the recently restructured US EPA Office of Environmental Justice and External Civil Rights (OEJECR, September, 2022) several initiatives are underway to enhance compliance with Title VI of the 1964 Civil Rights Act. Over the past several months OEJECR has been engaging with the Environmental Council of States (ECOS) and other interagency bodies to facilitate and enhance environmental justice and civil rights compliance. This poses opportunities to coordinate with and leverage federal efforts. Failure to take advantage of these opportunities could result in needless waste of time and resources.
  - The US EPA has issued several documents relevant and potentially useful to complying with the requirement to avoid discriminatory impacts. For instance in August, 2022 EPA issued "Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions" (https://www.epa.gov/system/files/documents/2022-08/EJ%20and%20CR%20in%20PERMITTING%20FAQs%20508%20compliant.pdf) and in December, 2022 issued documents pertaining to cumulative impacts ("EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum"; https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf.)
- **Civil rights requirements are pre-existing and cross-cutting.** Emphasize the priority and cross-cutting aspect of civil rights requirements. While some agencies and entities subject to these civil rights requirements may view them as "additional" to already existing obligations for which availability of resources may appear limited, the State should insist on

the fact that these requirements are fundamental, long standing and cross-cutting. Their "priority" should not be open to debate, they cannot wait. Justice delayed is justice denied.
    - To ensure this, compliance with 11135 et seq. should be made a pre-condition for taking actions potentially effecting protected populations. The US EPA's experience in implementing the Clean Air Act and requiring assurances of compliance with Title VI as a precondition for federal action on State Implementation Plans (SIPs) may be informative. (Referring to US EPA actions on CARB-submittal of clean air plan for the San Joaquin Valley and conflicts with Section 110(a)(2)(E) of the Clean Air Act.)
- **Emphasize substantive compliance that affects actual decisionmaking.** Do not repeat the US EPA's ill-founded and decades long emphasis on procedural over substantive requirements. Improved and more protective decisionmaking by agencies and entities subject to these requirements should be prioritized. Procedural requirements on their own are insufficient, tending to press indirectly for better decisionmaking, while civil rights at their core require actual nondiscriminatory decisionmaking.
- **Environmental justice advisory body.** Consider convening an advisory body including members and/or representatives of disadvantaged communities. The State currently has a number of EJ-related advisory bodies and consideration could be given to consulting with one of them on issues and situations in which environmental justice and civil rights intersect.

Council Response: This comment is not requesting a change to the regulatory language but makes statements and recommendations outside the scope of the language noticed for the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: The County of Santa Clara ("County") is pleased to offer comments on the Proposed Government Code Section 11135 *et seq.* Regulations. Overall, the County strongly supports robust enforcement of civil rights protections, including the expansive protections of Article 9.5 for state-funded programs and activities. The County is committed to advancing equity, inclusion, and belonging in its daily operations, policies, and budget decisions. That commitment includes furthering civil rights, racial justice, environmental justice, and equal opportunity as well as ensuring nondiscrimination as prohibited by federal, state, and local laws.
Consistent with that commitment, these comments support the purpose of the regulations by identifying areas where clarification or additional explanation from the Civil Rights Council would assist covered entities in complying with the requirements and allow members of the public to understand their civil rights protections.

The County's comments generally fall into a few categories – clarifications to strengthen the protections related to gender or sex discrimination; clarifications to assist covered entities in

serving individuals with limited-English-proficiency; clarifications regarding the scope of certain other terms; and clarifications related to the interplay between these regulations and other statutory schemes. In all instances, the County offers these comments to further the Civil Rights Council's efforts to ensure that these regulations promote robust civil rights compliance and our shared commitment to advancing equity.

[Specific comments regarding various sections, which are addressed below.]

The County is deeply committed to ensuring equal access to County programs, benefits, and activities regardless of gender or sex and applauds the Civil Rights Council's efforts to ensure robust protections against discrimination on those bases, including protections for transgender participants or beneficiaries. In keeping with that objective, the County has identified certain areas of the regulations regarding gender and sex where clarification or expansion would promote these goals and enable covered entities to better understand their obligations under Government Code section 11135 et seq.

[Specific comments regarding various sections, which are addressed below.]

The proposed regulations provide strong protections to ensure that persons with limited-English-proficiency (LEP persons) have meaningful access to programs and activities funded by the State. The County is in strong support of the proposed regulations, especially since a majority of the County's residents over the age of five speak a language other than English at home. However, in some instances the proposed regulations would benefit from further clarity to ensure that covered entities are able to comply, avoiding costly litigation to develop the interpretation of these requirements.

[Specific comments regarding various sections, which are addressed below.]

In order for the County to comply with these proposed regulations, and for other covered entities to do the same, it would be beneficial for the Civil Rights Council to clarify certain terms in the regulations. [I]ncluding additional clarification would also provide members of the public with greater understanding of their rights under these regulations and help covered entities avoid unnecessary litigation.

[Specific comments regarding various sections, which are addressed below.]

The proposed regulations will strongly further the purposes of Government Code section 11135, *et seq.* Therefore, the County is pleased to support the regulations and offer these comments to strengthen and clarify the regulations to promote the shared goals of equity and nondiscrimination.

Council Response: The Council appreciates this comment and responds to the commenter's detailed comments in the appropriate sections below.

Comment: Please accept the following as my public comments regarding the proposed changes to the current DFEH provisions regarding reporting disability discrimination specifically, and unlawful discrimination more broadly.

I am not a non-profit or a public entity. I am an attorney licensed to practice law in California with disabilities. I've also submitted assisted or represented multiple disabled people making complaints to the DFEH over my career, primarily in education, employment or healthcare settings. Many of my clients have been Deaf, hard of hearing and/or have an auditory processing disorder. In full disclosure I use bilateral hearings aids myself, and identify as someone who has a hearing related disability.

There is a disconnect at the DFEH and many other public entities about the types of reasonable accommodations that hard of hearing and/or people with auditory processing need. It is likely the DFEH understands that Deaf people need qualified ASL interpreters for effective communication. However, there seems to be a complete lack of awareness regarding why hard of hearing and/or people with auditory processing disorders also need effective communication, as well as an assumption that because we have some degree of hearing/processing we don't need closed captioning, life stream CART services with a transcript (which is not the same as closed captioning on the bottom of a Zoom), note taking, summaries extra time to process or repeat information or questions, extra time for reporting so that intakes are not curtailed or incomplete to fit in a 30 minute window.

It is not acceptable that hard of hearing and/or those with auditory processing disorders are denied effective communication because it is time consuming or inconvenient to DFEH scheduling and investigators, especially when hearing disabled people are attempting to make complaints about denials of reasonable accommodations. Frequently, these denials trying to be reported are a series of events over a span of time. If an entity has systemic discrimination issues there is literally a number of events being reported, each factually important and frequently not related to the same policy or procedure series of retaliatory, coercive, intimidating or acts of interference with reasonable accommodations, and therefore more like a series of related poems than a novella.

Unfortunately, due to lack of response by the entity, these types of complaints involve numerous people and numerous acts in various settings. However, if complainants are not allowed effective communication and other reasonable accommodations the specific acts cannot be explained by the complainant to the DFEH, much less investigated by the DFEH.

Also when people are denied reasonable accommodations and effective communication their voices are silenced and the Respondents' conduct will not be investigated. Complainants risk being further silenced if they speak to the DFEH, or even have a history of speaking to the DFEH. The scope of what is retaliatory under the DFEH is no where near comprehensive enough to encompass what happens in higher education settings when hard of hearing/processing/Deaf people are punished by Respondents for their protected activity or the

perception that they have engaged in or are planning to engage in protected activity. This includes not just withholding disability related services, but also denying other forms of communication, meeting notices, opportunities to meet/interact with other disabled students/employees through isolation/exclusion, breach of duties owed to all students/workers, targeting them, denying them remedies provided to others similarly situated who are not complainants, withholding awards/bonuses, imposing additional requirements for them to access benefits, denials of benefits, violating internal directive, policies, and procedures secured or guaranteed by the Code (Renumbered).

Most importantly, disabled students/others cannot wait a year for relief from continuous and ongoing retaliation or serial denials of reasonable accommodations or equal access. The investigation period, assuming the DFEH even listens to understand what the denials of reasonable accommodations and/or effective communication are. It is still unclear how the DFEH expects disabled people to report courses of conduct that involve similar Events, multiple people, different harms, benefits, etc. while they still must rely on the entity being reported for the very services, reasonable accommodations, effective communication that has already been denied, improperly provided, substituted with unilaterally chosen ineffective substitutes.

The DFEH would never ask a documented blind person with a cane if they still need reasonable accommodations each time, and likewise neither would most public entities. Therefore, why is there a double standard for documented hard of hearing, auditory processing, Deaf people?

This intrinsic bias and assumptions regarding disabled people with hearing disabilities needs to be addressed, as usually the lack of regular hearing/processing is comorbid with other disability related challenges, such as sequencing, executive functioning and planning.

I had hoped to be able to submit a more streamlined comment, however, Re number the Code sections and stretching them out is not user friendly for people who have vision disabilities. Obviously, whoever decided to move and completely renumber GC 11135 does not care how much more inaccessible the new version is for an exercise like this requiring comparing and contrasting, rapid eye switching between texts, while processing the legal Semantics of word choice and replacement.

If anything, please do what you can to make the revised Code readable, accessible, and understandable. How do you expect disabled people to understand their rights when they are buried deep inside a lengthy and complex Code section such as this, which is not disabled user friendly.

Council Response: This comment is not asking for a particular change to the text of the proposed regulations. No further response is required per Government Code section 11346.9(a)(3).

Article 1. General Matters

Comment: We thought that some of our broad comments would be best given through the context of real life examples that we've heard from the children, youth, and families across California that we serve. Grounding our comments in these stories helps illustrate the ways that these Government Code regulations could be strengthened to fulfill their purpose of providing robust protections for Californians.

Case 1: A nonminor dependent (NMD)1 foster youth is living in a transitional housing program that has been licensed by the Community Care Licensing Division of the California Department of Social Services and certified by the county to provide transitional housing to the county's nonminor dependent foster youth. The county has a contract with the transitional housing provider (a nonprofit non-governmental entity) to provide housing and supportive services to its NMD foster youth. The NMD foster youth has one minor child who lives with her in her transitional housing. When she finds out that she's expecting another child and tells her transitional housing program case manager, the program informs her that she cannot stay in their program and housing unit with two children, and she's told that she needs to leave the program and her housing unit.

Feedback: In this scenario, the transitional housing program should be considered a covered entity under proposed regulation 14020(m)(3) and (4) and the youth as the ultimate beneficiary should be protected on the basis of sex discrimination; however, in our practice, we find that many transitional housing programs don't understand or believe that Government Code 11135 applies to them. The contracting covered entity (e.g. the child welfare agency/county etc.) should be required in its contracts with these providers (who are also covered entities) to include requirements that the contracted provider follow relevant nondiscrimination laws. To address this issue, we propose adding Section 14009.

Addition: Section 14009 Recipients: Knowledge Presumed All recipients are obligated to comply with Article 9.5, this subchapter, and other implementing regulations and lack of knowledge that a recipient is a covered entity shall not be a defense or excuse for failure to comply.

Council Response: The Council declines to adopt the suggested modification because it would not add clarity to the regulations.

§ 14000. Purpose of This Subchapter

Subsection 14000(c)

Comment: [R]egarding vagueness, proposed section 14000, subdivision (c), would incorporate by reference all "definitions and prohibitions set forth in other subchapters of Chapter 5 of Division 4 of Title 2 of the California Code of Regulations," and "[i]n the event of any conflict between the definitions and prohibitions of the provisions incorporated by this reference and the definitions and prohibitions set forth in this subchapter, the definitions and prohibitions set forth in this subchapter shall prevail." The proposed rules should make clearer the applicable definitions and prohibitions imported from elsewhere in the code.

As an initial matter, we note that there appears to be an error in reference. The referenced chapter, Chapter 5 of Division 4 of Title 2, has been renumbered and does not exist currently. The citation appears to be intended to reference Chapter 5 of Division 4.1 of Title 2, which are all the other regulations of the Fair Employment and Housing Council (now the Civil Rights Council). If this is the case, this rule presents significant cause for confusion by regulated agencies. Government Code section 11139 says that Article 9.5 "shall be independent of any other rights and remedies," and proposed section 14004, subdivision (a) says that "[c]ompliance with other laws does not in itself constitute compliance with or discharge the protections, prohibitions, rights, duties, sanctions, and remedies imposed by Article 9.5" by a regulated entity. A regulated agency would be obligated by proposed section 14000, subdivision (c), to ascertain which of the other rules of the Civil Rights Council related to employment and housing constitute "definitions and prohibitions;" determine which, if any, could apply in the Article 9.5 state-funded-benefit context; and then determine whether there is a "conflict" with an existing rule. Even then, there would be no guarantee, pursuant to proposed rule 14004, subdivision (a), that compliance with the non-Article 9.5 rule would meet its obligations under Article 9.5.

This appears to exceed the interpretive and compliance obligations on a regulated agency which any rule, including rules incorporated by reference, may impose. (See Cal. Code Regs., tit. 1, §§ 12, 16, 20.)

Council Response: The Council agrees with this comment in part and accordingly proposes to correct the reference to "Division 4" in section 14000(c) to read "Division 4.1." The Council disagrees with the remainder of this comment to the extent it contends that the proposed language is not clear.

Subsection 14000(d)

Comment: [A coalition of commenters writes:] We applaud the Council for including the following language in section 14000, subsections (d) and (e): "this subchapter and implementing regulations afford additional protections to provide robust protection of protected classes in state and state-supported programs and activities," as well as, "includes intersectional discrimination [and] discrimination on more than one basis.

Council Response: The Council appreciates this comment.

Comment: [A coalition of commenters writes:] Subsection (d) appropriately notes that federal law provides a floor of protections independent of section 11135. Because the federal Americans with Disabilities Act prohibits denial of full and equal access, this protection should be noted at the end of the second sentence of subsection (d) by adding the words "and denial of full and equal access."

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] The proposed regulations use the defined term "other implementing regulations." However, the third sentence of subsection (d) inadvertently omits the word "other."

Council Response: The Council agrees with this comment and proposes to add "other" in subsection (d) between "this subchapter and" and "implementing regulations."

Comment: California Code of Regulations (CCR) section 14000(d) should be stricken in its entirety. It is not implementing regulations, but instead is drafted as if a statute. Notably, Government Code (GC)11135 already provides if the State's laws are more stringent, they supersede federal protections, as the law of the state. This regulation text does not clarify those obligations or this fact. Further, these regulations are drafted to control how the statutory scheme and implementing regulations should be "construed." This is a legislative or judicial prerogative, not appropriate for a regulatory scheme to assist in implementing legislation and is already provided statutorily under GC 11139.2.

Council Response: The Council disagrees with this comment. Government Code section 12935(a) sets forth the responsibilities of the Council, which include in pertinent part the adoption and promulgation of regulations that "***[i]nterpret***, implement, and apply all provisions of … Article 9.5 (Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of this code …" The Council accordingly has the authority to and responsibility of construing the statutes enforced by the Civil Rights Department in the course of its rulemaking work.

Subsection 14000(e)

Comment: We appreciate the addition of language at 2 C.C.R. Section 14000(e), and thereafter, recognizing that prohibited discrimination includes intersectional discrimination and discrimination on more than one basis. Californians do not lead single-issue lives, nor do they solely experience single-issue discrimination, and including this language will help make clear to all stakeholders that discrimination rooted in more than one actual or perceived characteristic is actionable.

Council Response: The Council appreciates this comment.

Comment: 2 CCR 14000(e) should be stricken in its entirety. This impermissibly seeks to create another category for impermissible discrimination, "intersectional discrimination" which is not in any statute and the same as on "more than one basis". Yet, this regulatory scheme seeks to define this and include its definition as a new protected category. Either term/concept is redundant and unnecessary since citing one or more protected classes as the basis of discrimination is always possible and never prohibited. Further, DWR objects to including "harassment, coercion, intimidation, and retaliation for exercising a protected right or refusing

to engage in an act prohibited by Article 9.5," since this language also seeks to act as legislation beyond the statutory authority for this regulation. GC 11135, 11136 and 11139 which are the underlying statutes for these regulations, do not include retaliation for exercising protected rights or any of this language. The statutory intent, by its language, is to prohibit the discrimination against persons by programs or activities funded by the state. This expands the statutory scope impermissibly to some exercise of protected rights, instead of focusing on the protected class status.

Council Response: The Council disagrees with this comment. Subsection (e) makes clear that discrimination under Article 9.5 may take different forms, including intersectional discrimination, discrimination on more than one basis, harassment, coercion, intimidation, and retaliation. The Council disagrees that this subsection goes beyond the statutory authority. Rather, this language is necessary to ensure that the requirements of the section are interpreted liberally in ways consistent with other civil rights protection and can be fully enforced.

§ 14001. History of this Subchapter

No comments received.

§ 14002. Applicability of this Subchapter by Operation of Law

No comments received.

§ 14003. Relationship to Local Laws

Comment: [A coalition of commenters writes:] We recommend adding "program" to the first sentence of proposed section 14003 (Relationship to Local Laws) as follows: "To the extent that any local law, regulation, ordinance, resolution, policy, program or practice is in conflict with Article 9.5..."

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

§ 14004. Legal Scope

Comment: [A coalition of commenters writes:] We applaud section 14004's interpretive guidance regarding section 11135's legal scope. This is necessary for recipients of state support and for beneficiaries of such support, and accurately describes the relationship between section 11135 enforcement and other civil rights laws. For example, we appreciate that subsection (a) expressly states that compliance with other laws does not itself constitute compliance with 11135 and that remedies available under 11135 are independent of the remedies available under other laws.

Council Response: The Council appreciates this comment.

Subsections 14004(b) and (c)

Comment: 2 CCR 14004(b) and (c) should be stricken. These are not implementing regulations, but instead drafted as if statutory language which is a legislative prerogative. Further, this is already provided statutorily under GC 11139 unless partially to clarify ambiguity for "lawful programs or activities that benefit members of protected classes." As such it appears to be definitional instead of prerogative. DWR suggest this be rewritten to perhaps indicate that lawful programs or activities may include but not be limited to programs or activities as referenced in this section.

Council Response: The Council disagrees with this comment. The Council is authorized to promulgate regulations setting forth how a statute should be interpreted (see Gov. Code § 12935(a)(1)), and proposed subsections 14004(b) and (c) set forth guidance regarding how Article 9.5 is to be interpreted. The Council further declines to adopt the suggested language because it would not add clarity to the proposed regulations.

Subsection 14004(c)

Comment: We applaud the addition of language at 2 C.C.R. Section 14004(c) specifying that the statutory provisions at issue shall not be interpreted in ways that adversely affect lawful programs or activities that benefit members of protected classes in order to overcome the effects of conditions that result or have resulted in limited participation in, or limited receipt of benefits from, any of a covered entity's programs or activities. Spelling this out is important to make clear to all stakeholders that intentional interventions to overcome the lingering effects of historical discrimination and structural inequities are legally permissible. The language is especially important to include in light of the efforts we have seen intensifying in recent years to use California's civil rights laws to frustrate their own purposes and block both public and private sector initiatives geared toward promoting inclusion and opportunity for women, LGBTQ people, and other marginalized groups.

Council Response: The Council appreciates this comment.

§ 14005. Recipient – Duration of Obligation: Real Property

Subsection 14005(d)

Comment: [A coalition of commenters writes:] The proposed regulations add a final sentence to subsection (d) of section 14005 (Recipient - Duration of Obligation: Real Property) clarifying that ultimate beneficiaries may enforce nondiscrimination covenants running with the land that are required in subsections (b) and (c): "Ultimate beneficiaries may enforce regulatory agreements or covenants, conditions and restrictions required pursuant to this section." Adding this language to subsection (d), which otherwise clarifies that a nondiscrimination covenant shall be deemed inferred even if there is failure to comply with the requirement to explicitly record a nondiscrimination covenant may cause confusion. We propose moving this additional language to a new subsection (e), to make it clear that a beneficiary has the right to enforce a

nondiscrimination covenant, whether or not a recipient or transferee failed to comply with (b) and (c).

Council Response: The Council agrees with this comment and proposes to implement the recommended change.

§ 14006. Recipient – Duration of Obligation: Personal Property

No comments received.

§ 14007. Recipient – Duration of Obligation: Other Cases

Comment: [A coalition of commenters writes:] We applaud the Council for recognizing that recipients should be obligated to comply with Article 9.5, this subchapter, and other implementing regulations for the period during which state support is received and continuing thereafter for the period during which the recipient enjoys the benefit or advantage of the state support it received. This language will make clear that covered entities must continue to comply with section 11135 so long as they enjoy the benefit and advantage of that state support (such as support received during the height of the recent pandemic) and will preclude such entities from engaging in discriminatory practices while they still enjoy such benefits and advantages.

Council Response: The Council appreciates this comment.

§ 14008. Severability.

No comments received.

Article 2. General Definitions

§ 14020. Definitions

Comment: A subdivision should be added to Section 14040 (definitions) to define "next friend" as: "Someone who is dedicated to the best interests of an aggrieved person who cannot file the complaint on their own behalf due to a mental disability."

Council Response: Assuming the commenter intended to reference section 14020, the Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(a). "The Act" or "Article 9.5"

No comments received.

Subsection 14020(b). "Adverse action"

No comments received.

Subsection 14020(c). "Age"

Comment: 2 CCR 14020(c) provides a definition for age discrimination that seems to conflict with statutory definitions. GC 12926(b) is very clear that age discrimination is limited to those who have reached a 40th birthday. The definition provided under these regulations is ambiguous and uncertain to give any guidance for avoiding discriminatory practices or effect. Whereas "age distinction" or "age-related term" may need explanation, the sentence defining "age" itself should be stricken.

Council Response: The Council declines to strike the definition of "age." The Council's proposed change merely adds perception to the exiting 11135 regulations' definition of age. (See Cal. Code Regs, tit. 2, section 11170(b)-(d).) Further, Government Code section 11139 states that Article 9.5 "shall not be interpreted in a manner that would frustrate its purpose" or "undermine lawful programs which benefit members of the protected bases described in Section 11135."

Subsection 14020(d). "Aggrieved person"

Comment: The definition of "aggrieved person" appropriately extends to unpaid interns, volunteers, and persons providing services pursuant to a contract. However, while this language
is consistent with the Fair Employment and Housing Act (FEHA), FEHA includes helpful guidance regarding nonemployees that is absent from the proposed regulations. The County supports including that language from FEHA: "In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered." Govt. Code § 12940(j)(1). FEHA is also explicit that the employer is liable for the acts of nonemployees with respect to interns, volunteers, and contractors where the employer "knew or should have known of the conduct and fails to take appropriate action." Both clarifications for this term would further the purpose of protecting these nonemployees from discrimination while also providing reasonable and consistent limits to the scope of the covered entities' responsibility.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(e). "Ancestry"

Comment: [A coalition of commenters writes:] Subsection (e) defines "Ancestry." The Council should consider adding "caste," to that definition as follows: "'Ancestry' means an individual's actual or self-identified family or ethnic origin, descent or lineage, nationality group, tribal affiliation, caste, or geographical place of origin in which the individual or the individual's parents or ancestors originated, or the perception of the individual's ancestry."

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(f). "Assistance Animals"

No comments received.

Subsection 14020(g). "Associated with"

Comment: [A coalition of commenters writes:] We propose two changes to the comprehensive definition of "associated with." The second sentence states that "associated with" includes, "a person's relationship as an attendant, aide, or caregiver of an individual with a disability." We recommend adding "medical condition" after "disability." We also recommend specifying that the caregiver may be of an individual with a disability or an older adult.

Council Response: The Council disagrees with this comment and declines to implement the suggested language because it would not add clarity to the proposed regulations.

Comment: [A coalition of commenters writes:] Later in the same sentence, the proposed regulation specifies that "associated with" includes, "attendance or participation in schools, clubs, associations, organizations, churches, temples or mosques, generally associated with a protected class." We recommend replacing "churches, temples, or mosques" with "places of worship," which is a more inclusive term than the places of worship listed in the regulations as currently proposed.

Council Response: The Council agrees with this comment and proposes to implement the suggested language.

Comment: 2 CCR 14020(g) defines "[a]ssociated with" and needs to be limited and should be with a person of a protected class, not just a cause. The intent of the statute for definitions where association is mentioned is in Government section 12926(o). In this definition, it clearly limits association "with a person who has, or is perceived to have, any protected characteristics." Therefore, the intent is to protect persons from discrimination, the same as the intent stated under Government Code section 11135. This regulation seeks to broaden protected classes which is the legislature's responsibility. Notably, the *Castro-Ramirez* decision referenced by the CRC was rendered approximately seven years ago and in the intervening years, the legislature has not incorporated more expansive language. Therefore, it should not be done here, but addressed, if deemed necessary, by the legislature.

DWR adds that *Castro-Ramirez* did not hold that FEHA requires an employer to reasonably accommodate an employee for their association with a person with a disability. FEHA prohibits discrimination on the basis of protected characteristics of an individual who is disabled or perceived as disabled. In employment, the employer has the obligation to interact with their employee and reasonably accommodate the qualifying disabilities of that employee to enable

them to perform the essential duties of their job, including accommodating job applicants. The *Castro-Ramirez* court imported the language of Government Code section 12926(o) into what is written in 12940(a) for their expansion of the reasonable accommodation obligation to apply to "associational disability." The dissent was correct in stating that the majority decision cited no legislative history, regulation, case law, administrative decision, or secondary authority to support the majority's holding that FEHA creates a duty to accommodate a nondisabled applicant or employee who is simply associated with a disabled person. All discussion in the majority decision about this issue is dicta because this issue was not even before the court to decide. California's statutory scheme, the legislative history and the record do not support extending the obligation further. This would be the Legislature's job and this regulation exceeds statutory authority.

AB 1670 (1999-2000) was the original source for this "associated with" language. Changes were also made to other Government Code sections pertaining to unlawful discrimination in housing to incorporate the same language. Analysis presented to the Assembly Committee on the Judiciary explained that existing law did "not expressly state that its protections against housing and employment discrimination cover associational rights" and that these changes were necessary to clarify "that FEHA's protections against housing and employment discrimination cover the right to freely associate." The Council's role is not to legislate but to implement regulations for existing legislation.

This comment applies to proposed 2 CCR 14326(b) which prohibits discrimination on the basis of a person's association with persons with disabilities. The comment similarly applies to all other proposed sections that address "associational" discrimination, including section 14181 (association with persons of a particular religion); section 14081 (association with person of a particular age); section 14101 (association with persons of a particular ancestry, ethnic group identification, or national origin); section 14126 (association with persons of a particular color and race); section 14152 (association with persons of a particular marital status); and section 14300 (association with persons of a particular sex or sexual orientation).

Council Response: The Council disagrees with this comment. The proposed definition is necessary to provide clarification and guidance regarding a term in the statute. The proposed regulation appropriately implements existing legislation, as Section 11135(d) explicitly protects people who are "associated with a person who has, or is perceived to have, any of those characteristics." The non-exhaustive list of examples of how individuals may be associated with persons who are perceived to be members of a protected class includes examples that commonly arise in discrimination cases.

Subsection 14020(h). "Auxiliary aids and services"

Subsection 14020(h)(2)

Comment: [A coalition of commenters writes:] We recommend that the examples of auxiliary aids and services in paragraph (2) of subsection (h) should include the use of a scribe. This is

recognized in the education context, see, e.g., U.S. Department of Justice, Civil Rights Division, Disability Rights Section, ADA Requirements: Testing Accommodations, available at: https://archive.ada.gov/regs2014/testing_accommodations.html (testing accommodations include scribes to transfer answers to Scantron bubble sheets or record dictated notes and essays).

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(i). "Benefit"

Comment: [A coalition of commenters writes:] This definition should specify information provided by covered entities, in addition to aid or services as already included in the proposed definition, as follows:

(i) "Benefit" means anything offered or provided with the intention of or for the purpose of contributing to an improvement in condition, maintaining a condition, or preventing anticipated deterioration of a condition over time, including aid, or services *or information* offered or provided by a covered entity.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(j). "Color"

No comments received.

Subsection 14020(k). "Contract"

No comments received.

Subsection 14020(l). "Contractor"

Comment: The Council proposes to amend the definition of "contractor" contained in former section 11150 to clarify that a contractor includes not only a person or local agency *but any recipient of state support under a contract or* subcontract. [The commenter proposes to add the language]"or state licensed to provide senior housing" following "contract or subcontract."] This is necessary to conform the regulations to the scope of Article 9.5 by acknowledging that there are recipients other than local agencies.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(m). "Covered entity"

Comment: The Council's proposed definition of "covered entity" is consistent with corresponding federal statutes. Section 504 regulations clarify that the statute applies to "**each recipient" of Federal funding and to each "program or activity" receiving** such assistance. (28 C.F.R. § 42.502.) *The implementing regulations further define "recipient" to* mean "any State or unit of local government, any instrumentality of a State or unit of local government, *any public or private agency, institution, organization, or other public or private entity,* or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance." (28 C.F.R. § 42.540(e).) […] Further, section 202 of the ADA, which prohibits public entities from discriminating against, or denying services or benefits to, an individual on the basis of disability, defines "public entity" to mean "any state or local government," "any department, agency, special purpose district, or other instrumentality of a State or States or local government," and "the National Railroad Passenger Corporation, and any commuter authority." (42 U.S.C. §§ 12131)

Council Response: The Council appreciates this comment. Because this comment does not suggest any revisions to the text of the proposed regulations, no further response is required per Government Code section 11346.9(a)(3).

Subsection 14020(m)(1)

Comment: Under Section 14020(m)(1) of the proposed regulations, "covered entity" includes " the state or a state agency, including the California Judicial Branch." We support this definition. The superior courts that process conservatorship cases are part of the Judicial Branch and therefore are covered entities subject to Section 11135.

Under Section 14020(m)(1) of the proposed regulations, "covered entity" also includes "any entity or individual, including local agencies, recipients, contractors, and grantees, that is funded directly by the state, or receives any state support." We support this definition. Regional centers conduct assessments and make recommendations to courts in conservatorship cases. They receive funding from the state. Therefore, they are covered entities under Section 11135.

Council Response: The Council appreciates this comment.

Subsection 14020(m)(2)

Comment: Section 14020(m)(2) defines a "covered entity" as including 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. Paragraph (3) defines a "covered entity" as including any entity or individual, including local agencies, recipients, contractors, and grantees, that is funded directly by the state or receives any state support. CDSS requests clarification as to whether a covered entity includes a licensed facility (community care facility, residential care facility for persons with chronic life-threatening illness, residential care facility for the elderly,

child day care facility, home care organization) or registered home care aide or Trustline provider. (See the Community Care Facilities Act (Health and Saf. Code [HSC] § 1500 et seq.), Residential Care Facilities for Persons with Chronic Life-Threatening Illness (HSC § 1568.01, et seq.), Medical Foster Homes for Veterans (HSC § 1568.21, et seq.), Residential Care Facilities for the Elderly Act (HSC § 1569 et seq.), Child Care Provider Registration ("Trustline," HSC § 1596.60 et seq.), Child Day Care Facility Act (HSC § 1596.70, et seq.), and Home Care Services Consumer Protection Act (HSC § 1796.10)). If the Civil Rights Department (CRD) does not intend licensed facilities be covered entities, CDSS requests clarifying language be added to the regulation to discourage civil actions in this context. Likewise, if this distinction hinges on whether a licensed facility receives federal or state funding through a state agency, CDSS requests clarifying language on this point as well.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsections 14020(m)(3)

Comment: [A coalition of commenters writes:] The proposed regulations appropriately note that entities are covered by Article 9.5 if any part of the entity receives state support. This principle is reflected in the definition of the term "covered entity" in subsection (m) with respect to local agencies (paragraph (4)) and the facilities of private entities (paragraph (6)(C)). For clarity and consistency, this principle should also be referenced in the definition of entities and individuals in paragraph (3) as follows:

"(3) any entity or individual, including local agencies, recipients, contractors, and grantees, ~~that~~ *if any part of the entity or individual* is funded directly by the state, or receives state support." Likewise, this principle should be reflected in subsection (m), paragraph (6)(A) as follows: "(6)(A) state support is extended to or received by such entity; or"

Council Response: The Council disagrees with this comment and declines to implement the suggested language, as it is not necessary for clarity. The subsection is not intended to constitute an exhaustive list, but rather to provide examples of entities or individuals that may be covered, as indicated by the term "including."

Subsection 14020(m)(7)

Comment: [A coalition of commenters writes:] Subsection (m), paragraph (7) notes that recipients of state support are covered entities with respect to programs and activities outside of California. However, this paragraph should include not only recipients of state support but also programs and activities that are conducted, operated, or administered by the state or any state agency outside of California.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] We note also that the terms "benefits or services" can be stricken from this paragraph because benefits and services are included within the definition of "program or activity" in subsection (ii) of section 14020.

Council Response: The Council declines to strike this language because it adds clarity to the proposed regulations.

Comment: 2 CCR 14020(m)(7) included the text "or to which state support is extended" in addition to those that receive state support. This is broader than GC 11135 which provisions only apply to those entities receiving state support in some way. Also, it would be impossible to apply these regulations practically to any entity that might be a target to "extend" state service but who never receives those funds. Therefore, this language should be stricken.

Council Response: The Council disagrees with this comment and declines to strike this language. The language is consistent with Title VI, a federal counterpart to Article 9.5. In its definition of "program or activity," Title VI includes "all the operations of...the entity of [a] State or local government] that distributes such assistance and each such department or agency (and each other State or local government entity) *to which the assistance is extended*, in the case of assistance to a State or local government." (42 U.S.C. § 2000d-4a(1)(B) [emphasis added].) That section 11135 was enacted after, and uses language similar to, Title VI (prohibiting federally-funded programs from discriminating based on race, color, or national origin) demonstrates the California Legislature's intent to ensure that section 11135 is at least as protective as its federal counterparts.

Subsection 14020(m)(8)

Comment: [A coalition of commenters writes:] Subsection (m), paragraph (8) applies Article 9.5 to entities created by two or more covered entities. It is not clear why other created entities are not likewise included. The creation of a new entity by any single covered entity would appear to be equally justified without the necessity that another covered entity be involved.

Council Response: The Council declines to adopt the recommendation suggested by the commenter because the proposed regulations are sufficiently clear without it. The proposed definition does not exclude an entity created by a single covered entity.

Subsection 14020(n) "DFEH" or "the Department"

Comment: [A coalition of commenters writes:] Government Code section 12903 was amended to change the name of the Department of Fair Employment and Housing ("DFEH") to the Civil Rights Department ("CRD") […] . The references to the Department should be updated throughout the regulations.

Council Response: The Council agrees with this comment and proposes to modify the proposed regulations accordingly.

Comment: 2 CCR 14020(n) refers to DFEH and should be updated to the new name of the Department.

Council Response: The Council agrees with this comment and proposes to modify the proposed regulations accordingly.

Subsection 14020(o). "Direct threat"

Comment: [A coalition of commenters writes:] The definition of "direct threat" should track the Americans with Disabilities Act definition. Although some of this direction appears in the provisions specific to assistance dogs, it applies elsewhere and should therefore be included in the general definition. We recommend the following addition:

(o) "Direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services. In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(p). "Disability"

Comment: [A coalition of commenters writes:] This definition of disability is comprehensive, and it is clear that the definition is to be liberally construed. Currently, the definition refers to impairments in the singular (e.g., "an impairment limits a major life activity when…"). We suggest making it clearer that the collective impact of various conditions may result in disability. This can be achieved by adding to the first sentence of the definition as follows:

"Disability" means a physical or mental impairment, *or combination of physical or mental impairments*, that limits one or more major life activities of an individual, a record of such an impairment, or being regarded as having such an impairment.

Council Response: The Council disagrees with this comment and declines to implement the suggested language because it is not necessary for clarity.

Subsection 14020(p)(2)

Comment: 2 CCR 14020(p)(2) has the provision that if the legislature determines to change law, that the regulations having more expansive provisions will govern. Regulations to implement law cannot be inconsistent with the underlying law. This provision seeks to usurp legislative powers for the state prospectively and should be stricken.

Council Response: The Council agrees with this comment and proposes to strike all language following the first sentence of 14020(p)(2).

Subsection 14020(p)(3). "Mental disability"

Comment: Under Section 14020(m)(1) of the proposed regulations, "mental disability" tracks the definition used in Government Code Section 12926 as described above. Adults adjudicated to be conservatees meet this criteria. Those who are proposed conservatees do as well since the petition and supporting documents show that they are regarded as, perceived as, or diagnosed as having a mental disability. We support this definition. Once a petition is filed, the court knows that the adult in question is entitled to the protections afforded by Title II of the ADA and Section 11135. As a result, the court's obligations under these laws is triggered at the initiation of a conservatorship proceeding.

Council Response: The Council believes the commenter intended to refer to subsection 14020(p)(3), which defines "mental disability." The Council appreciates this comment.

Comment: [A coalition of commenters writes:] The definition of mental disability at subsection (p)(3) should begin as does Government Code Section 12926(j), with the language: "'Mental Disability' includes, but is not limited to, all of the following:" While the new definition is expansive, we still feel this simple phrase, "but is not limited to" is an important catchall, and the most inclusive language that could be used, and is already used in a different part of the Government Code so would ensure consistency.

Council Response: The Council disagrees with this comment. The proposed regulations at 14020(x) define "includes" to have the same meaning as "includes, but is not limited to."

Subsection 14020(p)(4). "Physical Disability"

Comment: These regulations repeat a lot of what is in the Government Code, which should not be necessary for implementing regulations and makes them unnecessarily long. Section 14020(p)(4)(A) is one of those examples since it repeats the definition already found under GC 12926(m)(1) so is not necessary. This also applies to section 14020(p)(4)(B) which is already under GC 12926(m)(1)(B)(2); section 14020(p)(4)(D) which is already under GC 12926(m)(4), and this also applies to section 14020(p)(E), which is already under GC 12926(m)(5).

Council Response: The Council disagrees with this comment. Given section 11135(c)'s mandate that the definitions of the protected bases listed in section 11135(a) have the same meanings as the terms used in section 12926, which is part of the Fair Employment and Housing Act, it is

necessary for clarity to define such terms, as applicable, in the proposed regulations for purposes of Article 9.5.

Subsection 14020(p)(4)(C)

Comment: 2 CCR 14020(p)(4)(C) adds "diagnosis" to the text already under 12926(m)(3) but again leaves off qualifying text which is very important and included under the Government Code – that the record or history of impairment "is known to the employer or other entity covered by this part" (referring to the Government Code law). This is very important since the record of impairment may not be known to the entity at all and this knowledge is the important part of these provisions which apply to prohibited actions by entities receiving state funds. However, since most of this text is already accurately included in GC 12926(m)(3), it should not be necessary to include it in the regulations. Also, adding diagnosis is not necessary, since that is covered by broader terms of history and record. Additionally, diagnosis can change as medical science changes, but the record of the impairment itself should be consistent. Further having diagnosis listed may cause confusion, since under the federal Family Medical Leave Act, employers may ask for diagnostic information but not under the California Family Rights Act. Therefore, referencing diagnosis here, may cause confusion for whether entities can ask for diagnostic information.

Council Response: The Council initially agreed with this comment in part and accordingly struck "diagnosis" from section 14020(p)(4)(C). However, following its receipt and consideration of further comments on this modification, the Council reinstated the term "diagnosis" into this section. This reinstatement was necessary for consistency with the definition of "mental disability" which includes "having a diagnosis" in section 14020(p)(3)(C).

Subsection 14020(p)(5). "Having a record of such impairment"

No comments received.

Subsection 14020(p)(6). "Perceived as having an impairment"

Comment: 2 CCR 14020(p)(6)(A) defines being "perceived as having an impairment" as having "an impairment that does not limit major life activities but that is treated or perceived as constituting a limitation." This should state that someone is "treated or perceived as having a limitation that limits major life activities," not just a "limitation" as that is too broad. It could be interpreted as any limitation, not connected to major life activities, as required by statute.

2 CCR 14020(p)(6)(B) refers to an impairment "only as a result of the attitudes of others toward such impairment." It seems that "attitudes" is a state of mind and does not describe any tangible actions that would evidence discrimination or this is so subjective that it would give no guidance. Additionally, it is impossible to regulate "attitudes" and the regulations should provide guidance for regulation of actions instead. Additionally, this suggests some regulation of speech defining "attitudes" which might impair free speech rights. DWR suggests this be

deleted/stricken, since actions indicating being "treated or perceived" as having an impairment is already stated and seems to cover this concept.

Council Response: The Council agrees with this comment only to the extent that the definitions set forth in this subsection may cause some confusion. Accordingly, it proposes to strike the language of section 14020(p)(6) in its entirety. Striking the definition of "perceived impairment" does not change the scope of substantive legal protections.

Subsection 14020(p)(7)

Comment: 2 CCR 14020(p)(7) includes drug addiction and alcoholism to be wholesale considered broadly as disabilities. That is inconsistent with state and federal laws, dependent on the job itself and requirements for those jobs whether being under the influence of drugs or alcohol at all would be a basis for termination. GC 12926 (m)(6) specifically provides that physical disability does not include "the current unlawful use of controlled substances or other drugs." Current use of or addiction to illegal drugs is not a disability under the ADA. (42 U.S.C., § 12114(a).) This regulation's blanket inclusion of alcoholism and drug addiction as disabilities would cause conflict with those various state and federal laws and regulations. If the CRC intends this instead to reference being under treatment for those conditions, then that is a notable difference. However, as the regulation is written, this should be stricken. Also, under section 14020(p)(18), this concept of treatment for drug or alcohol addiction is specifically excluded from "current unlawful use of controlled substance or drugs" Therefore, under 14020(p)(7), the reference to drug addiction should be stricken and perhaps only reference being under treatment for alcoholism.

Council Response: The Council disagrees with this comment. The ADA does not exclude from the definition of disability "current addiction to illegal drugs." Rather, the ADA states only that "a qualified individual with a disability shall not include any employee or applicant who is currently *engaging in the illegal use of drugs*, when the covered entity acts on the basis of such use." (42 U.S.C. § 12114(a) (emphasis added).) This language is consistent with the language that the commenter acknowledges in section 14020(p)(18) of the current regulations. The ADA goes on to clarify, in pertinent part, that it does not exclude from the definition of disability "an individual who … is participating in a supervised rehabilitation program and is no longer engaging in such use." (42 U.S.C. § 12114(a)(2).)

Subsection 14020(p)(8)

Comment: 2 CCR 14020(p)(8) seems to be restating many of the same concepts already in statute covered as a history of disability, an actual disability or a perceived disability. This could be edited down to concepts which might need clarification, which appear to be even if the perception of the disability is erroneous. However, this does not seem to give any additional guidance in a lengthy regulatory scheme.

Council Response: The Council disagrees with this comment. The language in section 14020(p)(8) is necessary for clarity, especially given the Council's proposal to remove the definition of "perceived as having an impairment" in subsection (p)(6).

Subsection 14020(p)(11). "Major life activities"

No comments received.

Subsection 14020(p)(12)

Comment: [A coalition of commenters writes:] We are concerned that the reference to "subparagraph (6)" in subsection (p)(12) is in error. We propose the reference to subparagraph (6) should be changed to subparagraph (11) which further discusses major life activities.

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Comment: 2 CCR 14020(p)(12) basically restates many of the concepts covered by GC 12926(m)(1)(A). However, it again goes broader than the statutory scheme and includes "reproductive functions" as a major life activity. This is not provided under the statute, but rather pregnancy and disability related to pregnancy care. What was newly included as a protected basis under FEHA was reproductive health decision-making, but not reproductive functions. Since this impermissibly expands the scope of the underlying law, it should be stricken.

Council Response: The Council disagrees with this comment. The inclusion of "reproductive functions" is consistent with the statutory mandate that "'major life activities' shall be broadly construed . . . ." (Gov. Code § 12926(m)(1)(B)(iii).) In interpreting this directive, the Council long ago promulgated FEHA regulations clarifying that "major life activities" are defined as including "the operation of major bodily functions, including … reproductive functions." (Cal. Code Regs., tit. 2, § 11065(*l*)(1).) The inclusion of "reproductive functions" in this proposed regulation is therefore consistent both with statute and with implementing regulations.

Subsection 14020(p)(13)

Comment: 2 CCR 14020(p)(13) is already covered under the statutory scheme as GC 12926(j)(2)(4) and is not necessary.

Council Response: The Council disagrees with this comment. Given section 11135(c)'s mandate that the definitions of the protected bases listed in section 11135(a) have the same meanings as the terms used in section 12926, which is part of the Fair Employment and Housing Act, it is necessary for clarity to define such terms, as applicable, in the proposed regulations for purposes of Article 9.5.

Subsection 14020(p)(15)(B)(i). "Assistive technology device"

No comments received.

Subsection 14020(p)(15)(B)(ii). "Assistive technology service"

No comments received.

Subsection 14020(p)(17)

Comment: [The definition of] "'[d]isability' does not include… psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs." Though we understand that this exclusion comes from Government Code Section 12926(j) directly, we recommend against excluding the diagnosed disability and instead clarifying that illegal activity and/or dangerous etc. behavior may be excluded notwithstanding a diagnosis.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14020(p)(17) reiterates what is already under the statutory scheme as GC 12926(j)(5) until the last sentence when "sexual behavior disorders" are defined. Therefore, the first sentence should be stricken as unnecessary.

Council Response: The Council disagrees with this comment. Given section 11135(c)'s mandate that the definitions of the protected bases listed in section 11135(a) have the same meanings as the terms used in section 12926, which is part of the Fair Employment and Housing Act, it is necessary for clarity to define such terms, as applicable, in the proposed regulations for purposes of Article 9.5.

Subsection 14020(q). "Ethnic group identification"

No comments received.

Subsection 14020(r). "Facility"

Comment: We request that the following language be added to the beginning of the definition: "'Facility' means**, whether permanent or temporary,** all or any portion of…"

Council Response: The Council disagrees with this comment. The suggested language is not necessary for clarity.

Subsection 14020(s). "FEHC" or "Council"

Comment: For 2 CCR 14020(s), DWR notes the Council is still defined as the Fair Employment and Housing Council, when its new name is the Civil Rights Council.

Council Response: The Council agrees with this comment and proposes to make the suggested revision.

Comment: [A coalition of commenters writes:] Government Code section 12903 was amended to change the name of the Department of Fair Employment and Housing ("DFEH") to the Civil Rights Department ("CRD") and to change the name of the Fair Employment and Housing Council ("FEHC") to the Civil Rights Council ("CRC"). The references to the Department and to the Council should be updated throughout the regulations.

Council Response: The Council agrees with this comment and proposes to make the suggested revision.

Subsection 14020(t). "Gender"

Comment: We applaud the Council's inclusion of numerous provisions in these proposed rules that define and apply terminology related to gender identity, gender transition, pregnancy, marital status, and other related concepts. These long-needed provisions will serve to clarify rights and obligations for all stakeholders and make it easier for Californians who have been denied full and equal access to state or state-supported programs to seek redress.

We appreciate that the proposed rules at 2 C.C.R. Section 14020 define "gender" both to "mean[] sex" and to "include…a person's gender identity and gender expression, or a perception of any of the aforementioned." We also recognize that this language accurately paraphrases the applicable statutory definition at Government Code Section 12926(r)(2). However, we believe additional context is needed to ensure that this language is not twisted to justify discrimination against or exclusion of transgender people, whose sex assigned at birth differs from their current gender identity and who may or may not have secured updates to the "sex identifier" listed on their formal identification documents. Given ongoing coordinated efforts to roll back the rights of transgender and nonbinary people by privileging "biological sex" [meaning sex assigned at birth] over gender identity, we suggest adding to this subsection a clarification that an individual's protected "sex" may differ from their sex assigned at birth.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] We urge the Council to adjust the regulations' definitions of "gender" and "sex" (subsection (rr)) to better account for the rapidly increasing legal threat against transgender Americans that relies on the conflation of these two terms.

Legal attacks against the transgender community frequently rely on defining gender as an individual's sex assigned at birth. While we recognize that the proposed regulations' definition of gender to "mean[] sex" refers to an existing definitional framework in FEHA, Government Code section 12926(r)(2), this language can be easily and dangerously interpreted to support discriminatory legislation and litigation that explicitly or implicitly relies on defining gender as an individual's sex assigned at birth. FEHA was amended to include gender, defined to mean someone's actual or perceived sex, in 2003 (Assem. Bill No. 196 (2003-2004 Reg. Sess.).).

Although the statutory language has evolved, the core of FEHA's definition of sex has not changed in 20 years.

Therefore, we suggest the Council use the proposed regulations to offer more clarity and distinction between the definitions of sex and gender under section 11135, including by providing clear plain meaning definitions of the terms. This would not change the meaning of the definitions which currently exist in FEHA and other state laws. Clarifying the application of those definitions will safeguard against abuse or manipulation of 11135 and its implementing regulations to harm communities the legislature intended to protect in promulgating 11135.

We further suggest that the definitions of "gender identity," "gender expression," and "transgender" currently in (subsection (rr)(1)-(3)) be moved under subsection (t) for the sake of creating further distinction between sex and gender. Finally, the Council should consider adding "transitioning" (subsection (zz)) as an additional definition under subsection (t) for the sake of grouping all terms related to gender and transgender identity.

Thus, we recommend the Council adjust subsection (t) as follows:

(t) Gender~~ means sex, and includes a person's gender identity and gender expression, or a perception of any of the aforementioned~~ *refers to the social and cultural roles associated with being a male, female, or other gender identity, and includes but is not limited to gender identity, gender expression, transgender, transitioning, or perception of any of the aforementioned. Gender falls under the legal category of "sex" as defined in Subsection (ss) for the purposes of this code section.*

> *(1) "Gender identity" means each person's internal understanding of their gender, or perception of a person's gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person's sex assigned at birth, or transgender.*
>
> *(2) "Gender expression" means a person's gender-related appearance or behavior, or the perception of such appearance or behavior, whether or not stereotypically associated with the person's sex assigned at birth.*
>
> *(3) "Transgender" is a general term that refers to a person whose gender identity differs from the person's sex assigned at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as "transsexual."*
>
> *(4) "Transitioning" is a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This process may include, changes in name and pronoun usage, facility usage, participation in a covered entity's sponsored activities (e.g., sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures.*

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: We ask that this definition be changed to the following: "'Gender' **includes** sex and a person's gender identity and gender expression, or a perception of any of the aforementioned." The reason for this change is because gender does not mean sex and is independent of sex, so stating that "'Gender' means sex" is incorrect.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: The definition for 2 CCR 14020(t) is already in the statutory scheme as GC 12926(r)(2) and therefore is not necessary.

Council Response: The Council disagrees with this comment. Given section 11135(c)'s mandate that the definitions of the protected bases listed in section 11135(a) have the same meanings as the terms used in section 12926, which is part of the Fair Employment and Housing Act, it is necessary for clarity to define such terms, as applicable, in the proposed regulations for purposes of Article 9.5.

Subsection 14020(u). "Genetic information"

Comment: The definition for 2 CCR 14020(u) is reiteration of the statutory scheme definition included under GC 12926(g)(1-3), except for including "or the perception of any of the aforementioned," which is already included as an overall concept in the statutory scheme. DWR maintains reiteration of statutory concepts is not necessary and creates confusion when slight differences are incorporated into the regulations.

Council Response: The Council disagrees with this comment. Given section 11135(c)'s mandate that the definitions of the protected bases listed in section 11135(a) have the same meanings as the terms used in section 12926, which is part of the Fair Employment and Housing Act, it is necessary for clarity to define such terms, as applicable, in the proposed regulations for purposes of Article 9.5.

Subsection 14020(v). "Grant"

No comments received.

Subsection 14020(w). "Grantee"

No comments received.

Subsection 14020(x). "Includes" or "including"

Comment: 2 CCR 14020(x) provides a definition for "includes." DWR suggests that somehow this concept, if deemed necessary, be included at the beginning of the regulations and not as a definition. Notably, dictionary references for the participle, "including," define it as necessarily implying a greater group of items. Therefore, perhaps using including throughout the statutory scheme would be simpler and eliminate definitions and explanatory sections.

Council Response: The Council disagrees with this comment. Other commenters have requested clarity regarding whether "but not limited to" should be added in some instances after the word "including." Accordingly, defining the term here is necessarily for clarity.

Subsection 14020(y). "Intersectional discrimination"

Comment: The inclusion of intersectionality definitions [is a] good starting point[] to ensure that turning a blind eye to racial discrimination in environmental regulations is not repeated. […] [S]ection 11135 would … include the term "intersectional discrimination" defined as "discrimination on the basis of a combination of protected classes, i.e., where two or more bases for discrimination are alleged. Thus, an entity that is not unlawfully discriminating solely on the basis of race or gender still may be discriminating against individuals who are perceived as or identified as having a combination of more than one protected basis … " (140209(y), pp.13).

Council Response: The Council appreciates this comment.

Comment: 2 CCR 14020(y) seeks to create some definition for "intersectional discrimination" that is not necessary and will only create confusion as already noted in comments for 14000(e). There is no need for this term or definition of a created term, so this section should be stricken.

Council Response: The Council disagrees with this comment. The definition provides useful guidance because it clarifies that discrimination may be based upon more than one characteristic protected under the Act.

Subsection 14020(z). "Local agency"

No comments received.

Subsection 14020(aa). "Marital status"

Comment: This definition should include common law marriage as well as legal marriage, and cohabitation arrangements.

Council Response: The Council declines to adopt the changes suggested by the commenter because they would not add clarity.

Subsection 14020(bb). "May"

Comment: 2 CCR 14020(bb) to define "may" is not necessary, since it is inherent in the term that it is permissive. Unless defining a term differently than a dictionary definition, it makes the regulations longer than necessary to include such definitions.

Council Response: The Council disagrees with this comment. The definition of the term "may" adds clarity and does not significantly add to the length of the regulations.

Subsection 14020(cc). "Medical Condition"

No comments received.

Subsection 14020(dd). "National origin"

Comment: [A coalition of commenters writes:] At paragraph (1)(B), the proposed definition includes "marriage to or association with persons of a national origin group." We believe this provision is unnecessary because it is redundant of other provisions in the proposed regulations, particularly the definition of "protected class" in subsection (jj), which includes national origin. We also note that the other protected classes defined in the regulations do not have a separate provision in their definitions for association with the protected classes, no doubt because subsection (jj) covers all protected classes. Similarly, we believe the provisions of (1)(D) and 1(E) are redundant of the defined term "associated with" in subsection (g).

Council Response: The Council declines to adopt the changes suggested by the commenter because the definitions provide further clarity to the proposed regulations and how they apply to individuals with particular protected characteristics.

Comment: [A coalition of commenters writes:] [T]he Council should consider adding to the definition of "national origin," as follows:

Paragraph (1)(C): ["National origin" includes] tribal affiliation <u>or caste</u>;

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: The protected right is for a person on the basis of their "national origin" to be free from discrimination, as stated in GC 11135(a). For the definition of "national origin" in 2 CCR 14020(dd)(1)(D), it includes mere membership or association with interests of a "national origin group," which expands the protected class to those who merely have an interest in the protected class and join a group affiliated with it but have no intrinsic individual association as a person within that protected class. Therefore, this definition seeks to create a protected class right beyond that which the legislature created in the underlying statutory scheme. This part of the definition should be stricken.

Council Response: The Council disagrees with this comment. The proposed language in 14020(dd)(1)(D) is necessary to provide guidance and clarity on the protections under section

11135(d) based on "a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics." In addition, the language on "membership in or association with an organization identified with or seeking to promote the interests of a national origin group" is consistent with the Fair Employment and Housing Act regulations. (Cal. Code Regs., tit. 2, § 11027.1(a)(4).)

Comment: 2 CCR 14020(bb)(1)(E) similarly expands the definition of "national origin" beyond what the legislature has provided. For any person to merely attend a school "generally used by persons of a national origin group" would not impute an intrinsic individual association as a person within that protected class. The other mentioned entities are religious institutions and already fall under the protected class of "religion," which beliefs are individual and may be totally separate from any intrinsic individual association with a national origin protected class. This seems to impute that only members of a protected national origin class would be members of some associated religion, implying a bias on what religious beliefs are held by what persons of what national origin. This should be struck since it is not necessary and is based on faulty presumptions.

Council Response: Assuming the commenter intended to reference subsection (dd)(1)(E), the Council disagrees with this comment. The proposed language in 14020(dd)(1)(E) is necessary to provide guidance and clarity on the protections under section 11135(d) based on "a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics." In addition, the language regarding schools and religious institutions generally used by persons of a national origin group is consistent with the Fair Employment and Housing Act regulations. (Cal. Code Regs, tit. 2, § 11027.1(a)(5).)

Comment: 2 CCR 14020(bb)(2) is not necessary. National origin is a protected class. Whether a country or geographic area renames or changes itself has no effect on the individual's intrinsic association with their actual or perceived physical, cultural, linguistic, or tribal association with some national origin group. DWR urges that this regulatory scheme critically evaluate if projecting the change in geographic names is necessary for regulations pertaining to GC 11135 et seq.

Council Response: Assuming the commenter intended to reference subsection (dd)(2), the Council disagrees with this comment. This provision is necessary to provide guidance and clarity on discrimination based on national origin. Perspectives surrounding the dissolution or emergence of a country could foreseeably lead to discrimination against an individual from that country. Accordingly, the language that the commenter proposes to strike is necessary for clarity and completeness. In addition, the proposed language is consistent with the Fair Employment and Housing Act regulations. (Cal. Code Regs., tit. 2, § 10027.1(b).)

Subsection 14020(ee). "Other implementing regulations"

Comment: 2 CCR 14020(ee) is not necessary to promulgation of regulations for GC 11135 et seq. Regulations require public comment and Office of Administrative Law approval before implementation, different from guidelines or procedures which do not require such review. Therefore, this definition does not make sense and is incorrect.

Council Response: The Council declines to propose changes in response to this comment because the proposed language provides clarity and implementing such changes is likely to cause undue delay in the rulemaking.

Subsection 14020(ff). "Perceived membership in a protected class"

No comments received.

Subsection 14020(gg). "Person"

No comments received.

Subsection 14020(hh). "Practice" or "Practices"

Comment: 2 CCR 14020(hh) has an expansive definition for "practice" to mean practically any other instrument of administration or communication used by entities – which seems expansive and inaccurate. DWR suggests that practices are any action or failure to act independent of any other business records or controlling documents and this definition, if needed, should be reconsidered and rewritten.

Council Response: The Council disagrees with this comment. The proposed definition is consistent with the definition of "practice" or "practices" in FEHA housing regulations. (Cal. Code Regs., tit. 2, § 12005(x).)

Subsection 14020(ii). "Program or activity"

Comment: We strongly encourage the Council to add unambiguous language ensuring that automated systems, computer systems, and data processing is covered in the definition of "Program or activity" in 2 C.C.R. Section 14020 (ii). As government agencies increasingly utilize automated systems such as algorithms, computer systems, and other forms of data processing, it is critical to robustly safeguard against any discrimination related to their use.

We suggest that the definition be drafted in the following way: "Program or activity" includes all of the operations and facilities of, or services, benefits or aid provided by, a covered entity, directly or indirectly through others by grants, contracts, automated systems, computer systems, data processing, arrangements or agreements..."

There is extensive evidence showing that automated systems can lead to discriminatory treatment and disparate impacts disfavoring people based on protected categories. It can affect all dimensions of people's lives, including medical treatment, public benefits, hiring, and encounters with the criminal justice system.

As the recently released White House *Blueprint For An AI Bill of Rights* makes clear, "[y]ou should not face discrimination by algorithms and systems should be used and designed in an equitable way." The "guardrails protecting the public from discrimination in their daily lives should include their digital lives and impacts… to ensure that all people are treated fairly when automated systems are used." Protecting against discrimination should also go beyond existing guardrails to consider the holistic impact that automated systems can have on Californians, particularly residents from underserved communities, and to institute proactive protections that support these communities.

Council Response: The Council declines to adopt the changes suggested by the commenter. The list in the definition of "program or activity" is not meant to be exclusive as is evidenced by inclusion of the term "include," which is defined earlier in the proposed regulations to mean "include, but are not limited to." Attempting to create an exhaustive list of all possible programs or activities risks unintentionally excluding "programs or activities" that would be covered under Article 9.5.

Comment: [A coalition of commenters writes:] The proposed definition of the term "program or activity" in subsection (ii) appropriately refers to everything a covered entity does directly or indirectly. However, the addition of the phrase "by grants, contracts, arrangements, or agreements" in the first sentence appears to unnecessarily limit the definition and create confusion with the definition of state support. We believe the intent of this definition is best expressed without a superfluous reference to the means by which programs or activities may be carried out. If it is useful to refer to contracts, arrangements or agreements, these terms could be added to the second sentence illustrating types of programs or activities. Furthermore, the second sentence illustrating types of programs or activities should add the following examples: "all regulations and regulatory activity" and "the provision of information."

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: Under Section 14020(hh)(2) of the proposed regulations, "program or activity" includes "all of the operations and facilities of, or services, benefits or aid provided by, a covered entity, directly or indirectly through others by grants, contracts, arrangements or agreements. Proceedings to adjudicate legal disputes, including conservatorship proceedings, are part of the operations or services of the Judicial Branch and therefore must comply with the requirements of Title II of the ADA and Section 11135. We support this definition. However, we propose an amendment to this sentence to provide additional clarification: "Such programs or activities include, but are not limited to, the provisions of employment or goods; the procurement of goods or services; the provision of education, training, health, welfare, rehabilitation, housing, legal, judicial, or other services."

Council Response: Assuming that the commenter intended to refer to 14020(ii), which defines "program or activity," the Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: The proposed regulations include provisions describing the scope of coverage for Section 11135 (specifically, the definitions of "covered entity" and "program or activity") consistent with the federal Rehabilitation Act. While the ISOR does a good job of explaining the source for this language – and the federal authorities to which courts should look for proper interpretation – the regulatory text itself could be misinterpreted to read more broadly and cover agencies and functions that are not within scope under the analysis set forth in the Rehabilitation Act authorities (or existing caselaw under Section 11135). Such a misinterpretation may result in perceived conflicts with putative covered entities' other legal obligations. For example, cities and counties are presently mandated to expand – and sometimes approve by right – numerous land use activities that could raise concerns under Section 11135 (were it applicable), including organic waste recycling facilities, hydrogen fueling stations, "short-term freight transportation uses," and a wide variety of housing development projects.

To reduce the potential for unnecessary dispute and harmful delay of activities otherwise required by state law, we recommend that the Council include an express exemption for local government activities that are mandated by statute or regulation, perhaps something like the following (patterned after the proposed exemptions for age-related programs, §§ 14081 through 14084):

> ***It is not a discriminatory practice for a local agency to take any action otherwise prohibited by Article 9.5, this subchapter, or other implementing regulations if such action is required by a Federal or State statute or regulation. The burden of proving that an activity falls within the exceptions of this section is on the local agency.***

Council Response: The Council declines to adopt the language suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(jj). "Protected class" and "protected basis"

Comment: [A coalition of commenters writes:] Subsection (jj) discusses the definitions of "protected class" and "protected basis," cross-referencing the Fair Employment and Housing Act and the Unruh Act. The third sentence lists a non-exhaustive list of protected bases but fails to include "source of income." The Fair Employment and Housing Act prohibits discrimination in housing accommodations on the basis of source of income, as defined in Government Code sections 12927(i) and 12955(p)(1). To avoid any ambiguity, this subsection should reference "source of income" as a protected basis.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: In 2 CCR 4020(jj) the regulations seek to override definitions provided by the legislature in statute and substitute as controlling the definitions provided under this section, promulgated to implement only GC 11135 et seq. Therefore, for only the purposes of this Government Code scheme, as noted in DWR's comments, definitions would create more protected basis and eliminate important considerations that the legislature determined were appropriate when enacting GC 12926 and in every subsequent revision. This would create confusion and usurp legislative rights and is contradictory to the language in GC 11135(c): "[t]he protected bases referenced in this section have the same meanings as those terms are defined in Section 12926." So, the definitions have the meanings as provided in section 12926 and where this subchapter varies from that definition the legislature has already determined it should not.

Further, the regulations attempt to automatically include any future protected basis into GC 11135 and its implementing regulations. This is ultra virus law making. Notably, reproductive health decisionmaking and veteran and military status is included under GC 12921 for protected classes. However, those are not included under GC 11135. Unless and until the legislature amends the law and makes the decision that those are appropriate to include for GC 11135, they should not be included at all in this regulatory scheme. Reserving the right to "read them into" the regulatory scheme in this section is exceeding the statutory authority. Should they be added by the legislature at some future time, the regulations should be amended. But these regulations should and cannot legally impute those protected basis into implementation regulations for an entirely different section of law.

Additionally, a lot of this seems a reinstatement of concepts that are already defined or explained either in statute or above – such as again reiterating what "perception" should mean and restating protected classes which are already included in GC 11135. Restating or re-explaining terms should be avoided, since it will create differences with statutes and within the regulations and just makes them longer than needed.

Council Response: Assuming the comment is referring to subsection 14020(jj), the Council agrees with this comment in part, to the extent the comment objects to language regarding potential future legislation. Accordingly, the Council proposes to strike the following language in subsection (jj): "In the event the Legislature in the future recognizes a protected class or protected basis by legislation or regulation, that basis will be considered a protected class or protected basis pursuant to Article 9.5 of the Government Code unless specifically excluded by the Legislature." For the same reasons, in section 14020(p)(2), the Council proposes to strike the following language: "To the extent that codified definitions or interpretations are expanded in the future, such new, more expansive definitional mandates shall be incorporated into Article 9.5. To the extent that such codified definitions or interpretations are narrowed or restricted in

the future, the more expansive definitions referenced in this sub-paragraph shall nevertheless continue to govern Article 9.5."

The Council disagrees with the remainder of this comment. The Council is charged with promulgating implementing regulations, which involves expounding upon and clarifying statutory language. The Council has promulgated implementing regulations for FEHA (Cal. Code Regs., tit. 2, §§ 11000 – 12271), which, for the sake of clarity, provide more detailed definitions of the protected characteristics defined in section 12926. Similarly, these proposed regulations seek to further clarify the statutory definitions of these terms as applicable to Article 9.5.

Subsection 14020(kk). "Qualified individual with a disability"

No comments received.

Subsection 14020(ll). "Qualified interpreter"

Comment: [A coalition of commenters writes:] The regulations should provide more details around qualified interpreters and how they should be utilized. Government agencies and covered entities should only hire highly qualified and trained interpreters. At a minimum, qualified interpreters must have advanced proficiency in their working languages, formal training in the language services field, and knowledge of interpreting ethics and protocols. These requirements for qualified interpreters must be shown through: (i) assessment by a formal certifying body, such as the California Judicial Council, National Board of Certified Medical Interpreters, or the Certification Commission for Healthcare Interpreters; (ii) assessment based on experience, education, and professional references; or (iii) completion of a professional interpreter training program of a minimum of 40 hours. When utilizing language service providers for interpreting and translation, government agencies and funded entities must ensure that each provider thoroughly evaluates the qualifications of all their multilingual staff and contracted interpreters. Government agencies and covered entities should also contract and/or partner with multiple language service providers, including community based organizations (CBOs) and non-profit entities, who can provide culturally and linguistically responsive services to meet language needs. Despite marketing claims by some large for-profit language service providers, there is no "one-stop-shop" that can provide high-quality interpreting and translation in all the sign and spoken languages used in our state. Government agencies and funded entities will need contracts with Deaf service providers for sign language interpreting, as well as contracts with multiple organizations, including CBOs, that specialize in interpreting languages of lesser diffusion, such as Latin American Indigenous languages. CBOs are often grassroots organizations who have trusted relationships and deep knowledge about local communities and understand how to best serve their communities, which larger, private for-profit providers lack. The same is true for community-based Deaf services providers, who have expertise about sign language users that is rarely found at large providers, especially those that focus on spoken languages. Further, as specified more in the discussion of "Alternative communication services" below, the regulations should also make clear that the use of family,

friends or untrained acquaintances of the person with limited English proficiency (LEP) will rarely constitute compliance and should only be used under emergency circumstances until a qualified interpreter can be found.

In addition to interpreting provided to enable 1:1 communication between service providers and community members, the regulations should clarify that bidirectional interpreting is required at multilingual meetings, events, and proceedings. The goal should be to create equitable multilingual events in which people with LEP can fully participate in all ways that English speakers can participate in the event, including access to spoken and written information in their primary languages and equivalent opportunities to ask questions, contribute to group discussions, and provide public comment. This will usually include the provision of professional bidirectional simultaneous interpreting at the event with appropriate technological equipment and support so that all participants can both listen and speak in their primary language. Events should be carefully designed so that everyone has access to the same information, and no one is excluded from any part of the process due to differences in language proficiency.

In addition to the suggested amendments below, we recommend CRC publicize and provide guidance to covered entities to adopt the following best practices for their public meetings, events, and proceedings:

1. Conduct multilingual, culturally-responsive outreach for the event, including in language outreach materials and culturally-specific media promotion that includes the notice of language assistance services at the event upon request;

2. Hire a team of at least two qualified interpreters to provide bidirectional simultaneous interpreting for each language combination;

3. Use wireless simultaneous interpreting equipment for onsite events and remote simultaneous interpreting (RSI) video conferencing platforms for virtual events;

4. Provide in-language tech support for participants in onsite and remote events;

5. Provide translated written materials such as slides, signage, and handouts in the primary written languages of event participants;

6. Promote an inclusive environment by avoiding room configurations or small group activities that segregate people based on primary language.

The suggested amendments are noted below:

(ll) “Qualified interpreter” means a person qualified and capable of effective, accurate, and impartial rendition of spoken or signed communication from one language to another between people who speak, sign, read, or write in a different language, both receptively and expressively, using any necessary specialized vocabulary and with appropriate cultural relevance, either simultaneously or consecutively. “Interpretation” is the act of listening to

spoken word, visual or tactile transmission of manual language, or reading something written in one language (source language) and expressing it accurately and with appropriate cultural relevance into another language (target language), either simultaneously or consecutively. Whether an interpreter is qualified to provide services requires more than self-identification as bilingual or multilingual. To be qualified an interpreter must: (i) demonstrate proficiency in and ability to communicate information accurately in ~~**both the source and target language**~~ **the languages in which the interpreter works**; (ii) have **general** knowledge ~~**in both languages**~~ of ~~**any**~~ specialized term**s**, concepts, or any particularized vocabulary and phraseology peculiar to the program or activity; (iii) understand and follow interpreters' ~~**and translators'**~~ confidentiality, ethics and impartiality rules; and (iv) understand and adhere to their roles as interpreters ~~**or translators**~~. **These requirements for qualified interpreters must be shown through: (i) assessment by a formal certifying body, such as the California Judicial Council, National Board of Certified Medical Interpreters, or the Certification Commission for Healthcare Interpreters; (ii) assessment based on experience, education, and professional references; or (iii) completion of a professional interpreter training program of a minimum of 40 hours.** Qualified interpreters include, for example, sign language interpreters, **spoken language interpreters,** oral transliterators, and cued-language transliterators. ~~**Also, to be qualified, an interpreter must have received adequate education and training in interpreter ethics, conduct, practice, and confidentiality.**~~ In some circumstances, effective communication may require that an individual be provided more than one interpreter. **Covered entities should also partner with multiple language service providers to meet language needs, including trusted community-based organizations who can provide culturally and linguistically responsive interpreter services. Use of family, friends or untrained acquaintances of the person with LEP will rarely constitute compliance and should only be used under emergency circumstances until a qualified interpreter can be found. To promote equitable and effective communication, bidirectional interpreting should be provided in almost all circumstances, meaning that everything communicated in one language should be fully and accurately expressed in the other language and vice versa.**

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14020(ll) defines a "qualified interpreter" as a person "qualified" and capable of effective, accurate, and impartial rendition of spoken or signed communication from one language to another. Although subsection (ll) defined a "qualified interpreter" in part as someone demonstrating proficiency in and ability to communicate information accurately, it does not state by which standards or tests such proficiency will be determined or measured. It does not state, for example, if a certified court interpreter will meet the standards or not. It does not state whether an interpreter must be certified by any specific entity to be considered qualified. Notably, later in the scheme, section 14100, "translator" is defined – which should be done all in one place to eliminate confusion.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: [T]he proposed new definition of "qualified interpreter" (proposed rule 14020, subd. (ll)) may impose immediate and significant costs for the Employment Development Department (EDD) and other departments and agencies. The current Article 9.5 regulation is: "interpreter means a qualified person capable of translating a language, orally or in writing, between people who speak, read or write a different language." (Cal. Code Regs., tit. 2, § 11164, subd. (c).) Regulated state entities, including EDD, use a definition from the Dymally-Alatorre Bilingual Services Act to set qualifications for staff interpreters. (See Gov. Code § 7296.) Section 7296 allows a state agency to set its own determination of what constitutes "qualified" from among three criteria, which include: 1) someone tested by CalHR and certified proficient; 2) someone tested by the agency; or 3) someone who meets the standards for outside contractors. (Ibid.) Each of these requires general fluency in the foreign language as well as terms and ideas regularly used in state government. (Ibid.) Proposed section 14020, subd. (ll)) would potentially impose four additional qualification criteria as well as education and training requirements that are not present in the Dymally-Alatorre Bilingual Services Act nor the civil service current job specifications for an interpreter. The ISOR cites the Dymally-Alatorre Bilingual Services Act as the basis for proposed rule 14020, subdivision (ll), but its requirements go significantly beyond those imposed by law. (Compare ISOR pp. 29-30 with Gov. Code § 7926.)

As a result, were proposed rule 14020, subdivision (ll), to go into effect, it would appear to disqualify all EDD staff interpreters and other state employee interpreters who use the same job specifications. Hiring or retraining interpreters would impose significant, unbudgeted costs to EDD and other agencies. In the meantime, the change in qualifications potentially could delay access to unemployment insurance and disability insurance benefits for limited English proficient members of the public while extremely limited EDD resources would be redirected to retraining interpreters to meet the requirements of proposed rule 14020, subdivision (ll).

Council Response: The Council disagrees with this comment and declines to implement changes to this subsection. Government Code section 7296 requires that an interpreter either be tested and certified or meet testing or certification standards, but the statute does not define what is necessary to become certified. Interpreter certification requirements typically include (and often exceed) the requirements set forth in (i) through (iv) of this subsection.[1]

[1] For instance, at least some, if not all, state ASL interpreter positions are required to either have at least 6 months of prior experience interpreting or must have a specific certification used by the Registry of Interpreters for the Deaf (e.g., the minimum requirements for a "Support Services Assistant (Interpreter)" position). The exam required for the certification assumes a candidate's ability to do the following:

- Accurately transfer messages from a source language to a target language 1 in any engagement that involves vocabulary and subject matter that would normally be understood by ordinary consumers

Subsection 14020(mm). "Race"

No comments received.

Subsection 14020(nn). "Real property"

No comments received.

Subsection 14020(oo). "Recipient"

Comment: We ask that some of the intent language from the Initial Statement of Reasons be included in the definition given the removal of the previous exemptions (i.e. exemptions for recipients with fewer than 5 employees or who received less than certain dollar amounts of State support). If not here, such language should be included in Article 1. General Matters since this is a substantial change in the regulations with regards to Government Code 11135 applicability and coverage.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [R]ecipient should be (pp) rather than (oo) alphabetically ("reasonable accommodation" comes before "recipient"). We ask that you review the entire definition section again to ensure that it is alphabetical as intended. The cross-references across the regulations would also need to be updated (as applicable).

- Mediate the cultural differences between the participants in the encounter (the interpreted situation) and they accept responsibility for the integrity of the interpreted message.
- Work at a technical level of discourse and are able to assess their own ability to perform an interpretation which may require specialized knowledge or vocabulary.
- Have advanced competence in ASL and English and are able to accurately facilitate communication between both languages – consecutively or simultaneously – as is appropriate for the situation.
- Readily access and produce the visual and/or auditory cues and nuances of each language with few errors that interfere with, or distract from, the communication.
- Perform these tasks with little or no supervision.
- Work in accordance with established professional conduct standards, alone or in teams of other interpreters, as is appropriate for the situation.
- Accurately relay messages between two languages: Along the continuum of ASL and other signed languages, as well as, other forms of visual and tactile communication for Deaf and DeafBlind individuals and English.
- Make cross-cultural comparisons and assessments, and adjust their communication as needed for the culture.
- Have a mastery of ASL and English to be able to assess the language needs of all parties in a communication.
- (For Deaf Interpreter candidates) Perform interpreting services alone or in a team with other Deaf or hearing interpreters in a variety of settings that involve vocabulary and subject matter that would normally not require a technical understanding of the subject. They are, however, able to determine their own ability to perform an interpretation which may require specialized knowledge or vocabulary.

Council Response: The Council agrees with this comment and proposes to reorder these subsections accordingly.

Comment: [T]he regulations implementing Title VI define "recipient" to mean "any State, political subdivision of any State, or instrumentality of any State or political subdivision, *any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient,* including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary." (28 C.F.R. 42.102(f).)

Council Response: Because this comment does not suggest any revisions to the text of the proposed regulations, no further response is required per Government Code section 11346.9(a)(3). To the extent the comment may be construed to suggest an amendment to the proposed definition of "recipient," the Council declines to do so because the proposed regulations are sufficiently clear without these changes and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14020(pp). "Reasonable Accommodations" or "Reasonable Modifications"

Comment: Under Section 14020(pp) of the proposed regulations, "Reasonable Accommodations" or "Reasonable Modifications" for individuals with disabilities are used interchangeably under this subchapter to means the full range of adjustments necessary to afford an individual with a disability a full and equal opportunity to use or enjoy benefits, privileges, or services of a programs or activity. They include, for example, changes, modifications, or adjustments in . . . rules, policies, practices, procedures . . . and other such needed accommodations." This would include adjustments in court rules, policies, practices, procedures necessary to afford conservatees and proposed conservatees a full and equal opportunity to participate in a conservatorship proceeding in a meaningful way. We support this definition.

Council Response: The Council appreciates the comment.

Comment: [A coalition of commenters writes:] Subsection (pp) contains a typo: "to means" should be changed to "to mean."

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Comment: 2 CCR 14020(pp) seeks to create a definition for "reasonable accommodations" which again differs from the definition already under GC 12926(p)(1-2). As stated above, these regulations were to implement GC 11135 et seq., which under GC 11135(c) provides that "[t]he protected bases referenced in this section have the same meanings as those terms are defined in Section 12926." Therefore, this section is not necessary and, as written, seeks to expand what the definition provides. This is especially applicable because this new definition seems to require "change, modification or adjustment to rules, policies, practices, procedures, licensing,

regulations, [and] programs" as a reasonable accommodation, which is not provided for under the existing GC 12926(p) definition. Further, change in regulation or licensing is beyond the ability of grant recipients and seems to be usurping powers of other entities to determine what is necessary for their jurisdictions. This section should be stricken in its entirety.

Council Response: The Council disagrees with this comment. Government Code section 11135(c) does not indicate that all "definitions" referenced in section 14020 of these proposed regulations must have the same meanings as in Government Code section 12926. The statute states only that "protected bases" referenced in the section have the same meanings as they do in section 12926. "Reasonable accommodation" is not a protected basis. Further, the definition of "reasonable accommodation" in Government Code section 12926(p) is particularly tailored to the employment context and thus would not apply to the protections set forth in Article 9.5.

Subsection 14020(qq). "Religion," "religious creed," "religious observance," "religious belief," and "creed"

Comment: For 2 CCR 14020(qq), again, religious creed, religion and various aspects are already defined under GC 12926(q) and here text definition is reiterated and revised. As noted, GC 11135 incorporated existing definitions under GC 12926. 2 CCR 14020(qq) should be pared down to only add aspects (like dress) which are newer concepts, if actually necessary to implement these particular Government Code statutes.

Council Response: The Council declines to strike the language referenced by the commenter. Given section 11135(c)'s mandate that the definitions of the protected bases listed in section 11135(a) have the same meanings as the terms used in section 12926, which is part of the Fair Employment and Housing Act, it is necessary for clarity to define such terms, as applicable, in the proposed regulations for purposes of Article 9.5.

Subsection 14020(rr). "Sex"

Comment: [A coalition of commenters writes:] For clarity, we urge the Council to provide a plain meaning definition of "sex" in addition to the enumerated subcategories that fall under sex for the purposes of section 11135 that are currently listed. We suggest defining sex as "the category a person is assigned based on their anatomy, physiology, genetics, and hormones, or based on an assigner's perception of those attributes."

As discussed in relation to the definition of "gender" above at Section II.A.9, current trans-discriminatory rhetoric and legislation often relies upon the conflation of gender and sex assigned at birth, making it important to distinguish between sex and gender as much as possible without changing the statutory definitions. Including a straightforward definition of "sex" in the regulations along with the proposed definition of "gender" under subsection (t) would help create this distinction while still recognizing that gender falls under the broader legal category of sex in the context of 11135. We note that our proposed language

acknowledges sex assignment without relying on it, thereby leaving space in the definition for intersex and/or transgender individuals who medically transition in a manner that aligns their biological sex characteristics with their gender identity. Defining sex to include "an assigner's perception of [sexed] attributes" emphasizes that assigned binary sex is not based on biological fact so much as it is based on visible sex characteristics are interpreted within a gender binary. This position creates more space for both transgender identities and intersex individuals who may have been miscategorized at birth.

As suggested above at Section II.A.9, we recommend moving current subsections (rr)(1)-(3) to subsection (t) so "gender" and related terms are defined together. Finally, we suggest reformatting subsection (rr) for clarity and ease of reading.

Thus, we recommend the following changes to subsection (rr):

(rr) "Sex" ***means the category a person is assigned based on their anatomy, physiology, genetics, and hormones, or based on an assigner's perception of those attributes. For the purposes of this code section, sex includes but is not limited to:*** ~~**including pregnancy, childbirth, and breastfeeding; medical conditions related to pregnancy, childbirth, or breast feeding; recovery from childbirth or termination of pregnancy, or other conditions related to the capacity to bear children; gender; transitioning; sex stereotype; gender identity; gender expression; and perception by a third party of any of the aforementioned.**~~

(1) Pregnancy, childbirth, and breastfeeding, including:

(a) Medical conditions related to pregnancy, childbirth, or breast feeding;

(b) Recovery from childbirth or termination of pregnancy, or other conditions related to the capacity to bear children;

(2) Gender, including

(a) Gender identity;

(b) Gender expression;

(c) Transgender;

(d) Intersex;

(3) Sex Stereotype;

(4) Perception of by a third party of any of the aforementioned.

~~**(1) "Gender identity" means each person's internal understanding of their gender, or perception of a person's gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person's sex assigned at birth, or transgender.**~~

~~**(2) "Gender expression" means a person's gender-related appearance or behavior, or the perception of such appearance or behavior, whether or not stereotypically associated with the person's sex assigned at birth.**~~

~~**(3) "Transgender" is a general term that refers to a person whose gender identity differs from the person's sex assigned at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as "transsexual."**~~

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: For the definition of "sex" under 2 CCR 14020(rr) the text again seeks to expand the definition beyond what is in GC 12926(r). Some of the concepts are reiteration, but this text adds "other conditions related to the capacity to bear children" which is not part of the definition and not related to childbirth. The legislature chose to add "reproductive health decisionmaking" as a protected class, but that was not added into GC 11135 which these regulations are implementing. And decisionmaking is not conditions related to capacity to bear children. Whereas pregnancy and related conditions are covered by GC 12926(r), this other expansive language should be struck, since it seeks to add protected conditions which are not legislatively approved.

Also, this scheme references "intersex" which is not a term used anywhere and unclear what that means. Since there is extensive terminology used in the definition section to cover gender expression/identity, using an ambiguous term should not be necessary and it should be struck.

Council Response: The Council disagrees with this comment and declines to strike language from this subsection. The Council is charged with promulgating implementing regulations, which involves expounding upon and clarifying statutory language. The Council has promulgated implementing regulations for FEHA (Cal. Code Regs., tit. 2, §§ 11000 – 12271), which, for the sake of clarity, provide more detailed definitions of the protected characteristics defined in section 12926 (including those defined in Cal. Code Regs., tit. 2, § 11030, with which proposed section 14020(rr) is consistent). Similarly, these proposed regulations seek to further clarify the statutory definitions of these terms as applicable to Article 9.5.

Comment: The County supports the inclusion of gender identity, gender expression, transgender identity, and intersex identity in the definition of "Sex," as well as the inclusion of related definitions for "Gender identity," "Gender expression," and "Transgender." The County further encourages the Civil Rights Council to add the terms "**Nonbinary**," "**Gender nonconforming**," and "**Two-Spirit**" to the definition of sex, and to provide definitions for these terms. The inclusion of these terms will clarify in no uncertain terms that the protections of Government Code section 11135 extend to individuals who do not have a binary gender identity.

Furthermore, because state law already recognizes each of these terms, their inclusion in the regulations would promote congruence with existing legal frameworks. *See, e.g.*, Health & Safety Code §§ 103425-26, 150900(f)(4).

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the change is likely to cause undue delay in the rulemaking.

Comment: The definitions of "gender identity," "gender expression," and "transgender" should be moved under 14020(t) ("Gender").

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(ss). "Sexual Orientation"

Comment: The current definition in the proposed regulations only includes four different sexual orientations (heterosexuality, homosexuality, bisexuality, and asexuality). However, there are many more types of sexuality beyond these four sexuality types, and it is important for the intent of the regulations to protect all types of sexuality. The definition would also read clearer if the description of "sexual orientation" came before the various terms. We therefore propose that the definition of "sexual orientation" be updated as follows: "'Sexual Orientation' means a person's emotional, romantic, or sexual attraction toward other people and includes actual or perceived heterosexuality, homosexuality, bisexuality, asexuality, or other sexualities. Sexual orientation may be described by terms including gay, lesbian, bisexual, straight, asexual, or queer, amongst others."

Finally, we ask that the following definitions be added to the proposed regulations because they are used within the regulations, but may not be terms that are commonly used or understood by the general public. The additional definitions are as follows:

"Sex assigned at birth" or "assigned sex": means the sex listed on a person's birth certificate.

"Intersex": means variations in sex characteristics in which a person is born with reproductive or sexual anatomy that appears atypical (not typically "male" or "female"). Some intersex traits are discovered at birth, while others may not be discovered until puberty or later in life. Intersex individuals still have a sex assigned at birth.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking. In addition, the list of sexual orientations in this subsection is not exhaustive as indicated by the term "includes," which is defined earlier in the proposed regulations to mean "includes, but is not limited to."

Subsection 14020(tt). "Shall"

Comment: The definition for "shall" under 2 CCR 14020(tt) should be struck as unnecessary since throughout the codes and regulations the mandatory nature of this term is self-evident, does not require definition, and is unnecessary for guidance.

Council Response: The Council did not propose to revise the definition of "shall." This provision was merely renumbered. Accordingly, this comment is outside the scope of the language noticed for the 45-day comment period, and no further response is required per Government Code section 11346.9(a)(3).

Subsection 14020(uu). "State"

Comment: Under Section 14020(uu) of the proposed regulations, "state" means "the State of California or any entity of the State of California other than a state agency." Does this include the Judicial Branch which is specifically included in the definition of "covered entity" in Section 14020(m)(1)? "State agency" is defined as "an administrative subdivision or instrumentality of state government, including, but not limited to, agencies, special purpose district, departments, offices, officers, commissions, councils, authorities, boards, bureaus and divisions, and includes the California State University." Is the Judicial Branch included in this definition? We propose an amendment to these definitions to clarify in which category the Judicial Branch is covered.

Council Response: The Council disagrees with this comment and declines to implement the suggested amendment because it is not necessary for clarity. Section 14020(m)(1) clarifies that "the state or a state agency" includes "the California Judicial Branch," confirming that the California Judicial Branch is a covered entity under Article 9.5.

Comment: The definition of state under 2 CCR 14020(uu) is unnecessary since the regulations are promulgated to implement the laws of California and does not require clarification. Further, under GC 11135(a), which these regulations are promulgated to implement, it refers to "[n]o person in the State of California" clearly and later in the same paragraph refers to the programs receiving funding or financial assistance from the state.

Council Response: The Council disagrees with this comment and declines to strike this language because it is necessary for clarity.

Subsection 14020(vv). "State agency"

No comments received.

Subsection 14020(ww). "State support"

No comments received.

Subsection 14020(xx). "State supported program"

Comment: [A coalition of commenters writes:] Subsection (xx) defines the term "state supported program." This term appears to be unnecessary because it is not used in the proposed regulations.

Council Response: The Council declines to strike this language because it clarifies the proposed regulations.

Subsection 14020(yy). "Stereotype"

No comments received.

Subsection 14020(zz). "Transitioning"

Comment: This definition should be moved under 14020(t) ("Gender").

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14020(aaa). "Ultimate beneficiary"

Comment: [A coalition of commenters writes:] Subsection (aaa) contains a typo at "program activity." This should be corrected by adding commas after the words "program" and "activity."

Council Response: The Council agrees with this comment and proposes to implement the requested change, along with other non-substantive typographical corrections, prior to submitting these proposed regulations for consideration by the Office of Administrative Law.

Subsection 14020(bbb). "Video remote interpreting"

Comment: [A coalition of commenters writes:] The regulations should include more safeguards and guidelines around the use of video remote interpreting (VRI). We are concerned that the regulations authorize video remote interpreting in lieu of in-person interpreting and seem to assume that video remote interpreting is equivalent to in-person interpreting. In fact, VRI is a less effective form of interpreting and should only be used in limited circumstances when in-person interpreting is not available, if the underlying event is in-person. This should be explicitly stated in the definition of "video remote interpreting" at section 14020.

Allowing VRI in all circumstances is particularly problematic for judicial and quasi-judicial proceedings. The Judicial Council Guidelines for VRI for American Sign Language and spoken language events specify that VRI should only be used when in-person interpreters are not available. The proposed sections would apply to any court proceeding and to any administrative hearing conducted by either a state agency or an entity that receives state funds even if in-person interpretation is available. The proposed regulations should be changed to state that VRI should be utilized in in-person events only if in-person interpretation is not reasonably available, if there is an emergency, or if there is a public health or safety necessity. There are situations when VRI should be allowed, including emergencies or when an in-person interpreter

is unavailable because of distance of travel or unavailability in a particular language. However, for official and critical proceedings such as court proceedings, or administrative hearings or interactions where individuals can obtain or lose benefits, Government Code section 11135 should require the highest level of quality interpretation. For certain activities outside official and critical proceedings, entities can and should be allowed to use other interpreters with different tiers of qualifications to meet the needs of individuals with LEP. That said, there should always be a preference for in-person interpreters, whenever possible. The order of preference for ensuring accuracy and quality during interpreted sessions, from best to acceptable: 1) on-site (all parties are present and in-person); 2) video remote interpreting (VRI) with a strong internet connection; 3) telephonic interpreting. The preference for onsite and video over phone interpreting is because nuances in language and non-verbal communication could lead to miscommunication. The use of VRI when an in-person interpreter is reasonably available should not be considered using a "qualified interpreter" as required by the proposed regulations.

The suggested amendments are noted below:

(bbb) "Video remote interpreting" ("VRI") service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video. **The use of VRI for a pre-scheduled in-person event where an in-person qualified interpreter is reasonably available should not be considered using a "qualified interpreter" as required by section 14020, absent an emergency or emergent public health or safety necessity.**

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Article 3. Prohibited Practices Relating to All Groups Protected by Article 9.5

§ 14025. General Prohibitions

Comment: Under Section 14025 of the proposed regulations, "No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, disability (including mental disability and physical disability), medical condition, genetic information, marital status, or sexual orientation, by action or inaction, be unlawfully denied full and equal access to the benefits of any program or activity, or be unlawfully subjected to discrimination, under any program or activity that is conducted, operated or administered by a covered entity." We support this definition. It is broad enough to prohibit courts, by action or inaction, from denying full and equal access to adults with mental disabilities in conservatorship proceedings. We especially support the clarification that "inaction" by a covered entity may constitute a violation of Section 11135.

Council Response: The Council appreciates the comment.

§ 14026. Discriminatory Practices and Unlawful Denial of Full and Equal Access

Comment: We have provided another real life case example to help illustrate how the regulations could be strengthened to ensure broad protection for California's youth and families.

Case 2: County X Human Services Agency (HSA) plans a resource fair for transition aged foster youth (ages 16-21) which includes community resources, health resources, and educational and employment-related resources. The HSA decides to hold the resource fair at a church in the community. The church made it clear to the HSA in advance that the church was uncomfortable with LGBTQI+ resources being mentioned by the resource providers, or advertised in any way either before the event or during the event. Though the County X HSA was informed about these limitations, they decided to move forward with hosting the resource fair at the church. LGBTQI+ foster youth in the community requested that the County HSA move the resource fair to another location so that a broader range of resources could be presented; however the county refused. On the day of the resource fair, many LGBTQI+ youth and their allies elected not to attend the resource fair because they felt uncomfortable with being singled out for limited resources and they feared retaliation if they attended the fair and asked about LGBTQI+ related resources.

Feedback: It needs to be made clear that covered entities cannot make arrangements with organizations/institutions to provide a government benefit that result in denying protected individuals full and equal access to the program/activity/benefit of the covered entity. The covered entity is ultimately responsible for ensuring that its program/activities/benefits are provided in a nondiscriminatory manner that does not deny protected individuals from full and equal access to program/activity/benefit, regardless of location.

Addition: Thus, we recommend that a new paragraph (c) be added to 14026: "Contracting, distributing or redistributing, administering, or otherwise allocating state support in a manner that the covered entity knows, or has reason to believe, may lead to a denial of equal access as defined in this section."

We further recommend that the regulations either distinguish or clarify any difference between "discriminatory practices" and "prohibited practices." Finally, the regulations may be enhanced by adding a few examples throughout, similar to the FEHA Fair Housing Regulations to illustrate various applications of the regulations. This addition would be especially helpful in Article 3.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: Proposed rule 14026 is also vague. Proposed rule 14026 would expand the prohibitions on specific practices with discriminatory intent or effect by "recipients" of state funds to any "covered entity." Covered entity is a new and expanded term, which includes state

agencies and any entity, private or local government, that receives any form of state support. (See proposed rule 14020, subdivisions (m)(1), (3), and (4).)

This change significantly expands the potential reach of these prohibitions and the potential requirements imposed on state agencies, but since the rules are drafted to apply to recipients of funds, the duty of a state agency is often unclear. For example, the rule against "providing or transferring state support to a covered entity that discriminates in conduct, operation, or administration or any program or activity" could impose significant oversight and audit requirements were it to apply to state agency originators of funds. (Proposed 14026, subd. (a)(5).) The current rule only applies to "recipients," which does not include state agencies. (See Cal. Code Regs., tit. 2, § 11154, subd. (e) ["It is a discriminatory practice for a recipient…to aid or perpetuate discrimination by transferring state support to another recipient that discriminates…"]; see also Cal. Code Regs., tit. 2, § 11150 ["Recipient" means any contractor, local agency, or person"].)

Moreover, the proposed rule does not define "conduct, operation, or administration." The rule could be read to apply to essentially any transfer of funds related to administration of a state benefit (essentially all transfers of fund by state agencies). The text of the rules does not indicate any limiting principle such as the "knew or should have known" rule that exists elsewhere. (See proposed section 14070, subdivision (e).) The proposed rules could be read to hold a state agency responsible for actions by entities two or three steps removed from the agency if that entity receives even a small amount of funding that originated with the agency. An agency would have no clear course of action to ensure it is meeting its obligations under this rule.

The justification for expanding the definition of covered entity may miss an important difference between federal and state funding. The justification for the updated definition of "covered entity" is that it is consistent with various federal rules related to the receipt of federal funding, which define "recipient" to include a state or state agency. (ISOR, p. 12.) But where the federal government originates funds, a state or state agency would be a recipient of those funds; however, where the state or state agency originates funds, only local agencies, private entities, or persons would be considered "recipients," as is the case under the current regulation. (See Cal. Code Regs., tit. 2, § 11150 ["recipient"].) The federal government does not regulate itself as a recipient of funds it originates. The application of this proposed rule to state agencies would constitute a policy decision of the state to regulate its own operations in originating funds—an analytically different choice than that made in federal rules, rather than a consistent approach. If the state intends to adopt such a rule, the ISOR should include more robust justification for this change in the definition.

The justification for the expanding the rule on discrimination by recipients of state funds to include all covered entities similarly are unclear in scope and would benefit from further consideration and explanation regarding the role of state agencies in administering benefits. (See ISOR, p. 37.) The ISOR describes that proposed sections 14026(a)(1)-(9) have been

imported from current section 11154 with updated terminology but also states that "[a]ll prior substantive provisions are retained" and that there is no change in legal effect. If the proposed rules are intended to cover state agencies, the extension of these rules to state agencies would expand their application and cost significantly. If state agencies will be obligated to engage in broad additional oversight to prevent discrimination by recipients of funds, the rulemaking package should more clearly explain the scope of state agencies' obligations.

Council Response: The Council disagrees with this comment and, furthermore, declines to make any changes to the proposed regulations based on this comment because the proposed regulations are sufficiently clear without such changes. Government Code section 11135 et seq.'s prohibition of discrimination and requirement of equal access apply to state agencies and recipients alike (see Gov. Code § 11135(a)), regardless of whether Title VI applies to the activities of federal agencies.

Comment: Proposed rule 14026—which as discussed above would expand certain prohibitions from "recipients" of state funds to any "covered entity," a term that includes state agencies—may require a state agency to increase its auditing and oversight of programs that it funds if it could be held responsible if for any programs that engage in discrimination. (See proposed 14026, subd. (a)(5).) Each nondiscrimination rule that is currently applied only to "recipients" and that the proposed rules would extend to cover state agencies represents a potential increase in administrative cost both for oversight and for direct compliance by the agency. Further, because there is not clear limiting principle on the obligation, potential oversight costs could be quite significant.

Council Response: The Council declines to make any changes to the proposed regulations based on this comment because the proposed regulations are sufficiently clear without such changes and making such changes is likely to unduly delay the rulemaking process.

Subsection 14026(a)

Comment: The County appreciates the detailed definition of "Discriminatory Practices and Unlawful Denial of Full and Equal Access" contained in section 14026 of the proposed regulations. Providing the robust level of detail of prohibited practices will assist covered entities in their compliance with Government Code section 11135, *et seq.*, as well as help members of the public understand their rights and take action when they experience discrimination. However, two parts of the definition are unclear to the County, particularly with regard to compliance with Proposition 209 alongside these proposed regulations. First, the County would suggest providing some examples or other guidance in the Final Statement of Reasons to illuminate the Civil Rights Council's meaning in section 14026(a)(3) regarding "In some situations, identical treatment may be discriminatory." Certainly, in the context of persons
needing accommodations for disability or religion, identical treatment of those who need accommodations and those who do not may be unlawful. The County presumes that is the sort

of situation contemplated by the regulations but believes that clarification would be helpful. Second, the County respectfully requests further clarification of what constitutes "reasonable efforts to achieve a representative board" for planning and advisory boards. The County is supportive of seeking diversity and representation on planning and advisory boards, but since the County currently has over 75 advisory boards and commissions, understanding this requirement
is critical to County operations. Specifically, the County also needs to balance the need for those
boards to have quorum and function with its obligations to comply with these regulations and with the prohibition on affirmative action in Proposition 209.

Council Response: The Council declines to propose additional details and examples because the proposed regulations are sufficiently clear without them and implementing the such changes is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] This wording of subsection (a) suggests a distinction between "program or activity" on the one hand and "providing, denying, or delaying any services or benefits" on the other hand. However, the definition of the term "program or activity" in section 14020(ii) includes services and benefits. It is not necessary or appropriate to use any term other than "program or activity."

We therefore suggest deleting the phrase "or providing, denying, or delaying any services or benefits."

Likewise, subsection (a) refers to the means by which a covered entity might engage in a prohibited practice indirectly "through contractual, licensing or other arrangements." Consistent with our comment regarding the definition of "program or activity," we believe it is unnecessary and confusing to describe some of the ways in which a covered entity might act indirectly because the definition of "program or activity" includes a comprehensive description of such actions.

In addition, subsection (a) uses the term "unfavorably," which is not a defined term and is not otherwise used in the proposed regulations. We believe the better approach would be to use the term "adversely," a more comprehensive term that is used elsewhere in the proposed regulations to include unfavorably.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14026(a) inserted the phrase "without legal justification" into the text. This should not be there and does not help to clarify any ambiguities but will create some. Further, the statutory scheme is intended to prohibit discriminatory actions. This adds in text "to treat in purpose or effect any person unfavorably". This goes too broad, since an "effect" could be a

totally unintentional result and yield liability when no intent or practice of discrimination creates that "effect." This language is unnecessary and will create confusion. It should be more direct to state that it is prohibited to discriminate against any person on the basis of the protected class of the person.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14026(a)(2)

Comment: [A coalition of commenters writes:] It is unclear what is meant by the current wording of subparagraph (a)(2) when it says "a program or activity that is not full." We suggest clarifying by applying "full and equal" to the services or benefits offered by a program: "(a)(2) affording a person the opportunity or right to apply for, receive the benefits of, or participate in a program or activity ~~**that is not full and equal to the program or activity afforded others**~~ **does not offer the same full and equal benefits or services that a program or activity affords to others**;"

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14026(a)(3)

Comment: [A coalition of commenters writes:] Subsection (a)(3) is a particularly important provision for people with disabilities who are not necessarily outright denied in many instances, but face barriers to participation because of being expected to conform to processes that are not necessary but merely typical or traditional. We suggest recognizing that a truly equitable program or activity is one that allows all persons to reach the same level of individual achievement so that disabled people can request reasonable accommodations that will enable them to excel beyond the levels reached by a non-disabled person where they have the capacity to do so. Thus, we suggest the following:

"(3) providing a program or activity to a person that is not as effective in affording a full and equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of individual achievement as that provided to others . . ."

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14026(a)(3) adds a sentence that "[i]n some situations identical treatment may be discriminatory." That provides no guidance and is a factual determination that must be

made in litigation. This phrase should be struck since it will cause confusion and encourage litigation.

Council Response: The Council disagrees with this comment. In the context of section 14026(a)(3), the phrase provides guidance, explaining that equally effective programs are not necessarily identical programs – for example, if a person with a disability needs reasonable accommodations or modifications to a program or activity in order to enjoy full and equal access, providing a program or activity in the identical manner that it is provided to non-disabled individuals (in other words, without a needed modification) could constitute discrimination.

Subsection 14026(a)(4)

Comment: [A coalition of commenters writes:] In subparagraph (4), we suggest adding "to" between "full and equal access" and "as truly effective a program" to ensure grammatical sense: "(4) providing different or separate programs or activities to a person, or to any class of persons, than is provided to others, or providing programs or activities at a different time, unless such action is clearly necessary to provide such persons with full and equal access **to** as truly effective a program or activity as that provided to others;"

Council Response: The Council agrees with this comment and proposes to implement the suggested language.

Subsection 14026(a)(6)

Comment: [A coalition of commenters writes:] Under subsection (a)(6), we recommend modifying "planning or advisory board" to include commissions, committees, taskforces, and boards of directors.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [P]roposed section 14026, subdivision (a)(6), requiring efforts to make a representative board for all planning and advisory boards of "covered entities," if read to include state agencies, may be difficult to reconcile with Proposition 209 and could interfere with appointments law to the extent it applies to state boards and panels responsible for the administration of benefits. The rulemaking package should more clearly explain what is intended by this provision.

Council Response: The Council declines to provide clarifications suggested by the commentator because the proposed regulations are sufficiently clear without them and implementing the change is likely to cause undue delay in the rulemaking. Section 14026(a)(6) prohibits covered entities from failing to make reasonable efforts to achieve a representative board. It does not impose a quota system.

Subsection 14026(a)(9)

Comment: [A coalition of commenters writes:] Paragraphs (A) through (D) in subsection (a)(9) identify forms of discrimination which in and of themselves may be unlawful under section 11135 and should also be listed as discriminatory practices which stand on their own, without a plaintiff needing to show that they are a result of a covered entity "utilizing criteria or methods of administration."

We suggest that subsection (a)(9) be revised as follows:

"(9) **engaging in conduct that,** or utilizing criteria or methods of administration that: . . ."

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14026(a)(9)(A) again seeks to expand a protected class to simply having a membership affiliation with some organization that might have an association with a protected class. The legislature has not extended protected class rights to membership and all language referring to this should be stricken.

Council Response: The Council disagrees with this comment. The proposed paragraph is necessary to provide clarification and guidance regarding examples of prohibited acts. The proposed regulation appropriately implements existing legislation, as Section 11135(d) explicitly protects people who are "associated with a person who has, or is perceived to have, any of those characteristics." Furthermore, section 14026(a)(9)(A) does not mention membership in an organization, but membership or perceived membership in a protected class.

Comment: 2 CCR 14026(a)(9)(B) includes language that controls where entities receiving funds must include "mission" or "purpose" statements and include legislative intent or history and statutory and regulatory references. This seems too broad for information how to implement the relevant statutes and this sentence is confusing. It should be up to a program or activity how and what they include in their relevant materials and the second sentence should be stricken.

Council Response: The Council declines to strike this language because it adds clarity to the proposed regulations.

Subsection 14026(a)(10)

Comment: [A coalition of commenters writes:] Paragraph (10) of subsection (a) should be revised to strike the words "services" and "facilities" because services and facilities are included in the definition of "program or activity."

Most of the enumerated examples in this section address different forms of the restriction or denial of benefits of a program or activity based on protected class status. An additional

numeral is needed to clearly cover discrimination that occurs when programs or activities themselves adversely or disproportionately impact people on the basis of membership in protected classes or further segregation. An example of when this type of discrimination occurs is when a city or county zones land in communities of color for industrial facilities that negatively impact quality of life, environmental quality, and housing.

As drafted, (a)(10) may be interpreted to capture both (1) the siting of facilities that afford benefits in a manner that restricts access to benefits to protected classes, such as when a city sites recreational facilities only in affluent and disproportionately white neighborhoods and not neighborhoods of color; and (2) the siting of facilities that result in negative impacts on surrounding people and communities, such as the siting of a meat rendering facility that emits noxious odors within a predominantly Black neighborhood. To ensure that both forms of discrimination are clearly covered by the regulations, we propose that these forms of discrimination be captured in two separate paragraphs and propose the addition of a new numeral (11) to that end, with the current numeral (11) renumbered to (12). We propose language to accomplish that here below, as well as to more fully capture the ways that facilities are designed, sited, expanded and approved, which extends beyond site selection and permitting, that result in adverse impacts on the basis of protected class membership. We recommend the following revised paragraphs (a)(10) and (11):

(10) making or allowing selections or closures of sites or locations of facilities, or making, issuing, or denying permits, **entitlements, or other approvals for sites or locations of facilities that** ~~**for programs, services, activities or facilities that**~~:

(A) Exclude from, denies the benefits of, or otherwise subject persons to discrimination under any program or activity, **or**;

(B) Defeat or substantially impair the accomplishment of the objectives of the program or activity with respect to membership in a protected class.

(11) Allowing, facilitating, supporting, or approving the development, operation, or alteration of facilities that result in adverse impacts on protected classes or otherwise subjects persons to discrimination.

~~**(11)**~~**(12)** interfering with admittance to or enjoyment of public facilities or the rights of an individual with a disability under any program or activity.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: Section 14026(a)(10) appears to prohibit CDSS from issuing a license to any facility (community care facility, residential care facility for persons with chronic life-threatening illness, residential care facility for the elderly, child day care facility, home care organization) or from registering any home care aide or Trustline provider, if such licensee or aide subjects any

person to discrimination under any program or activity. CDSS requests clarifying language in regulation as to whether a "program or activity" is meant only to refer to the substantive benefits or services provided to an individual or if it also refers to employment discrimination by a licensee or exclusion of clients from a facility based on the protected status of the client or their authorized representative. CDSS also requests clarification on whether any substantiated discrimination against clients, their authorized representatives, or employees in a licensed facility would require revocation of the license or home care aide or Trustline registration. (See the Community Care Facilities Act (HSC § 1500 et seq.), Residential Care Facilities for Persons with Chronic Life-Threatening Illness (HSC § 1568.01, et seq.), Medical Foster Homes for Veterans (HSC § 1568.21, et seq.), Residential Care Facilities for the Elderly Act (HSC § 1569, et seq.), Child Care Provider Registration ("Trustline," HSC § 1596.60 et seq.), Child Day Care Facility Act (HSC § 1596.70, et seq.), and Home Care Services Consumer Protection Act (HSC § 1796.10)).

Council Response: The Council declines to add additional clarifications suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking. Read with the definition of "program or activity" in section 14020(ii), section 14026 clarifies the issues raised by this comment.

Subsection 14026(b)

Comment: [A coalition of commenters writes:] We proposed that subsection (b) be revised as follows in accordance with our proposed revisions to (a)(10) and (11):

"~~**This subsection**~~ **Paragraphs (10) and (11) of subsection (a)** ~~**applies**~~ **apply** to any covered entity engaging in ~~**permitting activity or site or facility selection,**~~ **any activity to allow, facilitate, support, or approve the development, operation or alteration of facilities that result in adverse impacts on protected classes or otherwise subject persons to discrimination,** notwithstanding that other covered **or non-covered** entities have **engaged in any activity or failed to engage in activity to allow, facilitate, support, or approve the development, operation or alteration of that same facility** ~~**issued, allowed or made permits or selections relating to the same program, activity, site or facility**~~."

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

§ 14027. Standards for Determining Discrimination and Unlawful Denial of Full and Equal Access

Subsection 14027(a)

Comment: Under Section 14025 of the proposed regulations, in order to determine whether a practice is discriminatory or unlawfully denies full and equal access, "all sources of information

may be used, including the sources of information and methods used by state and federal courts
and agencies in determining whether a practice is discriminatory or denies full and equal access." We support this criteria. It allows for the Civil Rights Department to utilize federal laws, cases, regulations, and guidance memos of the Department of Justice to determine whether California courts are violating Section 11135 by the manner in which they conduct conservatorship proceedings.

Council Response: The Council assumes that the commenter intended to reference Section 14027(a), which includes the language cited by the commenter. The Council appreciates the comment.

Comment: 2 CCR 14027(a) references information which can be used to determine whether a practice is discriminatory. These are common references to federal courts and agencies who provide guidance. However, then this regulatory scheme says that these controlling authorities are "considered a floor and not a ceiling" for the objectives of regulations. That gives no guidance for implementation and also attempts to override judicial interpretation and legislative mandates. This entire second sentence should be stricken.

Council Response: The Council declines to strike this language because it clarifies the proposed regulations.

Subsection 14027(b)

Comment: We support the addition of language at 2 C.C.R. Section 14027(b) and following that specifies the practices prohibited under the statutory provisions at issue include not only facial and/or intentional discrimination, but also disparate impact discrimination. This added language will help put state agencies on notice that they are responsible for the adverse effects of systemic inequities they allow to persist, and help Californians understand that they may have a valid discrimination claim in situations where a facially neutral policy or practice foreseeably resulted in an adverse or disproportionate impact on members of a protected class, or served to reinforce or perpetuate discrimination or segregation impacting members of a protected class. We encourage the Council to add clarifying language at Section 14027(b) spelling out the meaning of "denial of full and equal access" in this context, since the currently proposed language indicates that any denial of full and equal access is prohibited but does not define the term, which would make this protection difficult for community members to access.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14027(b)(2)

Comment: We encourage the Council to expand the definition of "intentional discrimination" at Section 14027(b)(2) to make clear that not only "taking an adverse action," but also knowingly

failing to take action, can constitute illegal discrimination; this will help address situations where the administrators of a program or activity are aware of a need to provide support—such as language interpretation, a disability accommodation, or acknowledgment of gender identity — and effectively exclude a beneficiary from full and equal access by failing to do so.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] We recommend adding the alternate wording of "disparate treatment" in addition to the terms already listed, which include "facial discrimination," "intentional discrimination," and "disparate impact discrimination." "Disparate treatment" currently is not contained within the set of regulations and may be useful to mention as an alternative term for "intentional discrimination" as stated in FEHA, mainly adding the language "sometimes referred to express discrimination, or disparate treatment" in subsection (b)(2), as follows:

"Intentional discrimination **(sometimes referred to express discrimination, or disparate treatment) i**s established . . ." This is a simple terminology addition to ensure that the different terminology of the same type of discrimination is mentioned.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] Subsection (b) states four categories of prohibited practices: facial discrimination, intentional discrimination, disparate impact discrimination, and denial of full and equal access. Only facial discrimination, intentional discrimination, and disparate impact discrimination are expounded in the following paragraphs.

Council Response: The Council interprets this comment to recommend adding a definition of "facial discrimination" to this subsection. The Council declines to adopt this change because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] Subsection (b)(2) describes intentional discrimination. It should include a knowing failure to act. If intentional discrimination is only defined as including affirmative acts, it may exclude many types of discrimination faced by members of a protected class. We suggest adding the following language at the end of this subsection:

(b)(2) Practices that intentionally discriminate against individuals on the basis of membership in a protected class are prohibited under Article 9.5, this subchapter, and other implementing regulations. Intentional discrimination is established when a protected basis is a motivating factor in taking an adverse action even though other factors may have also motivated the

practice. Intentional discrimination may be proved by direct or circumstantial evidence. "Intentional" discrimination includes "purposeful" discrimination. **Intentional discrimination includes a knowing failure to act.**

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14027(b)(3)

Comment: The Civil Rights Department's March 8, 2023 press release announcing the Council's rulemaking on Government Code section 11135 described one of the objectives of the rulemaking as

> Ensure California law is interpreted in a way that is at least as protective as Title VI of the Civil Rights Act of 1964, the federal law that similarly prohibits discrimination in programs and activities receiving federal financial assistance.

Based on our past professional experience and research and ongoing interest in the implementation of Title VI by the US Environmental Protection Agency (US EPA), Government Code Section 11135 is an important legal tool for helping to protect racial minority and other marginalized communities against unequal environmental burdens. While were not able to engage in a very careful review of all text in of the proposed rule, we are submitting these comments with such environmental justice concerns in mind.

Specifically, Professor Yang's most recent law review article, Old and New Environmental Racism (forthcoming in early 2024 in the Utah Law Review), evaluates EPA's past environmental justice efforts and assesses the state of its Title VI program. Among other things, Professor Yang concludes that the effectiveness of the US EPA's Title VI program has been seriously hindered by the Agency's less-than effective enforcement of its Title VI implementing regulations. A draft of the article, entitled Old and New Environmental Racism, can be accessed at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4353917.

We refer the Council to that draft article, especially sections III(B) and (C), for a more comprehensive discussion of the weaknesses of EPA's Title VI program relevant to the proposed rulemaking and reforms to enhance the effectiveness of the EPA's civil rights enforcement efforts. If considered carefully and incorporated into the implementation and enforcement of Government Code section 11135, this provision could be a valuable tool in promoting environmental justice.

As mentioned by the California Civil Rights Department March 8 press release, the proposed changes to section 11135 would "[e]nsure California law is interpreted in a way that is at least as protective as Title VI of the Civil Rights Act of 1964 … , [p]rovide clear definitions about who is protected by the law and who must comply with it, [c]larify standards for determining whether a practice is discriminatory or denies full and equal access, including legal standards

for facial discrimination, intentional discrimination, and disparate impact discrimination, and [c]larify state-law standards for providing equal access to government programs to people with disabilities and people with limited English proficiency". However, in updating and clarifying the applicability of section 11135 so that the protections effectively address contemporary conditions and discriminations in its current manifestations, California should avoid the weaknesses in how Title VI has been implemented and enforced by federal agencies, especially with respect to disparate impact concerns related to environmental justice.

We focus our comments here specifically on concerns related to disparate pollution exposures and environmental risk that should be encompassed in the protections of section 11135. As is well-documented, racial minorities and other marginalized communities often experience increased exposure to pollution, waste disposal operations, and other causes of environmental degradation. Unfortunately, traditional approaches to discriminatory effects in the environmental justice context have oftentimes been superficial and ignored the harms that even small increments of pollution risks can pose to minority communities, resulting in compounded environmental harms to minority communities, including worse long-term health outcomes.

The inclusion of … an updated version of section 14047(b)(3) on disparate impacts [is a] good starting point[] to ensure that turning a blind eye to racial discrimination in environmental regulations is not repeated. Under the new definitions, "Disparate impact" would occur "when a facially neutral act or practice, regardless of intent, a) has an adverse or disproportionate impact, or predictably results in an adverse or disproportionate impact, on members of a protected class; (b) creates, increases, reinforces, or perpetuates discrimination or segregation of members of a protected class; or (c) has the effect of violating any of the other prohibitions in Article 9.5, this subchapter, or other implementing regulations." (14027(b)(3), pp.23-24)

Council Response: Because this comment does not suggest any revisions to the text of the proposed regulations, no further response is required per Government Code section 11346.9(a)(3).

Comment: [T]he CDR should also take into account "non-de minimis increases in pollution exposure and health risks as a per se adverse effects for purposes of the Title VI disparate effect regulations." (Old & New Environmental Racism, p. 51 [available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4353917].) Although some increases in pollution may seem small, the cumulative consequences, combined with other environmental exposures, may ultimately be substantial and create serious adverse effects on vulnerable communities and individuals.

Council Response: Because this comment does not suggest any revisions to the text of the proposed regulations, no further response is required per Government Code section 11346.9(a)(3).

§ 14028. Types of Evidence and Proof in Intentional Discrimination Cases

Subsections 14028(a) and (b)

Comment: 2 CCR 14028(a) and (b) include an extensive regulatory scheme about "evidence" to prove discrimination. In California, there are extensive statutes promulgated to give guidance about what "evidence" may be used and the limitations of that kind of evidence. State and federal courts opine about evidence and what value it may have and this entire section with discussion of the value of this evidence should be struck and at most bullet points of the types of evidence that may be considered. Similarly, section 14028(c) inserts a "burden of proof" standard which should not be included. This is up to state law and federal law to determine the correct burden of proof or shifting burdens of proof and should not be included in this regulatory scheme for the implementation of limited statutes. This entire section should be struck.

Council Response: The Council declines to adopt the changes suggested by the commenter. These proposed regulations "accurately render existing case law interpreting state and federal antidiscrimination principles … to ensure compliance with the law and to prevent misconstruction of statutes." (Initial Statement of Reasons at pp. 41-42.) The Council cites to the cases on which it bases these subsections in the Initial Statement of Reasons.

Subsection 14028(b)

Comment: In subsection (b)(4), strike the word "required" because it appears to be a typographical error.

Council Response: The Council agrees with this comment and proposes to strike this language from the subsection.

Subsection 14028(c)

Comment: [A coalition of commenters writes:] The regulations describing intentional discrimination should be consistent with and similar to the regulations for housing provisions of the Fair Employment and Housing Act, title 2, California Code of Regulations, section 12042.

The burden of proof proposed in Section 14028(c) is the *McDonnell Douglas* standard adopted by the U.S. Supreme Court in 1973. California anti-discrimination laws have significantly evolved since 1973, and the proposed standard is no longer consistent with California law.

The California Supreme Court has pointed out that the three-part *McDonnell Douglas* standard was not written for the evaluation of claims involving multiple reasons for the challenged adverse action. Instead, that framework presupposes that the respondent "has a single reason for taking its action, and the reason is either discriminatory or legitimate." (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 215.) The *McDonnell Douglas* framework hinges liability on whether the respondent's proffered reason for taking the action is genuine or pretextual and aims to determine the "true reason" for the action. This focus on identifying the single, true

reason for the action creates complications in mixed-motive cases in which the respondent is alleged to have acted for multiple reasons, some legitimate and others not.

Many of the section 11135 claims the CRD will be required to investigate and decide will be mixed-motive cases. The proposed three-step *McDonnell Douglas* standard will result in unnecessarily long delays in CRD's investigation and determination of 11135 discrimination claims. The California Supreme Court opinion in *Harris* establishes the two-step burden of proof standard that should be applied in this regulation: 1) the complainant must demonstrate by a preponderance of the evidence that respondent's action was substantially motivated by discrimination; and 2) if the complainant meets this burden, the respondent must demonstrate by a preponderance of the evidence that its action was taken for legitimate, nondiscriminatory reasons. Notably, if a complainant meets the burden of demonstrating that respondent's action was substantially motivated by discrimination and the respondent fails to demonstrate a legitimate nondiscriminatory reason, the respondent is entitled to both monetary and non-monetary relief. But if a complainant meets the burden of demonstrating that respondent's action was substantially motivated by discrimination and the respondent does demonstrate a legitimate nondiscriminatory reason for its action, the complainant may still be entitled to non-monetary relief. (*Harris*, *supra*, 56 Cal. 4th at 211 ["In light of the FEHA's express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney's fees and costs."])

We suggest the following changes:

(c) Burdens of Proof in Intentional Discrimination Cases Based on Circumstantial Evidence

(1) A complainant, plaintiff, or petitioner first has the burden of establishing a ~~**prima facie case**~~ **claim** of discrimination by showing **by a preponderance of the evidence** that **respondent's action was substantially motivated by discrimination. The complainant can satisfy this burden by demonstrating that** the aggrieved individual or individuals: (A) belong to a protected class; (B) were subject to adverse action; and (C) a causal connection or link exists between the individual's or individuals' protected class and the adverse action. ~~**A prima facie case establishes a rebuttable presumption of discrimination.**~~

(2) If the complainant, plaintiff, or petitioner satisfies the burden of proof set forth in paragraph (c)(1) of this subsection, the respondent or defendant must then ~~**demonstrate**~~ **establish by a preponderance of the evidence that the adverse action was taken for** a legitimate, nondiscriminatory reason ~~**for the adverse action**~~.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this subsection, **the complainant is no longer entitled to an award of reinstatement, back pay or damages, but may still be entitled to declaratory relief or injunctive relief to stop discriminatory practices. In addition, the complainant may be eligible for reasonable**

attorneys' fees and costs. ~~**the burden shifts back to the complainant, plaintiff, or petitioner to demonstrate that the non-discriminatory reason(s) asserted by the respondent are pretextual or are false.**~~

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: At 2 C.C.R. Section 14028(c), the proposed rules set forth a framework for proving intentional discrimination based on circumstantial evidence. This three-step framework appears to be based on the standard established by the United States Supreme Court fifty years ago in *McDonnell Douglas v. Green* (1973) 411 U.S. 792. Courts applying the *McDonnell Douglas* test seek to ascertain the one true reason for an adverse action and make a liability finding depending on whether that sole reason appears genuine or pretextual. Thus, this approach is not a good fit for fact patterns involving multiple reasons for taking an action, as the California Supreme Court noted in *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 215. We suggest adjusting the proposed rules to instead reflect the two-step analysis the California Supreme Court established in *Harris*: first, the complainant must demonstrate by a preponderance of the evidence that discrimination substantially motivated the challenged action, and if that standard is met, the respondent may then seek to prove by a preponderance of the evidence that it took the action for legitimate, nondiscriminatory reasons. This change would account for the likelihood that many modern claims of discrimination will entail a multiplicity of reasons for the challenged actions. It would also help fulfill the remedial purposes of Government Code Section 11135 *et seq.* by affirming the possibility that (as in the employment context) a plaintiff may be entitled to equitable relief and attorney's fees in circumstances where evidence establishes both discriminatory and nondiscriminatory reasons for the challenged actions and the court declines to award damages.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

§ 14029. Types of Evidence and Proof in Disparate Impact Discrimination Cases

Comment: [A coalition of commenters writes:] This proposed section enumerates descriptions of evidence that may be used to show disparate impact. This section primarily addresses restrictions on or denials of access to benefits of programs or activities and not evidence to demonstrate that programs or activities adversely affect people on the basis of protected class. We recommend adding a new numeral (6) to address this omission:

(a) Evidence of disparate impact may include statistical or other evidence that: …

(6) shows an adverse or disproportionate impact on members of a protected class.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: We commend the effort to update the applicable regulations for Government Code section 11135 and appreciate the opportunity to provide input on the proposed rulemaking in this regard. We are pleased to provide the following comments (submitted in our personal capacities), particularly applicable to proposed Article 3 and proposed § 14029 of the California Code of Regulations ("Types of Evidence and Proof in Disparate Impact Discrimination Regulations") (Version dated February 10, 2023).

The provisions are of special importance in the context of environmental justice and environmental discrimination concerns. With respect to the disparate impact prohibitions set out under Article 3 and § 14029 of the proposed rulemaking, the Council should revise the proposed regulations such that the effects encompassed within "disparate impact discrimination" include not only visible injuries from prohibited practices, but also the exposure to increased (non-de minimis) environmental risks and pollution/toxics that racial minority and other vulnerable communities often suffer, which can produce long-term and latent injuries that manifest many years later or only in combination with other events.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsections 14029(b) and (c)

Comment: 2 CCR 14029(b) and (c) should be stricken in their entirety. These regulations again go too far and usurp the courts and legislative roles in determining the correct burden of proof and legal sufficiency for allegations of discrimination. These regulations should be pared down substantially for what is necessary to give guidance for implementation of GC 11135 et seq. and not to create litigation guidance or evidentiary rules which are reserved to the judicial system and evidence codes of the state.

Council Response: The Council disagrees with this comment. These subsections describe "[t]he shifting burdens of proof [that are] well established in case law adjudicated by both federal and state courts." (Initial Statement of Reasons at p. 43.) The Council then cites to the cases on which it bases these subsections in the Initial Statement of Reasons and explains their relevance to determining the burdens of proof relating to Article 9.5.

§ 14030. Other Proof Provisions

Comment: 2 CCR 14030 should be stricken in its entirety. Again, this seeks to impermissibly create some evidence code or veer into judicial interpretation instead of providing implementation guidance.

Council Response: The Council disagrees with this comment and declines to strike the section. The inclusion of this section provides guidance and clarity regarding the well-established distinctions between intentional discrimination claims and disparate impact claims and their respective proof requirements and clarifies that the same evidence may be probative of multiple forms of discrimination. The types of evidence included in this section "are illustrative and *do not preclude courts from considering other types of evidence or proof that they determine meet evidentiary requirements*." (Initial Statement of Reasons at pp. 44-45 (emphasis added).)

Article 4. Remedial Actions

§ 14050. Administrative Complaints and Judicial Private Right of Action

Comment: Changes in these regulations appear likely to impose increased litigation costs on agencies. Private civil suits for equitable remedies to enforce Article 9.5 are permitted by statute. (Gov. Code, § 11139.) The proposed rules would include a private right of action by regulation and embellish the list of equitable remedies available. (See proposed rule 14050, subd. (a).) This change may laudably expand access to remedies, but in doing so could impose litigation costs on agencies that are not discussed or justified in the rulemaking pages.

Moreover, these rules propose a shift to mandatory attorney's fees and costs, including expert witness fees, for plaintiffs in such claims. (See proposed rule 14050, subd. (c) ["shall"].) Section 14050's mandatory fee shifting provision differs from the permissive fee shifting provisions in the Americans with Disabilities Act (ADA), (42 USC § 12205), and the Fair Employment and Housing Act (FEHA), (Gov. Code 12965, subd. (c)(6)). However, the ISOR cites only the ADA and FEHA as the justification for this change without providing any specific justification for the shift to mandatory fees. (ISOR, pp. 45-46.) Further, mandatory fee shifting does away with the consideration of whether the claim brought a significant benefit to a large group of people and whether there is adequate public enforcement of the right, two counterbalances which permit a state agency that is doing its job to avoid liability for fees under existing law. (See Cal. Code Civ. Proc, 1021.5; see also Conservatorship of Whitley (2010) 50 Cal.4th 1206, 1215.) As a result, agencies may be responsible for paying fees and incurring administrative costs due to court orders where a balancing of equities would not reach the same result.

A further risk with mandatory fees is that state agencies may be necessary defendants to afford complete relief in claims involving malfeasance by recipients of state funds. (See proposed 14052, subd.(c) [state agency can be ordered by a court to take corrective actions on a finding that a funded party has violated Article 9.5].) In such circumstances, absent guidance from these rules, which are silent on the subject, an agency which has not itself violated Article 9.5 could be jointly and severally liable for fees with a funded entity co-defendant. The vagueness of the rules regarding state agency responsibility for actions of recipients of funds increases this potential liability.

In addition, even though Government Code section 11139 permits only equitable relief and no damages, the proposed rules may impose significant discovery costs on state agencies. As discussed above, the proposed rules would require agencies to pay expert witness costs (proposed 14050, subd. (c)); they also encourage the use of statistical evidence to prove claims. (See Proposed 14028, subd. (b); proposed 14029, subd. (a).) Moreover, these rules would waive the limitation on discovery for administrative writ proceedings under California Code of Civil Procedure section 1094.5, subdivision (e). (See proposed 14051, subd. (b).) Taken together, these changes are likely to increase the complexity and cost of discovery for state agencies.

The stated justification for the waiver of the limitation on discovery in 1094.5 administrative writ actions is that exhaustion of administrative remedies is not required for an action directly under Article 9.5, and that is true. (See Gov. Code § 11139.) However, it is unclear how this rule might affect judicial review of other administrative proceedings. For example, would a party who alleged an Article 9.5 claim be excused from administrative exhaustion requirements applicable to Unemployment Insurance claims before the California Unemployment Insurance Appeals Board (CUIAB), which might overturn the denial of UI benefits and moot the claim? Or would the relevant agency, EDD, be required to submit to full discovery of the UI benefit claim and Article 9.5 claim in a de novo proceeding in spite of its own procedures for handling such claims? The proposed rules include significant ambiguities with respect to an agency's discovery obligations in light of this broad reading of the scope of Article 9.5, which could impose significant costs that are not reflected in the rulemaking package. The discovery uncertainties and costs could be partially addressed with a clarification in the rule that, like employment claims under FEHA, parties with other statutory claims for benefits that underlie the Article 9.5 claim must exhaust their administrative rights on the underlying benefit claim before seeking to bring an individual civil suit raising the Article 9.5 claim.

[…] LWDA supports the intent to expand and clarify discrimination protections for state-funded entities, and LWDA urges the Civil Rights Council to address the ambiguities and costs addressed in this comment as the rulemaking proceeds.

Council Response: The Council declines to propose modifications to the draft regulations in response to the above comment because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14050(a)

Comment: Under Section 14050 of the proposed regulations, "Any aggrieved person or state agency may file an administrative complaint with the Department regarding any alleged violation of Article 9.5, this subchapter or any other implementing regulations." We propose amendments to this provision in order to give access to the administrative complaint process to victims of discrimination who have mental disabilities that preclude them from filing a complaint with the Department. A third party who is aware of a discriminatory practice by a covered entity should be allowed standing to file a complaint with the Department to initiate a

review. Without third party standing, discrimination against most conservatees and proposed conservatees would go unchallenged. The right of a person with a mental disability to access the administrative complaint process would be "meaningless" unless someone is allowed to initiate the process on his or her behalf. *Michelle K. v. Superior Court of Orange Cnty*, 221 Cal. App. 4th 409, 452 (Cal. Ct. App. 2013).

Since federal law may be used to interpret Section 11135, Section 14050 of these regulations should be amended to allow a "next friend" to initiate a complaint with the Department on behalf of a victim of discrimination whose mental disability precludes them from filing a complaint on their own. To qualify as a next friend under federal law, a person "must provide an adequate explanation - such as inaccessibility, mental incompetence, or other disability - why the real party in interest cannot appear on his own behalf to prosecute the action" and the next friend "must be truly dedicated to the best interests of the person on whose behalf [she] seeks to litigate." *Ross v. Lantz* (2 Cir. 2005) 396 F.2d 512, 514, *citing Whitmore v. Arkansas* (1990) 495 U.S. 149, at 163-164.

For victims of discrimination whose mental disabilities preclude or impair them from filing an administrative complaint on their own, amending this regulation to allow a third party to file the complaint on their behalf is declarative of exiting state law. 17 CCR § 50510. "Access rights" include a right to "advocacy services" to protect their rights. Under Welfare and Institutions Code Section 4902, a protection and advocacy agency may "pursue administrative, legal, and other appropriate remedies" to protect the rights of people with disabilities. Under its contract with the Department of Developmental Services, Disability Rights California is authorized to "Initiate action on behalf of consumers who are unable to register a complaint on their own behalf."

Section 14050 should be amended to read: "Any aggrieved person, **next friend, protection and advocacy agency**, or **other** state agency may file an administrative complaint with the Department regarding any alleged violation of Article 9.5, this subchapter or other implementing regulations."

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: Subdivision (b) of section 14050(a) would implement the right provided at GC section 11139 to enforce Article 9.5 and implementing regulations via civil action for equitable relief. Subdivision (c) would entitle a prevailing plaintiff or petitioner in a civil action to costs, expenses, reasonable attorneys' fees, and expert witness fees. Civil actions against CDSS and the fee shifting in subdivision (c) could increase CDSS' financial obligations and thus not be cost neutral.

Council Response: This comment does not request a particular change to the proposed regulations; therefore, no further response is required per Government Code section 11346.9(a)(3).

Subsection 14050(c)

Comment: [A coalition of commenters writes:] Consistent with longstanding principles, subsection (c) appropriately notes that prevailing parties may recover attorney's fees and costs. In order to clarify that filing a judicial action should not be necessary to recover fees and costs, the proposed regulations should be revised to eliminate references to civil action so that parties (other than the state and state agencies) may obtain such relief in administrative proceedings.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14050(c) should be stricken in its entirety. Whether or not a plaintiff or defendant is entitled to monetary recovery in a civil court action is determined by the legislature and courts. It is improper for the regulations for this section to determine what costs and fees should be recovered in litigation. Further, even restating what the law might allow is unnecessary in this very lengthy regulatory scheme.

Council Response: The Council disagrees with this comment. The language that the commenter proposes to strike is necessary to implement the Legislature's 2016 reorganization of Article 9.5 and its enforcement and regulatory mechanisms.

§ 14051. Exhaustion of Administrative Remedies

Comment: The County is supportive of the Civil Rights Council's policy in the proposed regulations to simplify the filing of complaints and avoid requiring exhaustion of administrative remedies when filing a civil action for a violation of Government Code section 11135, *et seq.* However, the County is concerned that the proposed regulations could be interpreted to suggest that individuals are not required to comply with the Government Claims Act prior to filing a civil
action, which would disrupt the existing procedures used by government entities to ensure early
resolution and curing of harms and appears to be inconsistent with the requirement to present all
claims for money and damages in Government Code section 905. That section also lists specific types of claims that do not have to comply with the Government Claims Act, but those exemptions do not include claims for violations of Government Code section 11135, *et seq.* Accordingly, the County requests that the Civil Rights Council clarify that prospective claimants must comply with the Government Claims Act.

Council Response: The Council declines to adopt this change because the Government Claims Act is outside of the Council's regulatory jurisdiction.

Subsection 14051(a)

Comment: [A coalition of commenters writes:] Under the Fair Employment and Housing Act, exhaustion of administrative remedies is not required for housing discrimination claims but is required for employment discrimination claims. Section 14051 attempts to recognize this distinction without requiring exhaustion of administrative remedies for employment or any other type of claims under Article 9.5. In doing so, however, we believe the proposed language may inadvertently imply that exhaustion is not required only for FEHA-related employment claims. We believe this section should be clarified by striking the phrase "available for employment claims under the Fair Employment and Housing Act, Government Code section 12900 et seq." in the first sentence. With this revision the section would state comprehensively that exhaustion of administrative remedies shall not be a prerequisite to the bringing of actions for judicial enforcement of Article 9.5, this subchapter, or other implementing regulations. Thus, we suggest the following:

(a) Exhaustion of administrative remedies ~~**available for employment claims under the Fair Employment and Housing Act, Government Code section 12900 et seq.**~~ shall not be a prerequisite to the bringing of actions for judicial enforcement of Article 9.5, this subchapter or other implementing regulations, nor shall any person first be required to exhaust administrative remedies of any other state or federal agency or the internal grievance procedures of any recipient, or comply with the Government Claims Act, Gov. Code sections 900 et seq., before filing an intake form or a complaint with the Department or a civil action for enforcement of Article 9.5.

Council Response: The Council declines to adopt the change suggested by the commenter because it is not necessary to enhance the clarity of the regulation and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14051(b)

Comment: [A coalition of commenters writes:] We believe the intent of this subsection would be clarified if it were revised as follows:

(b) Where ~~**an underlying**~~ ***a separate*** administrative proceeding has ~~**occurred**~~ ***been initiated***, the civil action or Department investigation …

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14051(b) inserts a last sentence that states "[a] civil action shall proceed by trial de novo." This exceeds the scope of implementing regulations for the statutory scheme.

This should be determined either by legislative mandate or court determination according to its jurisdiction. Therefore, this should be stricken.

Council Response: The Council disagrees with this comment and declines to strike the last sentence of section 14051(b) because it is necessary to add clarity to the regulations. The Council is charged with promulgating implementing regulations, which involves expounding upon and clarifying statutory language. Section 14051(b), in its entirety, is necessary to ensure consistency with subsection (a) (which no longer requires exhaustion of administrative remedies). It is also necessary to update the regulations to reflect statutory changes made when the Legislature enacted AB 677 (Ch. 708, Statutes of 2001).

Subsection 14051(d)

Comment: [A coalition of commenters writes:] To clarify that tolling applies throughout the administrative procedure, we suggest the following changes:

(d) If an aggrieved person chooses to seek resolution of a claim under Article 9.5, this subchapter, or other implementing regulations through a state or state agency administrative procedure or internal agency grievance procedure other than through the Department, or if a complaint is referred to an agency for investigation pursuant to section 14052(b), the one-year deadline for filing a complaint with the Department under Government Code 12960 shall be tolled for the pendency of the investigation **or administrative proceeding**.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

§ 14052. Mandatory Remedial Action

Subsection 14052(b)

Comment: Currently, individuals can file civil rights complaints with CDSS and with the county welfare departments (CWDs) and other covered entities CDSS oversees. CDSS is responsible for overseeing investigations of all complaints made to CWDs and approving closure of each case. CDSS receives several hundred such cases each year and expects to retain jurisdiction over a similar number of cases in future years.

Currently, individuals can also file civil rights complaints with CRD alleging discrimination by CDSS. CRD has resolved past cases of complaints to CRD concerning CDSS programs. However, draft section 14052(b) would allow CRD to "refer" these complaints to CDSS "for investigation," thereby creating a new caseload of civil rights complaints for CDSS. CDSS is not equipped to adopt this additional caseload.

Council Response: The Council disagrees that the proposed regulations would add a substantial new caseload for agencies. This comment does not request a particular change to the proposed

regulations; therefore, no further response is required per Government Code section 11346.9(a)(3).

Comment: Proposed section 14052, subdivision (b), states that "[t]he Department retains discretion to refer complaints concerning violations to, or back to, the state agency responsible for the program or activity for investigation and possible resolution." However, S.B. 1442 removed other agencies' authority to investigate and make findings regarding violations of Article 9.5. (See, e.g., Initial Statement of Reasons (ISOR) at pp. 1, 3, and 46 ["the Legislature's 2016 reorganization of Article 9.5 removed individual agency enforcement and hearing obligations."]) The legislative history of S.B. 1442 reflects this intent. (See Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 1442, as amended Aug. 19, 2016, p. 2 ["Removes the authority of various state agencies to promulgate regulations to prohibit discrimination and requires the investigation and enforcement of antidiscrimination provisions to be performed by the DFEH [now CRD]."].)

Without statutory authority to investigate or adjudicate complaints, or make rules for doing so, it is unclear what types of actions would be expected of an agency to whom a claim is referred pursuant to proposed section 14052, subdivision (b). The package is clear that Article 9.5 duties and responsibilities are separate from those imposed or created by other laws (see proposed section 14004, subd. (a)), so it does not seem an agency could make use of other authority to investigate such claims. The cited authority for the rule, Government Code section 12935, subdivision (a), is CRD's general rulemaking authority, and neither it nor the Reference sections (Gov. Code §§ 11135, 11136, 11137, and 11139) appear to provide the authority to refer claims back to the state agency administering the benefit. The ISOR's justification for proposed section 14052, subdivision (b), does not offer additional explanation. The relevant statute appears to require an agency to refer the claim to CRD. (Gov. Code, § 11136 ["shall submit a complaint detailing the alleged violations to the Civil Rights Department for investigation and determination…"].) Thus, proposed section 14052, subdivision (b) creates uncertainty for regulated agencies including LWDA regarding its obligations and its authorities with respect to a "referral back" from CRD.

Council Response: The Council disagrees that this section conflicts with the text or legislative intent of SB 1442 and declines to make changes in response to this comment. It reserves the department's right to refer complaints to or back to an agency where appropriate.

Comment: [T]he investigative obligation imposed by the referral provision in proposed section 14052, subdivision (b), would impose additional administrative and personnel costs for each agency for which there is no current budget or regulatory regime. The mandatory remedial actions proposed by proposed rule 14052, subdivision (c) would also represent a cost, to the extent that the rule applies to state agencies and exceed the limited remedial action contemplated by Government Code section 11137.

Council Response: The Council disagrees with this comment. Section 14052(b) reserves the department's right to refer complaints to or back to an agency where appropriate.

The Council disagrees that section 14052(c) would impose new costs on agencies. Government Code section 11137 already requires a state agency to "take action to curtail state funding in whole or in part" to a recipient. The non-exhaustive list of remedies set forth in proposed section 14052(c) provides guidance regarding the types of remedies an agency may take to ensure its compliance with the mandate in Government Code section 11137.

Subsection 14052(c)

Comment: [A coalition of commenters writes:] We believe the intent of subsection (c) would be more accurately captured by adding the phrase "or provides state support to" after the word "administers." In addition, subsection (c) should clarify that the listed actions to be taken for a violation of the cited laws should be in addition to the remedies provided by law, instead of "other laws." Thus, we recommend the following changes:

"(c) If a recipient or recipients are found to have violated the Fair Employment and Housing Act, Government Code section 12900 et seq., Civil Code section 51, 51.5, 51.7, 54, 54.1 or 54.2, the Act, this subchapter or other implementing regulations, the state or responsible state agency that administers ***or provides state support to*** the program or activity involved, in addition to remedies provided by ~~**other**~~ law~~**s**~~ and actions directed by a Court, shall take one or more of the following actions:"

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14052(c) again goes too far in controlling the actions of other entities, without legislative mandate or court authority. The existing language (with current revisions) of section 14052(d) provides the discretion for appropriate remedial action, determined according to the facts at the time. Section 14052(c) should be stricken in its entirety, since it arbitrarily mandates remedies in addition to what a court might deem appropriate and usurps judicial and legislative authority.

Council Response: The Council disagrees with this comment. Subsection 14052(d) provides clarity and guidance by further explaining the types of actions that would meet the requirement set forth in Government Code section 11137 that a covered entity "shall take action to curtail state funding in whole or in part" to a "contractor, grantee, or local agency [that] has violated the provisions of [Article 9.5]."

§ 14053. Permissive Remedial Action

Comment: [A coalition of commenters writes:] The proposed regulations appropriately reflect that section 11135 distinguishes between and separately prohibits two distinct types of wrongs:

discrimination, and denial of full and equal access. For the most part, the proposed regulations reference both of these prohibitions. However, section 14053 inadvertently omits reference to denial of full and equal access in both subsections (a) and (b). These omissions should be corrected by inserting "or denial of full and equal access" in three places:

- after the word "discrimination" in the last line of subsection (a)(1);
- after the word "discrimination" in the last line of subsection (a)(2); and
- after the word "conduct" in subsection (b).

Likewise, we believe that the word "nondiscrimination" in the last line of subsection (b) should be stricken as unnecessary and unduly limiting or confusing because it could be interpreted to omit laws that prohibit denial of full and equal access.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14053(b)

Comment: 2 CCR 14053(b) should be stricken in its entirety. The language proposed by section 14053(c) provides the state discretion to take what remedial actions are deemed appropriate to address violations. Therefore, the previous subsection (b) is unnecessary. Further, part of the regulations require "specific performance of agreements between the state or state agency and the recipient or recipients." Specific performance is generally a legal term of act used only for land transactions. Further, the state cannot compel another entity to perform obligations and must look to other remedies if they fail to comply.

Council Response: The Council disagrees with this comment and declines to strike section 14053(b) in its entirety because it is necessary to add clarity to the regulations. Section 14053(b) provides examples of remedial actions that may be taken by the state or responsible state agency.

Article 5. Harassment, Coercion, Intimidation, and Retaliation

§ 14070. Harassment Prohibited

Comment: 2 CCR 14070 should be struck in its entirety or much abbreviated and included under one of the above sections as what may be considered as discriminatory acts. This regulatory scheme goes too far to define what is "quid pro quo harassment" and "hostile environment harassment" and the evidentiary proof required for this. There are extensive definitions already incorporated into this statutory scheme and this could be pared down for a succinct definition. This again attempts to make rules of evidence which are beyond what these regulations should include. These concepts are threshed out by courts and should not be included in implementing regulations.

Council Response: The Council disagrees with this comment. As set forth in the Initial Statement of Reasons (pp. 49-50), section 14070 is consistent with existing statutes and regulations, and is necessary to add clarity to the regulations.

Subsection 14070(b)(2)

Comment: [A coalition of commenters writes:] As with section 14053, noted above, subparagraph (b)(2)(H) should include "or denial of full and equal access" after the term "discriminatory practice."

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14070(b)(3)

Comment: [A coalition of commenters writes:] Subparagraph (b)(3) describes types of prohibited conduct related to quid pro quo harassment and hostile environment harassment. Subparagraph (b)(3)(D)'s intent would be made clearer by revising the proposed language as follows, with references to the definitions for gender and sex recommended in this comment letter, as opposed to the Council's current proposed definitions:

"[Such harassment includes:] unwelcome sexual conduct, or other unwelcome conduct, ~~**which need not be based on**~~ ***regardless of whether motivated by sexual desire,*** ~~**linked to**~~ ***targeting*** an individual's sexual orientation, ***gender, as defined in section 14020(t),*** or sex, ~~**including: pregnancy or medical conditions related to pregnancy, childbirth or medical conditions related to childbirth, breastfeeding or medical conditions related to breastfeeding; gender identity; and gender expression**~~ as defined in section 14020(rr)."

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] Subparagraph (b)(3)(F) states that prohibited conduct includes taking adverse action including representing unavailability of a benefit. We suggest the following addition: "[Such harassment includes:] taking any adverse action against a person in a manner that constitutes quid pro quo or hostile environment harassment, such as, representing to a person that a benefit is not available ***or may be reduced***..."

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14070(e)

Comment: 2 CCR 14070(e) provides that a covered entity will be liable for harassment of an ultimate beneficiary by a third party if the covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action. This proposed regulation is inconsistent with the holding in *Davis v. Monroe County Board of Education* (1999) 526 U.S. 629, 633, cited by the Council. This regulation applies a negligence standard, but *Davis* requires intentional conduct or specific intent where a recipient demonstrates "deliberate indifference to known acts of harassment in its programs or activities" by the funding recipient. "Deliberate indifference" is only applicable where the funding recipient exercises "substantial control over both the alleged harasser and the context in which the known harassment occurs." (Id., at p. 645.) This is consistent with FEHA's requirement under section 12940(j)(1), which dictates that "in reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered." The issue before the Court was whether "a recipient of federal education funding [could] be liable for damages under Title IX," not whether the awarding state agency would be liable. The Council exceeded the standard provided by the authority it relies on and it must be stricken.

Council Response: The Council disagrees with this comment. The proposed regulation is consistent with governing law, as set forth in the Initial Statement of Reasons (pp. 50-51), as well as regulations implementing the Fair Employment and Housing Act.

§ 14071. Retaliation Generally

Comment: We ask that (9) be added with an additional example of protected activity since we have seen these violations frequently, particularly in our work related to California's realignment of the state juvenile justice system to the counties:

"(9) attending or participating in meetings, providing public comment, or otherwise exercising or enforcing one's rights under the Brown Act, the Bagley-Keene Act, or any other state or local laws and regulations related to public access, participation, or transparency."

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] We believe the regulations should recognize a presumption of retaliation when an adverse action follows protected activity within a short period of time. Such presumptions are common in California law. (See, e.g., Civil Code § 1942.5; Labor Code §§ 1019, 1472, 2105.)

Similar to section 14070(e), the actions of a third party should be covered by section 14071 when taken by a third party and the covered entity knew or should have known of the conduct and failed to take immediate and appropriate corrective action. Therefore, we suggest the amendment of subparagraph (b)(1)(B) as shown below. It is also important to ensure persons

receive protection when they are perceived to have engaged in protected activity. Therefore, we suggest the following changes to the proposed regulations:

(a) It shall be unlawful for any covered entity to take adverse action against an aggrieved person because the person has engaged in protected activity ***or has been perceived to have engaged in protected activity***.

(b)(1)(A) the aggrieved person engaged in a protected activity ***or was perceived to have engaged in protected activity***;

(b)(1)(B) the respondent subjected the aggrieved person to an adverse action***, or a third party subjected the aggrieved person to an adverse action and the respondent knew or should have known of the conduct and failed to take immediate and appropriate corrective action***; and

(c) Persons Protected. For purposes of a retaliation claim, an aggrieved person includes any person who has alleged that they have been subjected to adverse action due to engagement***, or suspected engagement,*** in a protected activity.

(c)(3)(B) the aggrieved person was participating in an activity which was perceived by the respondent ***or the respondent's agent*** as protected activity, whether or not it was so intended by the aggrieved person.

(d)(2) opposing practices prohibited by the Act, this subchapter, other implementing regulations, the California Fair Employment and Housing Act, California Civil Code section 51, 51.5, 51.7, 54 54.1, or 54.2, the federal Fair Housing Act, the Americans with Disabilities Act, the federal Civil Rights Act, or section 504 of the Rehabilitation Act, including seeking the advice of the state, any state or local agency, the Department or Council, ***legal counsel,*** or a person employed or retained by a recipient who has authority to receive, transmit, investigate, or discover a complaint, or correct an alleged violation, whether or not a complaint is filed, and if a complaint is filed, whether or not the complaint is found to have merit;

(d)(3) assisting or advising any person in seeking the advice of the state, any state or local agency, the Department or Council, ***legal counsel,*** or a person employed or retained by a recipient who has authority to receive, transmit, investigate, or discover a complaint, or correct an alleged violation, whether or not a complaint is filed, and if a complaint is filed, whether or not the complaint is found to have merit;

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14071(a)

Comment: GC 11135 et seq. prohibit discrimination against persons in protected classes. 2 CCR section 14071(a) speaks to retaliation against persons who engage in "protected activity." It is unclear what this regulation is about and how it relates to the underlying statutes and their

purposes. This should be amended to instead include the concepts under 14071(d)(1) and (2) that it is unlawful to retaliate against persons who make a complaint, testify or in any way assist in complaints related to violations of this part. This could be much shorter, direct and provide guidance. This entire section should be edited to pare it down to this limited concept. It should not include what they need to allege or how to prevail on a claim, since those are evidentiary concepts which should not be included in this scheme. The rest of this section should be struck as unnecessary to make this concept clear and direct.

Council Response: The Council disagrees with this comment. The language that the commenter proposes to remove is necessary for clarity and, as set forth in the Initial Statement of Reasons, the language is consistent with corresponding state and federal law as well as court decision interpreting such laws. (See ISOR, pp. 52-53.)

Subsection 14071(d)(7)

Comment: 2 CCR 14071(d)(7) seeks to make it a "protected activity" to seek information under a Public Records Act (PRA) request. This is out of the scope of these regulations. It has little relevance to the underlying purpose of the statute, to protect persons in protected classes from discrimination. And remedies for violations of PRA requests are already statutorily provided. This should be stricken.

Council Response: The Council disagrees with this comment and declines to strike section 14071(d)(7) because that section is necessary for clarity. It provides a non-exhaustive list of actions that may constitute a protected activity, on which basis a covered entity may not retaliate.

Comment: The proposed regulations provide helpful clarification regarding the protections from retaliation, which the County strongly supports and takes very seriously in its operations already. However, the definition of "protected activity" is somewhat confusing since some of the activities delineated in the definition could be read to be unconnected to the nondiscrimination purposes of Government Code section 11135, *et seq.* Specifically, subdivision (7) includes "seeking information, formally under a Public Records Act request, or informally, regarding programs or activities of a state, any state agency, or a recipient" as a protected activity without requiring that the records or information request be tied to information about discrimination or a protected class. Therefore, the regulation could be read as creating a cause of action for retaliation when a covered entity declines to respond to a person's request for information about a program or activity or refuses to comply with a Public Records Act request. The County recommends adding language similar to that in subdivision (5) of the same definition to subdivision (7) that would clarify that the protected activity in (7) is seeking records or information "regarding discrimination or denial of full and equal access on a basis enumerated in Article 9.5, this Division or other implementing regulations."

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14071(d)(8)

Comment: 2 CCR 14071(d)(8) seeks to make it a "protected activity" to seek reasonable accommodation or modification or request an interactive process meeting. Again, the regulations go broader than what they are tasked to implement. Reasonable accommodation applies to employees of the entity and can be a factor in disability discrimination, but it does not need to be included or described within this regulatory scheme.

Council Response: The Council disagrees with this comment and declines to strike proposed section 14071(d)(8) because that section is necessary for clarity. It provides a non-exhaustive list of actions that may constitute a protected activity on which basis a covered entity may not retaliate.

§ 14072. Coercion, Intimidation, Threats, or Interference with Rights Prohibited

Comment: [A coalition of commenters writes:] For consistency and to avoid potential confusion, we recommend the following additions:

It shall be unlawful to coerce, intimidate, threaten, or discriminate against or deny full and equal access to any person for the purpose of interfering with any right or privilege, ***advantage, opportunity, remedy or duty*** secured by the Act.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14072, like 2 CCR 14070, seeks to again talk about coercion, intimidation etc. that are not necessary when those are factual determinations for whether a protected class member has experienced discrimination. This section should be deleted and those bulleted concepts, if necessary, could be included above or eliminated.

Council Response: The Council disagrees with this comment. Section 14072 is necessary to add clarity to the regulations.

Article 6. Specific Practices Prohibited – Age

Comment: [A coalition of commenters writes:] We appreciate and are thankful for the CRC's efforts to improve the regulations implementing section 11135 with respect to age. The Council's inclusion of intersectional discrimination allows for individuals to bring their full identity in situations that will be uncomfortable. Section 11135 is an opportunity for individuals who experience discrimination on the basis of multiple identities to have such discrimination

recognized. We are grateful for the Council's intentionality in expanding the scope of prohibited discriminatory practices and unlawful denial of full and equal access. Allowing our state to include a prohibition on facial discrimination, intentional discrimination, disparate impact, and denial of full and equal access accounts for the many ways that modern discrimination works, and we fully support. As Californians age, adults 60 years of age and older account for 20% of the population. The CRC has an opportunity to update these regulations to enhance anti-discrimination practices in state funded programs and activities and improve the delivery of services to all Californians as consistent with Governor Newsom's Executive Order N-16-22 on advancing equity.

As Californians age, the CRC has a valuable opportunity to make strategic changes that recognize and effectively stamp out age-based discrimination by expanding the definitions, clarifying the exceptions to avoid unattended consequences, and change reporting requirements to allow for greater public transparency. The updated definitions of section 14080 related to age are welcome because they appropriately recognize the ways in which age discrimination works. Discrimination can occur based on actual age (i.e., how old a person is) or someone's perceived age. In order to change systems to reduce age-based discrimination, state funded programs and activities must center on anti-discrimination practices. These definitions ultimately allow for greater recognition of the ways in which age-based discrimination works.

Council Response: The Council appreciates this comment.

§ 14080. Definitions

Comment: 2 CCR 14080 cross-refers to 2 CCR 14020 for definition of age and therefore is redundant in this regulatory scheme and should be stricken in its entirety.

Council Response: The Council declines to adopt the change suggested by the commenter, as the cross-reference is necessary for clarity.

§ 14081. Practices Prohibited on the Basis of Age

Comment: 2 CCR 14081 is unnecessary and redundant. Under 2 CCR 14000, the "purpose" section, "age" is already included as a protected class. Throughout the scheme it is reiterated that discrimination against protected classes is prohibited. 2 CCR 14081 reiterates these same concepts, so they have nothing to add to what is already included in the regulations. All of it should be struck. In the definitions section, under 2 CCR 14020(c), if anything about "age" discrimination needs to be clarified, it should be that, as included under GC 12926(b) age discrimination only applies to persons who have "reached a 40th birthday."

Council Response: The Council declines to adopt the changes suggested by the commenter, as section 14081 is necessary for clarity. Regarding subsection 14020(c), as noted above in response to a similar comment, the Council declines to make the suggested change, because the proposed regulations are sufficiently clear without it and implementing it is likely to cause undue delay in the rulemaking.

§ 14082. Statutory Exceptions to the Rules Against Age Discrimination

No comments received.

§ 14083. Definition of "Normal Operation" and "Statutory Objective"

No comments received.

§ 14084. Exceptions to the Rules Against Age Discrimination: Normal Operation or Statutory Objective of Any Program or Activity

Comment: [A coalition of commenters writes:] Understanding national guidelines and the leading innovations of regulations in California allows for a healthy state. While we support the proposed definitions in section 14080, we encourage the Council to further clarify the exceptions to age-based discrimination in section 14084. First, we appreciate and understand that section 14084 is in line with federal law such as the Age Discrimination Act of 19755 and other authorities. The proposed wording of section 14084 although well intentioned, potentially creates unintended consequences. Section 14084 would benefit from further clarification. For example, as recent as during the height of the Covid-19 pandemic "clinicians made decisions to withhold interventions based on the patient's age and assumed COVID-19 mortality risk. Even though age has direct correlation with risk of death from COVID-19, the initial assessment of that risk was far more grim than later data revealed, particularly in the 60- to 70-year-old age group—illustrating the need for quick and accurate data. Some of the very high early mortality rates among older patients during COVID-surge conditions may have been influenced by implicit or covert triage decisions, raising mortality rates among patients from whom resources were withheld." Moreover, Justice in Aging in partnership with a coalition of civil rights groups and legal scholars, released a report on Intersectional Medical Discrimination During COVID-19. In the context of crisis standards of care (i.e., care rationing guidance) during the pandemic, age-based "tiebreakers" were used to discriminate against older adults. Tiebreakers occurred when two or more patients had similar clinical prognoses, but limited resources were available for both patients. In that instance, age was proposed as a way to "break the tie," resulting in the older patient losing access to potentially lifesaving treatment, even if they would otherwise survive.

Although we believe that this type of age discrimination is in clear violation of section 11135 and other authorities, to avoid future catastrophic consequences, we believe the "Exceptions to the Rules Against Age Discrimination" should be clarified to provide greater protection to older adults during times of emergency and limited resources. This type of clarification, e.g., providing examples of improper age-based discrimination, could be done in the preamble or other commentary accompanying the final regulations or could be issued as agency or departmental guidance. Such actions would improve implementation of California's anti-discrimination regulations beyond its federal counterparts.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

§ 14085. Burden of Proof

No comments received.

§§ 14086, 14087, 14088

Comment: [A coalition of commenters writes:] [R]egulatory and procedural transparency brings clarity and allows for greater public participation and accountability. Proposed language in subsections 14086, 14087 and 14088 each allow for internal state agency review and include a reporting requirement. Although internal review is an important component to holding government actors accountable, it does not reach the level of oversight necessary to effectively mitigate age-based discrimination. We suggest that each entity be required to report and maintain public-facing reports available via the entity's website under sections 14086, 14087 and 14088. Furthermore, the subsections should be modified to include the time by which the reports must be posted online. Also, upon request a public report shall be available for print by the agency within 15 calendar days. Allowing for public transparency of review of the reports, which offers the public and advocates a role in implementing section 11135, will allow for more accountability, oversight, and confidence amongst Californians.

Council Response: The Council disagrees with the comment and declines to adopt the additional reporting requirements suggested by the commenter.

Article 7. Specific Practices Prohibited – Ancestry, Ethnic Group Identification, and National Origin

Comment: [A coalition of commenters writes:] The regulations in this section must provide more robust protection than existing mandates for communities who use languages other than spoken English. While section 14000(d) asserts that "federal laws provide the floor of protections relating to discrimination…and [these] implementing regulations afford additional...robust protection…," the regulations at Article 7 do not include a number of protections for individuals with limited English proficiency (LEP) and those who are Deaf and hard of hearing that already exist in current federal anti-discrimination laws, as well as in other state laws.

The Initial Statement of Reasons acknowledges and recognizes that "'in light of the parallel language of [section 11135] and [Title VI], federal law provides important guidance in analyzing [section 11135] claims.' (*Darensburg v. Metropolitan Transportation Com.*, (9th Cir. 2011) 636 F.3d 511, 519)." These acknowledgements and efforts to make language rights standards consistent are critically important as our community members do not distinguish between or recognize the various possible funding streams that support the critical services and benefits they require, sometimes for basic survival and fundamental needs. Even advocates, public

officials, and policy makers have a hard time understanding and navigating whether programs and services are provided by or through federal, state, county, or city entities. Anti-discrimination laws as a whole should be leveraged to ensure that all critical services and benefits, regardless of their funding streams, are accessible to linguistically marginalized communities and create different paths to ensure that access is meaningful and enforcement attainable. Section 11135 and its regulations must rise to the level of creating these purported robust protections if California is truly to be a beacon of hope and exhibit leadership in the area of anti-discrimination for its diverse communities. At the very least, the state must not establish rules that fall below existing standards and protections, which is what the current proposed regulation does.

Additionally, it is critical to understand the difference between the word "interpreting" and "translation," since these terms are frequently conflated inaccurately and are not interchangeable. Interpreting refers to the spoken/oral or sign language transmission of language. Translation refers to converting written text from one language into another. In existing mandates, there are different legal requirements for when it is necessary to provide spoken or signed interpreting services (which should always be provided without delay unless it is an unusually rare language) and when it is necessary to provide proactive written translation services (which could have varying requirements based on the mandate, regulations, guidance, or other policies, sometimes predicated on numerical population considerations, the importance of the services or written document, and other relevant factors).

To ensure that the proposed 11135 regulations match or exceed existing federal and other state mandates and reflect well-established best practices, the following protections and safeguards must be clarified to raise the standards of the proposed rule and are explained in greater detail throughout this section of this comment letter:

1. The regulations should require spoken and sign language services without delay by qualified interpreters or multilingual staff;

2. The regulations should provide additional details and directives within existing definitions to meet or exceed current federal and state non-discrimination mandates.

3. The regulations should include and address the exploration and incorporation of alternatives to challenging technology platforms;

4. The regulations should require written translation of vital information, which includes documents and notice of free interpreter services and availability of any translated materials;

5. The regulations should not condition civil rights protections on numbers or population percentages; and

6. The regulations should specify safeguards and guidelines for Video Remote Interpreting (VRI) (which is discussed above).

We also request that the Final Statement of Reasons reflect the comments herein and align with current legal mandates and standards. These comments also provide background and context that could be useful for guidance and best practices documents that the CRD can publicize and provide to covered entities as they implement the regulations.

Council Response: The Council responds to each of these suggestions in the appropriate sections below.

§ 14100. Definitions

Comment: [A coalition of commenters writes:] Due to the limited number of definitions in this section, we are recommending additional detailed requirements within the current definitions. As an alternative, additional definitions can be added as separate new terms, such as "reasonable steps" or "vital information." Moreover, the regulations should clearly require spoken and sign language services for all languages without delay by qualified interpreters or multilingual staff. This section explains how the regulations can ensure that spoken and sign language services are effective and timely provided, by amending the language in several of the definition sections: Alternative communication services, Multilingual employee, Limited English proficient person, Primary language, and Translator. The regulations must always make clear that qualified, trained, and professional interpreters must always be used and offered for all languages, free of charge, by the covered entity. It is imperative that any limitations on proactive translation of written materials not be confused with timely provision in real-time of spoken or sign language interpreting, something that is already a pervasive problem across California and the nation.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14100 again has more definitions applicable to GC 11135 et seq. which should be moved above to have all definitions which apply to this regulatory scheme in the same place – under 14020.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14100(a). "Ancestry," "ethnic group identification," and "national origin":

Comment: 2 CCR 14100(a) should be deleted since it is an internal cross-reference to 14020. The rest of these definitional sections should be compared with what is already in the extensive definitional section to see if it is necessary or clarifies some ambiguity.

Council Response: The Council declines to strike the language suggested by the commenter because the cross-references in proposed subsection 14100(a) and subsequent definitions in this subsection are necessary for clarity.

Subsection 14100(b). "Alternative communication services"

Comment: [A coalition of commenters writes:] [W]ith respect to alternative communication services, we believe that data collection, monitoring, and enforcement are integral to the successful enforcement of Article 9.5. We urge the Council to adopt regulations requiring robust data collection, and providing for comprehensive monitoring and enforcement, for all of Article 9.5.

We note in particular that California lacks any regulatory requirement for state entities or entities receiving state support to collect information on demographic disability status. Federal census and surveillance entities have tested and developed six functional disability questions that are readily available for use and other states such as Oregon and Washington have also done so in the health care arena. We strongly urge California to require the collection of voluntarily provided disability information so that civil rights can be enforced and monitored for this population.

Council Response: The Council declines to make changes in response to this comment because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] To ensure meaningful provision of sign and spoken language services in all circumstances, the regulations need more detail to break down the necessary steps for successful communication. Specifically, the regulations should add more explicit directives around proactive notice and outreach about language services, providing free language services without delay, ensuring linguistic proficiency in multilingual staff, refusing ad hoc interpreters and translators, and acknowledging the importance of identifying correct linguistic variants. Please see below for more explanation on each recommended directive that detail necessary steps and considerations in providing interpreting services:

The regulations should require funding recipients to proactively inform individuals about their rights to access services in their primary language.

[I]t is necessary to amend the definition of "Alternative Communication Services" to require proactive outreach. This is an important first step to expanding access to services. Due to pervasive unfamiliarity around language rights and historical underserving of communities with LEP, government agencies and covered entities should proactively outreach to diverse language communities with information about language services, such as the availability of free qualified interpreters (and translated materials, which is discussed in more detail below). All public facing staff and portals should, affirmatively and often, verify the primary language and linguistic

variant of each individual and provide interpreters whenever the staff member does not share the same language.

Although not a substitute for translating vital information into the top 15 languages meeting certain population thresholds as explained below in the definition of "Translator,", one cost-effective method of outreach is for funding recipients to create notices explaining the availability of free language assistance services (sometimes called "Babel notices" or "taglines" in other legal authority). These notices should accompany all vital information in written form and contain in-language notice in languages beyond any population thresholds, as those language populations may not have initial access to in-language materials and need to contact state agencies or covered entities to request written translations and other spoken or sign language services. Notices should not be limited to written communication but should also include audio and video messaging through various media and platforms, especially for languages without a commonly used written form.

Deliberate and continuous engagement with linguistically marginalized communities to assist in expanding language access is critical. There are many examples of how this can be done, some of which have already been codified in state law. Some examples include: targeted outreach to solicit advice on policies and practices affecting individuals who are eligible for the entity's services and benefits; marketing and promoting programs and services in languages with a significant number of users in the state or service area; and establishing grant programs to provide funding for community-based organizations to provide outreach and education to linguistically marginalized communities. Please see Unemployment Insurance Code 316(i)(1) for an example of how some of these activities have been enacted in state law and for consideration on what to include when amending the definitions of Reasonable Steps and Alternative Communication Services.

The regulations should require early, accurate and ongoing identification of language needs.

Once the public is aware of language services, funding recipients need to capture and record language needs as the next step through collection of disaggregated data collection on race, ethnicity and language, among other demographic factors. This subsection explains why early identification and recording of language needs (including linguistic variant) is necessary to ensure meaningful access. Covered entities should ask each individual they serve about their communication needs during their first interaction. Requested data for each individual should include:

- Primary spoken or sign language(s)
- Primary written language(s), if any, or if the person has limited literacy
- Secondary language, if any
- Country, region, or community of origin to help identify interpreters with a compatible linguistic variant (see below)

When multilingual staff who are proficient in the individual's primary languages are not available for direct communication, qualified interpreting should be provided as described below, even if the individual does not proactively request an interpreter. Information about the individual's primary language(s) should be documented in the client's case file, enabling the covered entity to automatically provide appropriate language services for all future interactions.

Further, assessing the need for language services should occur throughout the life of a case or services provided to each individual. This is critical, because individuals at times do not accurately note their language needs for various reasons. For instance, an applicant may attempt to fill out an application in English, despite their limited proficiency, creating the possibility of miscommunication. An applicant could also have some level of proficiency in English, which might be sufficient to apply or answer some preliminary questions, but not adequate to continue through the process and provide more complex information. Mechanisms must be developed to capture this data to inform future needs for planning, staffing, budgeting, seeking new funding and resources, and to maximize the effective and efficient provision of services

The regulations should require funding recipients to provide spoken and sign language services without delay and without any cost to the individual with LEP.

This section explains why it is necessary to clarify the circumstances when free sign or spoken language interpreting is required and emphasizes the timeliness of services. As a general principle, all spoken and sign language services must be provided and be free of charge and without delay for each individual with LEP regardless of the language population's size, cost to the entity, significance of the communication, or proportion of the number of users of the language to the general population. Because of pervasive misuse of the terms "interpreter" and "translator," any threshold limitations on proactive translation requirements (meaning, written language) are commonly conflated with interpreting requirements (meaning, spoken or sign language). As a result, there is a widespread misunderstanding among funding recipients that spoken or sign language interpreters are only required for larger language groups. Existing language access mandates are clear on this: spoken and sign language interpreting by a qualified interpreter is always required, no matter how small the population of users of the language in the service area. The regulations should be equally clear on this.

These concepts have already been codified at Unemployment Insurance Code section 316(d), stating that all spoken and sign language services "shall be provided in real time by qualified interpreters or qualified bilingual staff…. If the department staff cannot obtain interpretation in the individual's language and linguistic variant in real time after good faith efforts to acquire language services, the department shall provide the individual with a return telephone or relay call in the individual's language within a reasonable timeframe." The same statute at section (c) states that each application "shall contain a section asking the individual to identify their primary written and spoken or sign languages to be kept in the individual's claims record."

Welfare and Institutions Code section 14029.91 also states, “Oral interpretation services shall be provided in any language on a 24-hour basis at key points of contact.” It is necessary to emphasize “in real time” because advocates report that individuals with LEP frequently wait for disproportionately long times to be connected with an interpreter (sometimes even months longer than English speakers), if they are ever connected at all.

The U.S. Department of Health and Human Services also references this in its most recent proposed rule: “Language assistance services requirements. Language assistance services required under paragraph (a) of this section must be provided free of charge, be accurate and timely, and protect the privacy and the independent decision-making ability of the limited English proficient individual.” Similarly, the U.S. Department of Labor states, “(d) Any language assistance services, whether oral interpretation or written translation, must be accurate, provided in a timely manner and free of charge. Language assistance will be considered timely when it is provided at a place and time that ensures equal access and avoids the delay or denial of any aid, benefit, service, or training at issue.”

In the event there is an undue delay in the provision of meaningful language services, the individual seeking services or benefits must be provided with an extension of time or deadlines necessary to receive the language service and proceed with meaningful participation in the program or activity. This type of good cause extension or relief can be found in state law at Unemployment Insurance Code section 316(k): “The provision of unemployment insurance language services shall not cause an undue delay in receipt of services or benefits. If the department’s provision of language services unduly delays an individual’s receipt of services or benefits, the individual's time to meet the department's deadlines shall be extended for the period of time necessary to receive the language services.”

The regulations should make it clear that untrained, ad hoc interpreters or translators are prohibited.

As noted above, the definition of “qualified interpreter” should make it clear that entities must not rely on family or friends of individuals with LEP, especially children, or other informal interpreters. This should further be reinforced through the definition of “Alternative communication services.” A common practice among government funded agencies and programs includes using a bilingual layperson who is accompanying someone with LEP who is trying to access information or services, which often ends up being a minor accompanying a parent or caregiver. The regulations should make it clear that this common and dangerous practice will not constitute compliance. Use of untrained interpreters presents ethical and safety concerns for individuals who do not use English as their primary language. Failure to provide appropriate language services has also fueled unregulated local networks of untrained “interpreters” who prey on vulnerable immigrants in desperate need of assistance. For their own commercial gain, these untrained interpreters often charge high fees despite their lack of qualifications, some even demanding a portion of monetary benefits obtained as a condition of assistance. Even those who are well-intentioned frequently cross the line into giving

inappropriate advice and engaging in the unauthorized practice of law and lack the specialized training to accurately interpret all communication.

Ad hoc interpreters are self-reported bilingual people who lack formal training, including untrained staff and family members and friends of individuals with LEP. Research shows that ad hoc interpreters frequently misinterpret or omit questions, commit errors with profound consequences, and ignore potentially embarrassing information, especially in the case of child interpreters. Untrained interpreters often do not have the appropriate vocabulary or literacy to understand fully and communicate accurately. The use of informal interpreters also carries the risk of bias in the interpreting process, inadvertently through word choice or emphasis, or through intentional omission of facts or violations of privacy and confidentiality. It may also diminish the non-dominant language speaker's willingness to be candid. Individuals with LEP may self-censor the information they share to protect against exposing their friends or family members to difficult situations. These problems are exacerbated when minors are used and the relationship between parent and child may be reversed and cause familial ruptures. Language Barriers to Justice in California, A Report of the California Commission on Access to Justice, released in September 2005, states that the "use of unqualified persons as interpreters . . . may result in genuine injustice where – through no fault of the court, the litigants, or the translator – critical information is distorted or not imparted at all . . . . Without a qualified interpreter, 'the English speaking members of the court and the non-English speaking litigants or witnesses virtually do not attend the same trial.'" Court administrators and judges in California have stated that the practice of relying on family or friends was a source of miscommunication, misunderstanding, and confusion, "jeopardizing an understanding by the parties of the reasons for and terms of judicial decisions."

Incomplete or inaccurate information could result in disastrous consequences and outcomes, implicating legal and ethical issues for entities. Allowing individuals with LEP to proceed with unqualified interpreters or no interpreters at all significantly hinders their ability to access critical benefits and services and may inadvertently prevent entities from receiving truthful and accurate information. This places these individuals at risk of being deprived critical benefits, relegating them into a second-class tier of individuals whose equal access to the entities' programs and activities is effectively denied.

Other federal guidance and regulations have also noted the importance of not utilizing family and friends as interpreters. For example, the Workforce Innovation and Opportunity Act regulations state that with some specified exceptions, recipients "shall not rely on an LEP individual's minor child or adult family or friend(s) to interpret or facilitate communication." When implementing the Americans with Disabilities Act Title II regulations, the U.S. Department of Justice explained that even if a family member or friend was able to interpret or was a certified interpreter, they "may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret "effectively, accurately, and impartially." The U.S.

Departments of Justice and Education stated in a joint letter that: “Some examples of when the Departments have found compliance issues regarding communication with LEP parents include when school districts: (1) rely on students, siblings, friends, or untrained school staff to translate or interpret for parents; (2) fail to provide translation or an interpreter at IEP meetings, parent-teacher conferences, enrollment or career fairs, or disciplinary proceedings; (3) fail to provide information notifying LEP parents about a school’s programs, services, and activities in a language the parents can understand; or (4) fail to identify LEP parents." Government agencies and covered entities should implement safeguards, define the limited circumstances, if any, where untrained accompanying adults may interpret, and restrict situations where a non-qualified accompanying adult may not be competent to serve as an interpreter in order to provide full and equal access to all individuals.

Failing to restrict situations where an individual may not be competent to serve as an interpreter in these regulations undermines the goal of the statute to provide “full and equal access to” individuals with LEP. Therefore, the regulations should make clear that the use of family members, friends, and other unqualified interpreters should be prohibited except for limited circumstances, including but not limited to rescheduling appointments, identifying the correct language or linguistic variant, procedural updates, or emergency situations, such as threats to health or safety. The use of minors, under age 18, should be absolutely prohibited, absent emergency situations.

The regulations should include and address the exploration and incorporation of alternatives to technologically challenging platforms.

[R]elying on websites alone is not sufficient language access. Because translated information and tech-based portals will be inaccessible to some users with LEP, it is important to have multilingual support and technical assistance easily available over the phone or in-person to explain documents and portals in-language through sight translations and allowing individuals to ask questions to follow-up through a qualified interpreter or multilingual staff. Having this type of language support is critical to addressing linguistic barriers as well as technology challenges, especially with so many operations and functions moving into remote spaces.

Government agencies and funded entities should also have clear directives that staff explain documents orally for individuals with LEP. Even with plain language translations, many may not be able to read written documents. Government agencies and covered entities should establish a practice of working with qualified interpreters to read or sight translate documents in the primary languages of individuals with LEP, providing plain language explanations of documents, and inviting questions from individuals to promote full understanding. This concept has been codified at Unemployment Insurance Code section 316(d)(2), stating, “Upon the individual’s request, a qualified interpreter shall read the department’s documents and notices aloud in the individual’s primary language within a reasonable timeframe.” This should be applied broadly across the state and incorporated into the proposed rule.

Examples of hands-on approaches to bridging language and technology barriers can be found in efforts across the country to create remote hearing studios, particularly for domestic violence survivors to obtain restraining or protective orders at the height of the pandemic. One example in Los Angeles was created in partnership with local government and nonprofit organizations. In this example, the survivor has a private space where children are welcome and safe, especially if they do not have alternative childcare options, with a separate space for them during the hearing. The survivor does not have to face the abusive party in-person. An advocate is available to provide basic in-language technical support and to serve as a support person if needed. There are printers, transportation vouchers, and resources for other domestic violence supportive services available. We are hopeful that these safe remote studios will be expanded and maintained even as the pandemic protections sunset. This has been extremely helpful for the survivors assisted, but it is just a drop in the bucket. It is a good proof of concept but a more sweeping effort from government systems is necessary to make a real difference.

Recordings and videos through websites, ethnic media, and social media platforms are other avenues to disseminate vital information in addition to or in lieu of written translations to inform individuals of benefits, services, and procedures. One promising example comes from Ventura County in California, where the County, in partnership with community-based organizations (CBOs), created audio alert systems in Mixteco and Zapoteco to protect farmworkers from wildfires.

While input and engagement from nonprofit and community organizations are critical in such efforts, they must be adequately compensated, and government agencies must continue to be accountable for providing meaningful language access. Historically, and especially during the pandemic, nonprofits and community groups have taken the burden of conducting outreach and creating multilingual materials for linguistically marginalized communities. Already overstretched nonprofits cannot stand-in completely for the failings of government agencies and covered entities.

The regulations should ensure that alternative communication services be appropriately utilized as part of reasonable steps to ensure meaningful access to programs and activities by persons with LEP, as laid out in section 14101(d).

Alternative communication services must be utilized as part of reasonable steps to ensure meaningful access to programs and activities by persons with LEP, as laid out in section 14101(d). The types of reasonable steps necessary to ensure meaningful access include but are not limited to the following practices that are necessary to ensure effective, timely communication:

Having a comprehensive language access plan, along with the resources, policies, and procedures necessary to effectively implement the plan;

Employing a multilingual access coordinator and/or multilingual access unit to coordinate the entity's multilingual access services, provide technical assistance to entity's staff, and monitor the provision of multilingual access services;

- Staff training on various topics related to language access;
- Conducting comprehensive assessments around language and cultural needs;
- Engaging in regular, disaggregated linguistic data collection and analysis;
- Proactive notice and outreach to multilingual communities about the availability of free language services;
- Establishing and enhancing robust methods and procedures for monitoring, oversight, and enforcement;
- Updating language access plans, policies, and procedures on a regular basis.

These concepts are laid out in more detail below.

Comprehensive Language Access Plan with Policies and Procedures to Effectively Implement the Plan

All government agencies and covered entities should be required to develop a comprehensive language access plan with the budget, policies, and procedures required to implement it effectively. This must be more than just the "nuts-and-bolts" of how to schedule an interpreter, how to identify whether an individual has LEP, etc., but must include requirements that government agencies and covered entities strategically plan for what types of language services it may need. For example, without gathering data about the language populations in its service area (see Data Collection and Analysis below), the government agency or covered entity may not be able to develop effective policies and procedures or provide effective language services when encountering an individual with LEP.

Many federal agencies have long recognized the benefit of creating a language access plan. For example, HHS' 2003 LEP Guidance included elements of an effective language access plan. And as noted in the 2016 Sec. 1557 Notice of Proposed Rulemaking's preamble, many organizations already develop such plans based on the model described in HHS LEP Guidance. Doing so ensures that government agencies and covered entities understand the populations they serve, the nature and importance of benefits and services, as well as the communications provided, and resources necessary to provide meaningful access. Depending on an entity's size and scope, advance planning need not be exhaustive but is used to balance meaningful access with the obligations of the entity. Planning for language services also includes conducting a comprehensive assessment of how individuals with LEP interact with the covered entity, identifying and assessing linguistically diverse communities in the services area, exploring effective methods of language services delivery, providing trainings to staff on the policies and procedures of the plan, understanding how the public should be informed of the availability of free language services, and how the language access policy directives, plans, and procedures will be monitored, evaluated, and updated. The size and scope of the plan may vary depending

on whether the covered entity is a small provider or a larger entity. The Centers for Medicare & Medicaid Services have also developed a reference guide for developing language access plans. Further, government agencies can better monitor compliance of entities that have a language access plan.

Government agencies and covered entities should also be required to put in place the necessary internal policies, systems, forms, and budget to properly implement and manage their language access plans. This could include investing in case management and other systems that will properly track and manage language needs, which are compatible across multiple geographical areas or departments. As the automation of notices and electronic correspondence becomes more prevalent, such systems must have integrated multilingual capacities, which requires long-term planning and budgeting. It could also include securing funding for new positions, multilingual staff, language access coordinators and staff, language provider contracts and services, the creation of joint quality control measures, and coordinated translation of documents.

Further, policies and procedures must include ongoing evaluation and updating. As HHS notes in the 2003 OCR LEP Guidance, "effective plans set clear goals and establish management accountability." Both goals and accountability are essential to ensuring effective implementation of language rights mandates and practices. There should be enhanced processes put in place for extensive monitoring and reporting to improve systems for effective service delivery. Such oversight will not only ensure that staff are complying with the requirements to provide meaningful language access, but also that staff are receiving all the support they need to provide language services, particularly during times of crisis. Without proper oversight, vulnerable communities could be impacted in a disproportionate and disparate manner. As issues are identified and enhancements are made, language access plans should be updated regularly.

Multilingual Access Coordinator and Unit/Staffing

The regulations should also require government agencies and covered entities to appoint a full-time multilingual access coordinator and create a language access unit. Even the best language access plan will not be effective without appropriate staffing. The language access coordinator and unit staff should provide ongoing internal training, technical assistance, and monitoring related to language inclusion. Adding language access responsibilities to a staff member with an existing, unrelated workload all but ensures the failure of the plan. State law already recognizes the importance of proper staffing in providing meaningful language access. Under state law, the EDD is required to "[e]mploy a multilingual access coordinator and multilingual access unit to coordinate the department's multilingual access services, provide technical assistance to department staff, and monitor the provision of multilingual access services." Similar requirements must be incorporated into the current proposed rule.

Ongoing Staff Training and Technical Assistance

All relevant staff should receive training on the government agency or funded entity's civil rights policies, obligations, and procedures. Not only must individuals in "public contact" positions understand civil rights policies, obligations, and procedures but also contract employees such as security personnel, identity verification companies, and supervisors who are responsible for overseeing, monitoring, and enforcing language access mandates and policies. Government agencies and funded entities must develop training that encourages effective approaches to meeting the needs of diverse community members. For example, the provision should require training on how to best work with interpreters, particularly the type of interpreters the covered entity uses (e.g., in-person, telephonic, video). As noted by the American Medical Association's Commission to End Health Care Disparities:

All employees should receive training so that they understand when an interpreter should be used, how interpreter services can be accessed, what the language services options are (e.g., in-person, telephone, video, translation services) and documentation requirements for quality, utilization, billing and internal reporting purposes.

Below are additional topic areas that the training and education efforts should include, although it is not an exhaustive list:

- Background on language access issues, including review of legal requirements, mandates, and policies;
- Review of the covered entity's Language Access Plan;
- Processes for identifying non-English language users of programs and activities;
- Processes for the requesting and obtaining of interpreters;
- Review of the role of interpreters;
- How to troubleshoot if there are issues with the interpreter or interpreting;
- Review of interpreter code of ethics;
- Legal services and nonprofit organizations that staff can refer to for more information on how to serve individuals with LEP;
- Cultural humility and awareness trainings on working with specific populations, such as domestic violence and sexual assault survivors, Deaf communities, Indigenous migrants, individuals with disabilities, children and youth (where appropriate);
- Techniques for working effectively with interpreters for all staff;
- For multilingual employees seeking to become classified as "qualified interpreters," robust training about the skills, protocols, and ethical codes of conduct for working effectively as a qualified interpreter and when it is appropriate to be in this role.

Furthermore, training must prepare staff for the expected culture change that will result as language access becomes routine. The burden of acquiring language services should not fall on the individuals with LEP. Instead, staff should be proactive about identifying the needs of individuals with LEP and providing the necessary services in a timely and equitable manner. To ensure this outcome, training should encourage staff to proactively and respectfully ask each

individual about their communication needs, keeping in mind that many people with LEP may feel intimidated by the process or be unaware of options to request language services. Any training should emphasize customer service and the importance of having welcoming and equitable multilingual spaces.

Needs Assessments of Language Populations Require the Collection, Analysis and Reporting of Disaggregated Demographic Data

The collection and analysis of language data is important both for developing effective policies and procedures to provide language access and for civil rights enforcement. Under state law, the EDD is required to "engage in regular data collection, monitoring, and oversight of multilingual access unemployment insurance services" and "annually report this data to the legislative budget committees." Similar requirements must be incorporated into the current proposed rule. Other disaggregated data information is also important to assess and identify discrimination issues, including race, ethnicity, age, sexual orientation, gender identity and gender expression, and other protected classes. Aggregated data fails to account for the social, cultural and economic diversity of the larger racial and ethnic umbrella categories of white, Latinx, African American, Asians, Native Hawaiian and Pacific Islanders, and American Indian/Alaskan Natives. The differences between the smaller racial and ethnic groups suggest that different groups have different challenges when interfacing with government agencies and services. The lack of disaggregated data often masks the racial and health disparities and cultural differences of sub-populations within the larger racial and ethnic categories and are often invisible if disaggregated race and ethnic data is not collected and reported.

There should be requirements that government agencies and covered entities conduct a comprehensive needs assessment of the communities they serve in order to meaningfully understand and provide language services, as well as collect demographic data on program participants to monitor gaps and disparities. State agencies and covered entities should conduct a thorough examination of disaggregated demographic data to analyze language needs for various departments and sectors through local, state and federal data sources. Regrettably, there is no easily accessible, current, comprehensive list of all languages used in specific geographic areas, along with an accurate approximation of the numbers of people who use each language. The American Communities Survey (ACS) is seen as one of the most comprehensive and regularly updated survey instruments in the country that collects demographic, economic, and social data from a sample of U.S. residents. However, any data is only as strong as the survey instrument and methods used to collect them. Because demographic surveys like the ACS consistently undercount marginalized communities, relying on any lone source is likely to leave out the most vulnerable and isolated individuals.

For example, in Los Angeles County, with over 220 languages spoken, ACS data lists only 42 "languages." This list includes some groupings such as "Thai, Lao, or other Tai-Kadai languages," which includes nearly 10,000 individuals with LEP. This is a significant number, and while Thai and Lao have some similarities, they are different languages. This type of aggregation presents

challenges in understanding how many individuals use each language and could diminish needed services in these communities. Other significant groupings include: “Other languages of Asia” at over 8,000 with LEP, and “Amharic, Somali, or other Afro-Asiatic languages” at almost 4,000 with LEP. Furthermore, the ACS completely excludes people who use sign languages and Indigenous languages from Latin America from its linguistic data. Meanwhile, the California Department of Education currently captures 100 language groups in its record of over 2.3 million English learners (EL) and those who are now fluent but previously EL and those from homes where English is not the primary language. In addition to having more languages, the Department of Education data, albeit a subsection of the state’s population, lists Thai and Lao as separate languages and includes languages such as Mixteco and Pashto, which are significant in number and do not appear distinctly in the publicly available ACS data. The differences in these data sources are an example demonstrating the need to examine various sources to determine an accurate representation of language usage.

As such, state agencies and covered entities should use a multi-pronged approach to understanding the language needs of those who may use their services. At a minimum, this should include data from the U.S. Census Bureau, ACS, state agencies such as the Department of Education or public data sources, such as the California Health Interview Survey conducted by the University of California, Los Angeles, government agencies and covered entities’ existing internal language data, and feedback from community organizations. Language data must be regularly updated, and community feedback should be proactively invited and welcomed. In addition to the limitations in the ACS’s publicly available information, other data collection efforts have been disappointing with regards to capturing specific language used and related needs. For example, the Legal Services Corporation’s 2022 Justice Gap Report found that “[l]ow-income Americans did not receive any or enough legal help for 92% of their civil legal problems.” This was an increase from 86% in the 2017 report. The report was based on several data sources and analyses, including a survey of 5,000 individuals in English and Spanish only; a four-week period where grantees reported various types of data but did not include language data; review of grantee activity reports (which includes some language data but was not used in report); and review of existing data from various U.S. Census sources. This is an extremely impactful report with potential for a wide range of policy implications, yet it failed to provide any analysis based on language usage. The linguistically marginalized communities we serve are some of the most isolated and vulnerable. These communities face tremendous linguistic and cultural barriers in seeking legal services, which should have been highlighted in the report, along with recommendations to ameliorate such barriers.

Government agencies and covered entities would benefit greatly from having detailed disaggregated language datasets overlaid with poverty levels tailored to service areas. Other relevant overlays include education, literacy, and tech access. Many government agencies and covered entities claim that they do “offer” language access, but that few individuals actually seek these services. This is unacceptable and illustrates why data is so important. Most community members with LEP do not know they can ask for language services or how to reach

out for services and benefits. There are often layers of systemic barriers that prevent effective communication or even requests to be made. For example, there is a trend among government agencies to create complicated phone tree greetings in English where a caller has to navigate through several prompts, a long list of languages to be selected and many minutes of automated instructions in English before getting to the point of reaching a live person. The explanation for these automations is to streamline, assess, and triage needs for the sake of efficiency. While this may create such efficiencies for English speakers who can navigate such systems, those with LEP will likely never get to the point to request an interpreter. The lack of language access on a systemic level leads people to be so completely shut out that they are almost not even seen or considered when new outreach, programs, or technologies are created. The cause of their exclusion is also the cause of the silence. From our experiences as CBOs serving persons with LEP, we know that when community members are aware of in-language services, they come to our offices for assistance. They are often unaware of similar language services at government agencies and other covered entities and seek our help to navigate their services. Therefore, having more detailed datasets will inform a wide range of operations related to service delivery, staffing, and outreach.

In conjunction with obtaining detailed data, covered entities should be required to capture and effectively utilize primary spoken/sign and written languages. The Civil Rights Department and other state agencies should adopt a disaggregated demographic data collection requirement, including language data, and establish disaggregated demographic data collection and reporting policies, practices and protocols as functions of civil rights monitoring. This effort also necessitates that agencies and entities clearly provide notice that such services are offered free of charge. An individual's language needs must also be well documented so that all services, assistance, and benefits can be provided to and utilized by the individual seamlessly without delays in requesting language services. When collecting the language information, if another person is completing the form or application, such as an eligibility worker, they should not "guess" about the person's primary language but rather proactively ask about the person's primary spoken/sign and written languages as detailed above. Moreover, although self-identification is the preferred option to collect the language information, it should not be relied upon as the exclusive mechanism because individuals may not seek language services due to fear of discrimination or bias, as well as other factors. This means that representatives of covered entities should inquire about language needs and offer language services multiple times as they build trust and rapport with participants in programs and activities. Having these protocols in place will help ensure that all individuals are served equitably.

All covered entities should be required to collect data, broken down based on the primary language of individuals with LEP, along with other demographic data on protected classes, on whether challenges were encountered, what complaints were filed, and how challenges and complaints were resolved. This data should be made publicly available. There should be enhanced processes put in place for extensive, regular monitoring and reporting to improve systems for effective service delivery. Such data collection and oversight will not only ensure

that staff are complying with the requirements to provide meaningful language access, but also that staff are receiving all the support they need to provide language services, particularly during times of crisis. Related to this, language access plans and budgets should include sufficient line items and allocations dedicated to language services based on a thorough and informed analysis of external and internal data collected. Without proper oversight, vulnerable communities could be impacted in a disproportionate and disparate manner.

Monitoring, Oversight, and Enforcement Mechanisms

Strong enforcement mechanisms are critical in supporting the recognition that the law protects people who experience language discrimination. There should be clear and accessible procedures for filing, investigating, and remediating discrimination complaints. Having clear procedures and compliance actions are important to accessing critical services and benefits. We encourage the Civil Rights Department to enhance efforts in providing technical assistance, support, and engagement, in addition to strong and effective enforcement around language rights. Detailed regulations, other types of guidance and directives, letters, and memos on language access topics and engagement efforts with government agencies, covered entities, and advocates can strengthen compliance.

If a complaint is filed, we encourage enforcement efforts to ensure that there is sufficient capacity to shorten the time between filing a complaint and resolution. Lengthy timelines for resolution have been a deterrent for advocates and covered entities. Advocates are reluctant to file knowing the duration a complaint will take to complete. For government agencies and covered entities, there may be less of an urgency to comply when complaints often take 4 to 5+ years to resolve. We also would like to see active involvement of complainants and their counsel routinely in the investigation and settlement negotiations. This could also address concerns around the lengthy timelines for resolution. All state agencies should publish the results of compliance reviews, complaint investigations, and resolution agreements on their websites, and efforts should be made to enhance the accessibility of these to the public and to covered entities. This should include requirements that plans and policies be updated on a regular basis.

For the reasons explained above, we ask that the definitions of Alternative communication services be amended as suggested and noted below:

14100 (b) “Alternative communication services” means the method used for purposes of communicating effectively with a person with limited English proficiency (LEP). ~~who is unable to read or speak or write in the English language~~. “Alternative communication services” include, but are not limited to, the provision of the services of a multilingual employee or a qualified interpreter for the benefit of an ultimate beneficiary in real time or within a reasonable timeframe; the provision of vital information and other written materials in a language other than English by a qualified human translator; the proactive provision of written materials in a language other than English by a qualified human translator of vital information for significant

language populations; the provision of written materials in a format other than standard font written print, such as Braille, large font print, sign language visual formats and electronic formats; the provision of content through sight translation, qualified interpreter, or audio/visual recordings to those who have low literacy or use a language without a common written form; auxiliary aids and services; the provision of alternatives to digital information, applications and other portals for individuals with LEP who cannot navigate virtual spaces, which can include providing multilingual support for individuals with LEP to access benefits and services via phone and in-person, other types of technical support, and formal partnerships with community organizations; extension of deadlines for the period of time necessary to receive language services in the event that the entity's provision of language services unduly delays an individual's receipt of services or benefits; and community education, outreach, and notice to the person with LEP ~~limited English proficient person~~ of the availability of free alternative communication services, including interpreter and translation services and where to file complaints if appropriate services are not provided. Alternative communication services do not include the use of ad hoc interpreters or translators, including family and friends who are not trained as qualified interpreters or translators except for limited circumstances, including but not limited to rescheduling appointments, identifying the correct language or linguistic variant, procedural updates, or emergency situations, such as threats to health or safety. The use of minors, under age 18, is prohibited, absent emergency situations until a qualified interpreter is provided. Alternative communication services must be utilized as part of reasonable steps to ensure meaningful access to programs and activities by persons with LEP, as laid out in section 14101(d). "Reasonable steps" include but are not limited to the following practices that are necessary to ensure effective, timely communication: having a comprehensive language access plan, along with the resources, policies and procedures necessary to effectively implement the plan; employing a multilingual access coordinator and/or multilingual access unit to coordinate the entity's multilingual access services, provide technical assistance to entity's staff, and monitor the provision of multilingual access services; staff training on various topics related to language access; conducting comprehensive assessments around language and cultural needs; engaging in regular, disaggregated linguistic data collection and analysis; proactive notice and outreach to multilingual communities about the availability of free language services; establishing and enhancing robust methods and procedures for monitoring, oversight, and enforcement; and updating language access plans, policies, and procedures on a regular basis.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14100(c). "Multilingual employee"

Comment: [A coalition of commenters writes:] The regulations should require that all "Multilingual Employees" pass a linguistic proficiency assessment and have clear roles.

Multilingual employees are a tremendous asset, and covered entities must ensure that they are qualified and that their roles and duties are clear. Qualified multilingual employees, who are assessed for their language abilities, can provide direct in-language communication but should not be utilized as interpreters or translators unless they also meet the requirements of "qualified interpreter" and/or "qualified translator" as defined in the regulations. This distinction is important in ensuring meaningful language access to covered entities' services and programs. The U.S. Department of Health and Human Services (HHS) explained that "[a] qualified bilingual/multilingual nurse who is competent to communicate in Spanish directly with Spanish-speaking individuals may not be a qualified interpreter for an individual with limited English proficiency if serving as an interpreter would pose a conflict of interest with the nurse's treatment of the patient." Government agencies and covered entities should not require multilingual staff to interpret without assessment and training and should not overburden them with requirements to provide language services on top of regular duties. Some positions may be designated as "bilingual" and receive "bilingual pay," but staff who are not in such positions should not be expected to use their language skills without proper training, assessment, and compensation.

Multilingual employees within covered entities should be evaluated in all the languages in which they serve individuals with LEP, using a formal assessment based on clear proficiency guidelines. In addition to partnering with a formal language testing service, covered agencies may need to collaborate with CBOs for assessment of less common languages like Indigenous languages of Latin America. Any existing assessment should be reviewed to ensure that it produces accurate and reliable results. The creation of standards for determining qualifications will ensure consistency and efficiency when applied across different agencies, entities, departments, and offices within a covered entity. This is important because linguistic proficiency is complex and multi-faceted, meaning that multilingual staff may not have the appropriate vocabulary or literacy to communicate effectively in all their languages in all settings. They may have advanced spoken proficiency in a language but limited written proficiency, or they may be proficient in informal registers of communication appropriate for limited customer service or outreach activities but not have the capacity for formal communication that requires legal, medical, or other specialized terminology. Effective language assessments will help multilingual staff understand their strengths and limitations so that they can focus professional development efforts on improving specific skill areas. Recognizing that language proficiency can be improved through education and practice, we recommend that covered entities provide support to multilingual staff to strengthen their language skills and provide multiple opportunities to retake assessments.

The recruiting and retention of qualified multilingual staff is critical to providing improved language access to individuals with LEP. Multilingual abilities should be highly considered in hiring of all positions involving public contact, as appropriate – these positions should require proficiency in languages commensurate with the needs of local communities. As mentioned above, government agencies and covered entities should explore encouraging current staff to

improve and develop language skills by offering language classes and other incentives for professional growth. Whenever possible, multilingual staff should be placed strategically with the utilization of their language skills being a formal part of their job duties and expectations. When supervisors require multilingual employees who are qualified interpreters or translators to provide interpreting or translation services, they should reduce their workload in other areas. Standardized resources for multilingual staff, including glossaries and training curriculum to be administered on a regular basis, should be developed and updated. Qualified multilingual employees should be designated on staff rosters to assist individuals as needed. Moreover, an accessible system for front-facing staff to find appropriate multilingual employees and language services must be implemented to assure that there is no undue delay.

For the reasons explained above, we ask that the definitions of Multilingual employee be amended as suggested below:

14100 (c) "Multilingual employee" means a qualified employee of a covered entity who, in addition to their duties, is also proficient and has been assessed in ~~oral~~ spoken, signed, and/or written communication skills in English and the target languages~~, as are necessary to accurately and readily interpret in a second language~~. A multilingual employee need not be proficient in reading or writing skills in a second language except where such skills are a job-related necessity~~ or necessary for orally interpreting a written document~~. Multilingual employees should not interpret or translate unless they have separately met the requirements of being a qualified interpreter or translator. Multilingual employees must be given clear roles and expectations regarding whether they are performing their job duties in-language or serving as qualified interpreters or translators.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14100(d). "Limited English proficient persons"

Comment: [A coalition of commenters writes:] As an important threshold issue, we would like to address appropriate, respectful terminology use throughout the regulations. Advocates in the emerging language justice movement have criticized the term "limited English proficient" or "LEP" for reinforcing a deficit view of those who are not fully proficient in English and do not use English as their primary language. Alternatives to LEP are terms such as "non-dominant language users" and "linguistically marginalized communities." We acknowledge that LEP is still used widely and relevant, particularly with respect to legal mandates, obligating its use in certain contexts. To the extent that LEP is used, people-first language should be utilized, and the term should be: "persons with limited English proficiency." In other parts of the regulations, people-first language is used, such as "individuals with disabilities," and we propose that this be applied consistently for all appropriate groups. This terminology change to "persons with limited English proficiency" is of benefit as California continues to become a progressively

multilingual state. As of 2021, 43.9% of individuals speak a language other than English, and this number continues to grow upwards.

We suggest these amendments:

(d) "Persons with ~~L~~limited English proficiency~~t persons~~" ("LEP") includes persons who are non-English speaking or who do not speak English as their primary language or have limited ability to read, write, speak, or understand English. Persons with LEP is being used to denote individuals or groups who primarily communicate using non-English spoken and sign languages. Terminology describing persons with LEP includes but is not limited to: non-dominant language users, linguistically marginalized communities, English Language Learners, Non-English Language Background, Linguistically and Culturally Diverse, or Deaf and Hard of Hearing.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14100(e). "Primary language"

Comment: [A coalition of commenters writes:] The definition of "primary language" should reflect an individual's preference, which is not necessarily the language used "most frequently" in their daily life. A person's work or school environment many be predominantly filled with English, but it is possible that they are not fully proficient in English and strongly prefer another language.

We also emphasize the critical importance that the definition of "primary language" be amended to include the concept of linguistic variants as a distinct form of a language used by people from a specific community or region. Recognition of distinct language variants as a language form is already codified in state law at the Unemployment Insurance Code section 316(a)(3) and is already logically implied in all language mandates, but lack of familiarity about linguistic variations makes it imperative to explicitly address in the regulations. It is important to recognize that many languages spoken in the U.S. are actually language families with many distinct linguistic variants (also sometimes known as "dialects") that may be used in the same country of origin but are frequently not mutually intelligible. For example, Mixteco is an Indigenous language from Southern Mexico that is widely spoken among California's farmworkers. Mixteco is a complex tonal language with over 50 distinct variants that vary based on the speaker's community of origin, and people who speak different variants often cannot communicate effectively with each other. The difference between Mixteco variants can be compared to the difference between Spanish and Portuguese. It is also important to note that the term "dialect" is falling out of favor by linguists and discouraged by advocates. It is frequently used inaccurately and often purposefully to diminish the value of certain languages. For example, Indigenous languages of Latin America are often inaccurately called "dialects," implying that they are a dialect of Spanish. Given that they were spoken in Latin America for thousands of years before the arrival of Spanish-speaking Europeans, this term is both

inaccurate and offensive. “Variants” or “variations” is the preferred and accurate term when talking about a language family that contains variations (such as variants of Mixteco) and “language” is the appropriate term when identifying a language, such as Mixteco.

We suggest the following edits:

(e) “Primary language” means the language an individual indicates that they prefer to use to have meaningful access to a program or activity ~~used most frequently by a person to communicate~~, including sign language, or tactile sign language. An individual’s primary language includes their “linguistic variant,” meaning the distinct form of a language used by members of a specific regional or social group. The determination of a person’s primary language must be made by the individual, not by the covered entity.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14100(f). “Translator”

Comment: [A coalition of commenters writes:] The current regulations do not address existing federal requirements to translate vital information for individuals with limited English proficiency. Since 1976, DOJ Title VI Coordination Regulations, federal agencies have directed recipients of federal financial assistance to translate vital information for individuals with LEP when there is a significant population.

In the Food Stamp Act, Congress requires the translation of materials and compliance with bilingual requirements in the implementing regulations. The implementing regulations require translated materials including the “application form, change report form and notices to households” provided in one or several languages as is necessary for the area. The requirement for these translated materials in this regulation, 7 C.F.R. § 272.4 (b)(3), is as follows:

> (i) In each individual certification office that provides service to an area containing approximately 100 single-language minority low-income households; and
>
> (ii) In each project area with a total of less than 100 low-income households if a majority of those households are of a single-language minority.

The U.S. Department of Labor (DOL) requires state and local governments to translate “vital information,” defined as “information, whether written, oral or electronic, that is necessary for an individual to understand how to obtain any aid, benefit, service, and/or training...Examples of documents containing vital information include...consent and complaint forms; notices of rights and responsibilities; notices advising LEP individuals of their rights under this part, including the availability of free language assistance...” The ACA section 1557 proposed regulations also require taglines in the top 15 languages in documents, physical locations, and websites. DOL also has a “Babel” notice requirement for covered entities, which must indicate

in various languages "that language assistance is available, in all communications of vital information, such as hard copy letters or decisions or those communications posted on Web sites."

Numerous state statutes also address written translation of vital information and documents, such as Elections Code section 14201 (resulting in over 20 languages throughout the state)38 and Unemployment Insurance Code section 316 (top 15 non-English languages). State programs, such as Medi-Cal, California's Medicaid Program sets specific requirements for translations of vital information and documents. The Department of Health Care Services uses two different standards to determine which languages written materials need to be translated into. The *numeric threshold* mentioned in the bullet point above may be met if 3,000 mandatory Medi-Cal eligibles whose primary language is not English reside in the managed care plan's service area. The *concentration standard* is met if the managed care plan's service area has 1000 Medi-Cal managed care beneficiaries with LEP living in a single zip code or 1500 in two contiguous zip codes. Under this definition, there are currently threshold languages statewide for all Medi-Cal managed care plans that require translated materials.

The regulations should consider California's vast linguistic diversity and the harm caused by vague mandates when setting population thresholds or "safe harbors" for translation requirements.

Federal regulations have required state and local governments to provide individuals with LEP translated vital information, both paper and electronic, for more than forty years, but the current regulations do not address these requirements. In accordance with established precedence on this issue, we propose that the regulations set a requirement for proactive translations of vital information and content that is appropriate for the needs of California's diverse communities. Amendments to "alternative communication services" and "translator" at section 14100 should address the importance of written translations of vital documents.

We acknowledge that the use of population thresholds for when written translations are required has been controversial for various reasons, such as concerns around utility and inconsistent results for urban and rural communities. In our experience, failing to have some sort of guidance regarding when written translations should be required creates even more vagueness and inconsistency, as many government agencies and covered entities have claimed that they have no obligation to translate materials at all or that only a few languages are sufficient. One approach is to require government agencies and covered entities to translate vital information into at least the top 15 commonly used languages of the State or the local or regional service area of the covered entity, or in all languages spoken by a significant number or portion of the population eligible to be served or likely to be encountered. The translations must be made readily available and accessible in an electronic format, hard copy, upon request, and on the covered entity's website. Examples of such vital information include but are not limited to: notices of nondiscrimination and privacy practices; applications and intake forms; notices of denial or termination of eligibility, benefits or services; hearing/trial notices; notices

of appeal and grievance rights; communications related to a person's rights, eligibility, benefits, or services that require or request a response from a participant, beneficiary, enrollee, or applicant; communications related to a public health or other emergencies; consent forms and instructional materials, such as those related to medical procedures or operations, discharge papers, medical power of attorney, or living wills; complaint forms; and handbooks related to services and benefits.

Some federal guidance documents include “safe harbor” provisions indicating that government agencies and funded entities can demonstrate strong evidence of compliance with Title VI if they provide written translations of vital documents wherever the population of individuals with LEP in a service area equals 5% of the population served or 1,000 individuals – whichever is less. This guidance provides that vital documents include ‘‘written notices of eligibility criteria, rights, denial, loss, or decreases in benefits or services . . . .’’ While this guidance is not binding, it does provide helpful guidance for applicable agencies and entities and serves as a strong indication that failure to translate vital information does not meet the minimum requirement for language access. In fact, the Washington State Novel Coronavirus (COVID-19) Response Language Access Plan adopted these safe harbor thresholds, requiring state agencies to translate vital information into languages spoken by at least 5% of the state population or 1,000 people, which resulted in translations in 37 languages.

The approach of requiring at least the top 15 commonly used languages of the State or the local or regional service area of the covered entity, or in all languages spoken by a significant number or portion of the population eligible to be served or likely to be encountered, will address concerns regarding inconsistencies and uniform percentages. Many covered entities should go beyond the top 15, as needed and appropriate. Even in the City of Los Angeles alone, nearly 30 language populations with LEP number 1,000 or more. Using only the top 15 approach would exclude tens of thousands of individuals with LEP in just one city. Statewide in California, over 40 language populations would number 1,000 or more. Using only the top 15 approach in California would exclude over 300,000 individuals with LEP, including single language groups that number over 30,000 with LEP. If a government agency or covered entity declines to utilize a specific population threshold, there should be an explicit statement that for languages spoken by a significant number or portion of the population eligible to be served or likely to be directly affected by its programs and activities, vital information must be translated into these languages and made readily available in hard copy, electronically, and upon request. Further, there must be directives for alternatives to written translations, as appropriate, if there is not a significant number or portion of the population eligible to be served or likely to be directly affected, or the written translations would not provide meaningful access because an individual is unable to read and understand them. (See also above, [discussion of why the] regulations should include and address the exploration and incorporation of alternatives to technologically challenging platforms.).

The regulations should unambiguously prohibit machine translation without qualified human translator review.

Machine translation (MT) is increasingly harnessing the power of artificial intelligence (AI), making it an essential tool utilized by professional translators to increase efficiency, as well as a useful tool for lay people for non-professional settings like personal travel. However, the use of MT in *professional* settings without review by a qualified human translator is a misuse of the technology. Absent appropriate review, the use of MT by covered agencies is inappropriate, discriminatory, and potentially dangerous. Covered entities should not use unreviewed MT to create multilingual materials, without exceptions for exigent circumstances or non-complex or non-technical content. Clear directives should be put in place indicating that MT without qualified human review is not an acceptable method of meeting legal obligations. Although this has been laid out in other contexts, it was not acknowledged in regulatory form until recently. The use of unreviewed MT, such as adding a Google Translate bar to a website, deepens existing inequities related to language, culture, literacy, and tech access. Community members on the wrong side of linguistic and digital divides have had little way to learn of updated options related to benefits and services, of the specific and often strictly enforced instructions for applications and administrative hearings, of what services and benefits remain or have recently again become available, and of the detailed requirements for making use of those services and benefits. Many individuals with LEP have not received vital information in a language they can understand. They have not received translated notices of their appointments being rescheduled or options for telehealth. Some are skeptical of an unfamiliar system that has not been explained to them in a language or manner they can comprehend. This distrust, combined with other factors such as inadequate technology, leads many to forgo seeking services or benefits at all or end up unfairly denied critical relief.

The use of unreviewed MT aggravates the problems described above by producing inaccurate translations of information that is critical to community needs. The harm caused by this practice includes:

- Lack of credibility: It is well established that unreviewed MT can cause confusion and spread misinformation. However, even when MT successfully conveys the basic message of a text, problems with grammar and word choice undermine confidence and trust. Linguistically marginalized communities may view government agencies and covered entities as lacking credibility and legitimacy because their messages contain grammatical mistakes and tones that could be perceived as informal, offensive, or childish. The choice of terminology is significant, and machine translation cannot differentiate the many nuances in our vocabulary. Inaccurate translations affect the ability of government agencies and covered entities to establish trust in these communities, many of which are historically underserved and difficult to reach.
- Offensive language related to gender identity: MT in some languages, such as Spanish, defaults to the masculine form of gendered words that refer to people, which means

that people who use she/her or they/them pronouns would frequently be automatically referred to as he/him in the Spanish translation. For transgender women, for example, this would be deeply offensive and could deter an applicant from continuing to seek services from an agency based on a belief that it is not a safe, affirming, or respectful environment for transgender people.

- Problems with tone and formality: MT defaults and inconsistencies regarding register, formality, and tone can be offensive to the diverse communities we serve. For example, many languages place great importance on levels of formality in words and speech. The wrong register and tone can be very offensive and hurtful to our communities. For instance, there are many levels of formality in the Korean language, the deployment of which is dependent on the relationship between the communicating parties; MT simply cannot account for this appropriately. Moreover, many of our clients are survivors of trauma, harassment, abuse, and violence, and using a disrespectful tone or register could retraumatize them as we may be using language that was used by their abusers or perpetrators. These individuals deserve to be treated with respect and dignity as they seek critical benefits and services. Allowing such errors in communications to occur goes against the client-centered and trauma-informed approaches necessary to reach and serve the most vulnerable in our communities.

Our greatest concern is the message that the use of unreviewed MT sends to and about linguistically marginalized communities, creating a substandard level of what is acceptable for English speakers versus non-English speakers. The use of MT without qualified human review is the equivalent of asking ChatGPT to generate an agency's website in English and publishing it without review. This would be considered radically unacceptable in part due to the respect afforded to the English speakers who must access critical information from the website. Similarly, the use of unreviewed MT is discriminatory and offensive to many of us who are serving and part of linguistically marginalized communities. They deserve the same respect, clarity, and lucidity that we provide to English speakers regarding the critical services and benefits offered. Official materials in English generally go through multiple revisions and checks before being released to the public, so to publish non-English materials generated by AI without professional review is irresponsible and shows disrespect to linguistically marginalized communities. The inevitable result will be reduced access and fewer services provided to these communities, which during times of crisis can mean the difference between life and death.

In the interest of conserving resources and increasing readability, the regulations should require materials to be adapted into plain language before translation and seek community feedback on translated materials.

Adapting English materials to plain language before translation is another critical step in providing meaningful language access. Using plain language helps ensure that translations are as readable and accessible as possible for their intended audience, especially for people with low literacy or who have had limited access to formal education, as well as for children and

youth. Translators should not be expected to "simplify" or lower the register of documents as they translate, both because they are not subject matter experts and because translation ethics require them to preserve the tone and register of the original. Instead, it's up to government agencies and covered entities to adapt written materials to plain language in English before sending documents for translation.

In addition to plain language adaptation, government agencies and covered entities should develop a process for regular community review of multilingual materials to promote accuracy, cultural appropriateness, and readability. This might include focus groups with community members of different ages who are native speakers of each language to review materials and give feedback. Costs and planning time for the community review process must be incorporated into the translation process so community organizations can be compensated for their services and have adequate time to review content. In balancing these numerous requirements, government agencies and funded entities should coordinate, implement quality control measures, and share resources to maximize translations that can be shared across geographies, as appropriate.

These concepts should be added and incorporated into the definition of "Translator", as noted below.

14100 (f) "Translator" means a person qualified and capable of translating a language in writing or sign. A qualified translator has received education and training in ~~translator~~ best practices, including ethics, conduct, practice, and confidentiality. "Translation" is the replacement of a written text or sign, or recorded image, from one language (source language) into an equivalent written text or sign, or recorded image in another language (target language), accurately and with appropriate cultural relevance, conducted by a qualified human translator, and at the appropriate grade level. Translators should be determined to be qualified by a formal certifying body such as the American Translators Association or based on experience, education, professional training, and references. Although many of the same requirements apply to translators as for interpreters, the skill of translators is very different from that of interpreting. Competency of translations can often be ensured by: (i) having a second independent translator to check the work of the primary translator, (ii) ~~including~~ using a community review process, for example, partnering with community-based organizations (CBOs) who are compensated and work with specific language populations to ensure the correct reading and literacy level and understandability of the document, and (iii) using "back translation" by having one translator translate the documents and a second one translate it back to English or the source language to check the appropriate meaning. "Machine translation" means automated translation that is text-based and provides instant translations between various languages, sometimes with an option for audio input or output. Translators often use machine translation as a tool to promote efficiency, but it is not appropriate to use machine translation in professional settings without review by a qualified human translator. If a covered entity uses machine translation, the translation must be reviewed by a qualified human translator. The production of high-quality

translations by covered entities should include a) adapting English materials to plain language before translation and, b) regular community review, such as by CBOs, of translated materials to ensure accessibility, readability, and cultural responsiveness. “Vital information” is information, whether written, oral, or electronic, that is necessary for an individual to understand how to obtain any aid, benefit, service, and/or training; necessary for an individual to obtain any aid, benefit, service, and/or training; or required by law. Examples of documents containing vital information include, but are not limited to applications, consent and complaint forms; notices of rights and responsibilities and/or any documents relating to legal rights of the person with LEP; notices advising individuals with LEP of their rights under this Article, including the availability of free alternative communication services; rulebooks; written tests that do not assess English language competency, but rather assess competency for a particular license, job, or skill for which English proficiency is not required; letters or notices that require a response from the beneficiary or applicant, participant, or employee; letters or notices that provide information regarding an interview, appointment, hearing, appeal, or other processes related to the provision of aid, benefits, services, and/or training. Vital information should be proactively translated into at least the top 15 languages of the State or the local or regional service area of the covered entity, or in all languages used by a significant number or portion of the population eligible to be served or likely to be encountered. The translations must be made readily available and accessible in an electronic format, hard copy, upon request, and on the covered entity’s website. If a translation cannot be provided, entities must include a tagline (sometimes called a “Babel notice”), in-language, indicating that the information is vital and provide a number where a live person answering the call can acquire a qualified interpreter or multilingual employee in real-time to explain the vital information. For people with LEP who have limited literacy, the same phone option should be made available where a person can call to request that vital information be explained to them or read aloud in their primary language.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Additional Changes: The Council proposes to remove the definition of “translator” because the term is not used outside of the “definitions” section and therefore is not necessary for clarity.

§ 14101. Prohibited Practices on the Basis of Ancestry, Ethnic Group Identification, and National Origin

Comment: Due to the overlap regarding prohibited practices based on ancestry, ethnic group identification, national origin, and disabilities, we recommend this addition to end of this section:

14101 (e) The prohibitions and sanctions imposed in this Article shall be in addition to those imposed in section 14333 and shall not be interpreted in a manner that would frustrate their purpose.

Council Response: The Council declines to adopt the language suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: Much of 2 CCR 14101 again is unnecessary and redundant. Under 2 CCR 14000 "ancestry, national origin and ethnic group identification" are already listed as protected classes for prohibited discrimination. Throughout the scheme it is reiterated that discrimination against protected classes is prohibited. 2 CCR 14101(a) reiterates these same concepts and specifies that this may include a person's primary language or accent. That concept alone could be incorporated into "definitions," if needed. 2 CCR 14101(b) is restating the same concepts and should be stricken. 2 CCR 14101(c) should be stricken because it expands protected status to "membership in an organization identified with or seeking to promote interests of persons with ancestry, ethnic group identification or national origin protected status. This seeks to legislate an expansion of protected status for membership, which is not tied to actually being a member of the protected class. That is the legislature's prerogative.

DWR suggests that 2 CCR 14101 be revised to state that "[a]mong other prohibited practices, it is prohibited for a covered entity to fail to take reasonable steps…." and only include the text that is currently under subsection (d)(1) through (5) to give guidance for assisting LEP persons.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking. The proposed language including membership in an organization as a type of "association" is necessary for clarity and appropriately implements existing legislation, as Section 11135(d) explicitly protects people who are "associated with a person who has, or is perceived to have, any of those characteristics." Membership in a particular organization is one of a non-exhaustive list of examples of how individuals may be associated with persons who are or are perceived to be members of a protected class.

Subsections 14101(a) and (d)

Comment: [A coalition of commenters writes:] The regulations at 14101(d) should be amended to ensure that civil rights protections not be conditioned on numbers or proportions.

The five-factor test at section 14101(d) is a significant curtailment of existing language access rights and should be extensively amended and clarified. As currently drafted, it conditions access to communication assistance services, both auxiliary aids and services for Deaf and hard of hearing individuals and language assistance services for individuals with LEP, on the number or proportion of each language community. This type of condition is not required for other civil rights protections and should not be applied here. Section 11135 specifically states that, "No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal

access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state." These regulations likewise provide that "[n]o person in the State of California shall...be subjected to discrimination...," at section 14025, however the proposed rule then only conditions the ancestry, national origin, and ethnic group identification protections for individuals with LEP on "[t]he number or proportion of LEP persons..." and other factors from Title VI LEP Guidance. This approach is inconsistent with federal civil rights laws that protect each "person" from national origin or disability discrimination and do not condition these anti-discrimination protections on the number or proportion of individuals in that group. None of the other 11135 protected classes are conditioned on a numerical analysis or the existence of resources. In fact, it would be appalling and clearly against established civil rights mandates to condition the provision of reasonable accommodations on the number and frequency of individuals with disabilities seeking access to programs and services.

The traditional four-factor analysis is not a requirement in any statute, executive order, or regulation. It comes from the initial DOJ Guidance in 2000 that was issued with EO 13166 (and the final DOJ LEP guidance was issued in 2002). If the current 11135 proposed rule is intended to follow these factors, it also failed to capture the breadth of the second factor, as guidance documents explain that it includes "the frequency with which they have *or should have* contact with an LEP individual from different language groups seeking assistance." The factors are based on the requirement at 28 CFR 42.405(d)(1), but it is important to note that the last factor regarding *resources* is not in the regulation. DOJ explained in a brief filed with the 9th Circuit in *Colwell v. HHS* that these factors are not required. The four factors have not consistently been referenced in other documents, and they are notably not included in the 1557 proposed rule and Department of Labor's Workforce Investment and Opportunity Act (WIOA) regulations. In fact, the Department of Health and Human Services, in its initial 1557 proposed rule declined to use the four factors, then amended the regulations in 2020 to include them, and then in its most recent proposed rule, removed them for many of the reasons discussed herein. The ACA section 1557 2022 proposed rule uses the following factors:

> (d) Evaluation of compliance. In evaluating whether a covered entity has met its obligation under paragraph (a) of this section, the Director shall:
>
> (1) Evaluate, and give substantial weight to, the nature and importance of the health program or activity and the particular communication at issue, to the limited English proficient individual; and
>
> (2) Take into account other relevant factors, including the effectiveness of the covered entity's written language access procedures for its health programs and activities, that the covered entity has implemented pursuant to § 92.8(d).

The WIOA regulations explicitly declined to include a multi-factor test and condition compliance based on a number or proportion of the population requiring services, as the factors represent "a formulaic analysis [that] detracts from the application of the general rule [under Title VI to take steps to provide meaningful access]..." The DOJ's 2011 self-assessment tool, 2014 courts self-assessment tool, August 2010 courts letter, the February 2011 AG memo to agencies regarding EO 13166, 2022 DOJ Equity Action Plan, and 2022 AG Memo on Strengthening the Federal Government's Commitment to Language Access do not mention the four factors. We have also heard from some federal agencies that the four-factor analysis has been harmful in implementation and enforcement efforts as it focuses too much on numerical conditions and has offered funded entities an "out" by stating that providing language services is too resource intensive. For example, as a general principle, all spoken and sign language services must be provided and be free of charge for each individual with LEP, regardless of the language population's size, significance, or proportion. As we have laid out above, agencies should never be able to claim that they do not have resources to provide some level of language services, even for languages of lesser diffusion. Despite this, some agencies use the four-factor analysis to say they do not have to provide even interpreting because there is not a great need or because they do not have the resources. Should the regulations retain any of the factors, the focus should be on the nature and importance of the program or activity and the significance to the individual to be able to participate, rather than numerical conditions.

Please see our suggested changes to section 14101(a) as follows:

(a) discriminate against or deny full and equal access to a person on the basis of the person's actual or perceived ancestry, ethnic group identification, or national origin, including a person's primary language. <u>At a minimum, meaningful access requires that all spoken and sign languages must be provided in real time or within a reasonable timeframe by a qualified interpreter or multilingual employee.</u>

Please see our suggested changes to section 14101(d) as follows:

(d) fail to take reasonable steps to ensure meaningful access to its programs and activities by LEP persons, including through the use of alternative communication services. The determination of whether a covered entity has failed to take reasonable steps to ensure meaningful access to its programs and activities by LEP persons is a case-specific, fact-based inquiry that must balance at least the following five factors:

~~(1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the covered entity;~~

~~(2) The frequency with which LEP individuals come in contact with the program or activity;~~

(~~3~~<u>1</u>) The nature and importance to people's lives of the program or activity provided by the covered entity;

(42) The significance of the communication to an individual's ability to access or be served by the program or activity; and

(3) Other relevant factors, examining the extent to which the covered entity has taken sufficient reasonable steps to ensure meaningful access to its programs and activities, which include but are not limited to the following practices:

(A) having a comprehensive language access plan, along with the resources, policies, and procedures required to implement the plan effectively pursuant to this Article;

(B) employing a multilingual access coordinator and/or multilingual access unit to coordinate the entity's multilingual access services, provide technical assistance to entity's staff, and monitor the provision of multilingual access services;

(C) staff training on various topics related to language access;

(D) conducting comprehensive assessments around language and cultural needs;

(E) engaging in regular, disaggregated linguistic data collection and analysis;

(F) proactive notice and outreach to multilingual communities about the availability of free language services;

(G) establishing and enhancing robust methods and procedures for monitoring, oversight, and enforcement; and

(H) updating language access plans, policies, and procedures on a regular basis.

~~(5) The resources available to the covered entity.~~

For the reasons laid out above, we strongly support the language above, but if CRC is inclined to include additional factors, we propose this in the alternative:

(d) fail to take reasonable steps to ensure meaningful access to its programs and activities by LEP persons, including through the use of alternative communication services. The determination of whether a covered entity has failed to take reasonable steps to ensure meaningful access to its programs and activities by LEP persons is a case-specific, fact-based inquiry that must balance at least the following five factors:

(1) With respect to the provision of proactive written translations of vital information, ~~T~~the number or proportion of LEP persons eligible to be served or likely to be encountered by the covered entity;

(2) With respect to the provision of proactive written translations of vital information, ~~T~~the frequency with which LEP individuals come in contact or should come in contact with the program or activity;

(3) The nature and importance to people's lives of the program or activity provided by the covered entity;

(4) The significance of the communication to an individual's ability to access or be served by the program or activity; and

(5) Other relevant factors, examining the extent to which the covered entity has taken sufficient reasonable steps to ensure meaningful access to its programs and activities, which include but are not limited to the following practices:

(A) having a comprehensive language access plan, along with the resources, policies, and procedures required to implement the plan effectively pursuant to this Article;

(B) employing a multilingual access coordinator and/or multilingual access unit to coordinate the entity's multilingual access services, provide technical assistance to entity's staff, and monitor the provision of multilingual access services;

(C) staff training on various topics related to language access;

(D) conducting comprehensive assessments around language and cultural needs;

(E) engaging in regular, disaggregated linguistic data collection and analysis;

(F) proactive notice and outreach to multilingual communities about the availability of free language services;

(G) establishing and enhancing robust methods and procedures for monitoring, oversight, and enforcement; and

(H) updating language access plans, policies, and procedures on a regular basis.

~~(5) The resources available to the covered entity.~~

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: Subdivision (a) of section 14101 would prohibit covered entities from denying "full and equal access" to a person on the basis of national origin, including a person's primary language spoken or accent. This could invite legal action against a state agency arguing that a covered entity is required to produce a written translation of any document in any language. Subdivision (d) of section 14101 would provide that a covered entity must take reasonable steps to ensure "meaningful access" for persons with limited English proficiency and determine what those reasonable steps are by engaging in a five-part balancing inquiry. CDSS believes the intent of the draft regulations is for the availability of written translations, and other language services, to be based on this balancing test. CDSS proposes that subdivision (a) be clarified to

not refer to the provision of language services, such as interpretations and translations, which is covered by subdivision (d).

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: Beyond interpreters, proposed rule 14101, subdivision (d) includes additional criteria to those imposed by Title VI of the Civil Rights Act of 1964 and Section 188 of the Workforce Innovation and Opportunity Act, thus requiring administrative time and recalibration of language access services to comply with the new rule. In addition, the dual standards in proposed rule 14101, subdivisions (a) ["full and equal access"] and (d) ["meaningful access"] will require compliance with both standards simultaneously, and, again, administrative costs in the form of retraining staff, new compliance documents, and new oversight for funded entities. The cost will likely impact America's Job Center of California locations, local workforce investment boards, and the whole ecosystem of programs supported by LWDA.

Council Response: The Council declines to make changes in response to this comment, which does not request a particular change to the text of the proposed regulations. No further response is required per Government Code section 11346.9(a)(3).

Subsection 14101(c)

Comment: [A coalition of commenters writes:] In subsection (c), after the phrase "discriminate against," the following should be inserted "or deny full and equal access."

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: The proposed regulations define "multilingual employee" to be a "qualified employee of a covered entity" that is sufficiently proficient in oral communication skills in both English and another language to "accurately and readily interpret in a second language." But the
proposed regulations do not further define how a covered entity should identify whether the employee is a "qualified employee." When the County employs a bilingual or multilingual employee to serve in a role where their job duties include interpretation and/or translation, the County administers an examination to ensure that employee has sufficient proficiency in the language(s) for which they are hired and in the language domains (reading, writing, speaking, or understanding) necessary for the required duties of interpretation (speaking/understanding) or translation (reading/writing) for the position. Similar requirements apply to state agencies, *see* Government Code section 7296(a), but local agencies have significant discretion on how to define "qualified." Adopting a requirement for testing and certification of interpretation and translation skills for "multilingual employee" would further the Civil Rights Council's objective

of ensuring meaningful access for LEP persons to the programs and activities of covered entities.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14101(d)

Comment: The proposed regulations could provide clearer guidance to covered entities regarding the five-factor test used to identify whether an entity has failed to take reasonable steps
to ensure meaningful access to its programs. For example, the Dymally-Alatorre Bilingual Services Act (Government Code §§ 7290–7299.8) provides that state agencies and local offices of state agencies serving "substantial numbers of non-English-speaking people," defined as five (5) percent or more of the people served, must employ a sufficient number of qualified bilingual
persons to "to ensure provision of information and services to the public, in the language of the non-English-speaking person." Govt. Code. §§ 7292, 7296.2. The County recognizes that the same Act provides significant discretion to local agencies regarding the threshold to trigger such a responsibility. Govt. Code §§ 7293, 7296. Nonetheless, the County supports identifying a comparable threshold, likely set slightly higher than five percent or variable based on the context
of the services provided, for these regulations through the Final Statement of Reasons as a guidepost to require covered entities to provide language assistance for at least certain languages
over the threshold. Otherwise, in localities with many LEP persons who speak many different languages, it is difficult for covered entities to ensure compliance without expending significant resources beyond those contemplated by the regulations and statute.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Article 8. Specific Practices Prohibited – Color and Race

§ 14125. Definitions

Comment: 2 CCR 14125 is again just cross referring to "race" and "color" definitions that are not necessary and this section should be stricken in its entirety.

Council Response: The Council declines to strike the language proposed by the commentator because section 14125 is necessary to add clarity to the regulations.

§ 14126. Prohibited Practices on the Basis of Color and Race

Comment: 2 CCR 14126 should be stricken in its entirety. 2 CCR 14126(a) is redundant to concepts already included under 2 CCR 14000 as prohibited discrimination against persons of race or color – whether actual or perceived as such. Section 14126(b) again seeks to extend protected status merely on association with persons in a protected class, which creates a huge pool of litigants with no "membership" in the protected class. This is an impermissible expansion of protected basis – which requires legislative action. Section 14126(c) again expands the protected basis to membership in an organization identified with or promoting interests of persons of a race or color – without actually being a member of that protected class. This again expands the class of persons having a protected status beyond what the legislature has done.

Council Response: The Council disagrees with this comment. The proposed language including membership in an organization as a type of "association" is necessary for clarity and appropriately implements existing legislation, as section 11135(d) explicitly protects people who are "associated with a person who has, or is perceived to have, any of those characteristics." Membership in a particular organization is one of a non-exhaustive list of examples of how individuals may be associated with persons who are or perceived to be members of a protected class.

Subsection 14126(c)

Comment: [A coalition of commenters writes:] In subsection (c), after the phrase "discriminate against," correct the typographical error by replacing "of" with "or."

Subsection (c) also conflates two distinct practices: membership in an organization and discrimination based on a person's name. These are not related practices and should each be in their own subsection. Suggested revision:

(c) discriminate against ~~of~~ or deny full and equal access to a person on the basis of such person's membership in an organization identified with, or seeking to promote the interests of persons of a specific color or race, ~~or because a person's name, or that of their spouse, is believed to reflect a given color or race.~~

(d) discriminate against or deny full and equal access to a person because a person's name, or that of their spouse, is believed to reflect a particular color or race.

Council Response: The Council agrees with this comment in part and proposes to replace "of" with "or," along with making other non-substantive typographical corrections prior to submitting these proposed regulations for consideration by the Office of Administrative Law. The Council declines to divide subsection (c) into two separate subsections because that change is not necessary to add clarity to the regulations.

Article 9. Specific Practices Prohibited – Marital Status

§ 14153. Prohibited Practices

Comment: [A coalition of commenters writes:] We suggest the following changes:

(b) discriminate against or deny full and equal access to a person on the basis of such person's actual or perceived association with persons of a particular marital status;

(c) discriminate against or deny full and equal access to a person on the basis of such person's actual or perceived membership in an organization identified with or seeking to promote the interests of persons with a particular marital status; or

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: CDSS recently terminated a religious entity's participation in a daycare meal reimbursement program because the entity did not allow its employees to be in gay or lesbian relationships, as stated in its handbook. This handbook also prohibited employees from cohabitating and from being pregnant while not married and from being in extramarital relationships.

CDSS proposes language be included in draft regulations to clarify whether, for purposes of section 14153, denying full and equal access to a person on the basis of pregnancy or childbirth outside of wedlock constitutes discrimination on the basis of marital status. For further background on how one California court might resolve this issue, it was litigated in 2011 pursuant to other civil rights laws in *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041.

Likewise, CDSS proposes language be included that would clarify whether denying access to persons in sexual relationships outside of marriage and/or extramarital relationships constitutes marital status discrimination.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14153(a)(b) and (c) should be stricken entirely. Again, this is redundant to concepts already included under 2 CCR 14000 making marital status a protected basis against discrimination, whether actual or perceived. Section 14153(b) again seeks to extend protected status merely on association with person's in a protected class, which creates a huge pool of litigants with no "membership" in the protected class. This is an impermissible expansion of protected basis, which requires legislative action. Section 14153(c) again expands the protected basis to membership in an organization identified with or promoting interests of persons with a particular marital status – without actually being a member of that protected class. This again expands the class of persons having a protected status beyond what the legislature has done.

DWR suggests that that 2 CCR 14153 be revised to state that "[a]mong other prohibited practices, it is prohibited for a covered entity to fail to inquire about a person's family or marital status unless needing relevant information to determine whether such person satisfies validly

imposed criteria for the aid or benefit, or participation in the program or activity in question, including any other former names by which such person has been known." This would incorporate the concept of draft regulation 14153(d) paragraph.

Council Response: The Council disagrees with this comment and declines to make the proposed changes because they would detract from the clarity of the proposed regulations. The proposed language including membership in an organization as a type of "association" is necessary for clarity and appropriately implements existing legislation, as section 11135(d) explicitly protects people who are "associated with a person who has, or is perceived to have, any of those characteristics." Membership in a particular organization is one of a non-exhaustive list of examples of how individuals may be associated with persons who are or perceived to be members of a protected class.

Article 10. Specific Practices Prohibited – Religion

§ 14180. Definitions

Comment: 2 CCR 14180 is again just cross-referring to "religion" definition that is not necessary and this section should be stricken in its entirety. As noted before, GC 11135(c) already provides that protected basis definitions are provided under GC 12926 and should not be redefined in this regulations scheme, unless some clarification is needed for terminology.

Council Response: The Council disagrees with this comment. Given section 11135(c)'s mandate that the definitions of the protected bases listed in section 11135(a) have the same meanings as the terms used in section 12926, which is part of the Fair Employment and Housing Act, it is necessary for clarity to define such terms, as applicable, in the proposed regulations for purposes of Article 9.5. Replacing these definitions with cross-references to section 12926 would detract from the clarity of the regulations.

§ 14181. Prohibited Practices on the Basis of Religion

Comment: 2 CCR 14181 should be stricken entirely. Again, 2 CCR 14181(a) is redundant to concepts already included under 2 CCR 14000 making religion a protected basis against discrimination, whether actual or perceived. Section 14181(b) again seeks to extend protected status merely on association with persons in a protected class, which creates a huge pool of litigants with no "membership" in the protected class. This is an impermissible expansion of protected basis, which requires legislative action. Section 14181(c) again expands the protected basis to membership in an organization identified with or promoting interests of persons with a particular religion – without actually being a member of that protected class. This again expands the class of persons having a protected status beyond what the legislature has done.

Council Response: The Council disagrees with this comment. The proposed language including membership in an organization as a type of "association" is necessary for clarity and appropriately implements existing legislation, as Section 11135(d) explicitly protects people who are "associated with a person who has, or is perceived to have, any of those

characteristics." Membership in a particular organization is one of a non-exhaustive list of examples of how individuals may be associated with persons who are or perceived to be members of a protected class.

§ 14182. Reasonable Accommodations of Religious Practices

No comments received.

§ 14183. Exemption of Religious Organizations

Comment: CDSS oversees various programs and activities which are carried out by religious nonprofit entities. These entities can be partners, participants, and/or recipients, depending on the program. For example, CDSS provides federal and state funding for meal reimbursement and administrative costs to daycares, afterschool programs, and other care providers through its administration of the Child and Adult Care Food Program. Many of these participants are religious nonprofits. CDSS also licenses facilities such as daycares, both religious and secular, some of which also receive funding, for example in the form of grants pursuant to the Infrastructure Grant Program or in the form of fee discounts or waivers pursuant to COVID-19 pandemic relief.

Section 14183 would retain the substantive language of section 11167, stating that GC 11135, et seq. and implementing regulations do not apply to the "religious activities" of a religious nonprofit entity. CDSS requests that CRD take the opportunity in amending these regulations to add a subdivision to the definition section defining "religious activities" to include prayer, proselytizing, and similar activities and to not include practices that result in discrimination toward program beneficiaries or employment discrimination. Alternatively, CRD could clarify in regulation that religious covered entities are not excused from compliance with Article 9.5's prohibitions on nondiscrimination toward ultimate beneficiaries and employees carrying our state-funded programs, services, or activities.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Additional Changes: The Council proposes to add language to this section explaining that neither Article 9.5 nor any of its implementing regulations apply to employment relationships subject to the "ministerial exception" under the United States Constitution, as set forth in *Our Lady of Guadalupe School v. Morrissey-Berru* (2020) 140 S.Ct. 2049 and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012) 565 U.S. 171. This additional language is necessary for clarity and to ensure covered entities are aware of their obligations under the United States Constitution.

Article 11. Specific Practices Prohibited – Sex and Sexual Orientation

Comment: I offer brief comment below regarding the proposed regulations. As a general matter, I write in support of the Council's proposed amendments to the Government Code to clarify the scope of prohibited sex and sexual orientation discrimination in state programs. Research by Williams Institute scholars has documented a long history of discrimination experienced by LGBT people, including in state-run programs. The proposed regulations address important aspects of SOGI discrimination, such as documentation of name and gender and access to facilities based on gender identity.

Council Response: The Council appreciates this comment.

§ 14300. Prohibited Practices on the Basis of Sex or Sexual Orientation

Comment: Article 11 § 14300 of the regulations details specific practices prohibited on the basis of sex and sexual orientation. Because discrimination against domestic violence survivors is often a form of gender discrimination, as explained below, FVAP suggests the addition of language that would clarify that discrimination against domestic violence survivors should be considered sex discrimination.

Women are much more likely than men to be survivors of domestic violence. Such findings are unsurprising because gender is often a motivating factor for domestic violence. Statistics show that disparities between the socially or culturally constructed roles assigned to women and those assigned to men are at the root of domestic violence. In other words, being female is the strongest risk factor for whether an individual will become a victim of domestic violence. Thus, discrimination against someone because they are a domestic violence survivor will most likely be or result in discrimination against women.

For example, domestic violence survivors often face housing discrimination because they are survivors. Additionally, it is well established that people facing housing discrimination because they are domestic violence survivors may have a cause of action for sex discrimination under the direct evidence, unequal treatment and disparate impact theories of the Fair Housing Act and California's Fair Employment and Housing Act.

The disparate impact theory is a particularly vital tool in combating housing discrimination against survivors of domestic violence. For example, a landlord may have a facially neutral policy of denying all applicants with previous evictions. However, domestic violence survivors often have evictions in their rental history because they are survivors, so this policy has a disparate impact on survivors and in turn women.

However, domestic violence survivors are often unable to access these protections because they lack legal representation, which is usually needed to successfully argue their direct evidence, disparate impact or treatment claims. For domestic violence survivors to easily access the protections in Government Code section 11135 *et. seq.*, it is imperative that regulations clearly define and explain how it prohibits discrimination against domestic violence survivors, which is gender based discrimination. Adding language to Article 11 § 14300 clarifying this

connection between survivors of domestic violence and sex discrimination is an important step to take in support of survivors and stopping gender based discrimination.

For these reasons, we ask for the inclusion of language to article 11 which clarifies that discrimination against domestic violence survivors should be considered sex discrimination.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] We applaud the addition of regulations that make it explicit that covered entities are prohibited from engaging in actions that discriminate or deny full and equal access to programs and activities for people who identify as members of the LGBTQIA+ community.

As of March 15, 2023, 420 separate bills rolling back or eliminating LGBTQIA+ civil rights have been introduced across the country this legislative session, including at the federal level. Given this political landscape, and as discussed above in relation to regulatory definitions under section 14020, subsections (t) and (ss), we urge the Council to create as much distinction between “sex” and “gender” within the proposed regulations without altering the statutory definitions.

For the reasons stated above, we support the explicit addition of “gender” or “gender identity” to section 14300 in both the title and text. Clearly separating the legal definition of sex and gender under state law will likely become increasingly important as discrimination against transgender individuals gains further traction across levels of government, including at the federal level.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] Because discrimination against domestic violence survivors is often a form of gender discrimination, as explained below, we suggest the addition of language under Section 14300 that would clarify that discrimination against domestic violence survivors should be considered sex discrimination.

Women are much more likely than men to be survivors of domestic violence. Such findings are unsurprising because gender is often a motivating factor for domestic violence. Statistics show that disparities between the socially or culturally constructed roles assigned to women and those assigned to men are at the root of domestic violence. In other words, being female is the strongest risk factor for whether an individual will become a victim of domestic violence. Thus, discrimination against someone because they are a domestic violence survivor will most likely be or result in discrimination against women.

Domestic violence survivors often face housing discrimination because they are survivors. In fact, "there is a strong link between domestic violence and homelessness." (34 U.S.C. § 12471.) Additionally, it is well established that people facing housing discrimination because they are domestic violence survivors may have a cause of action for sex discrimination under the direct evidence, unequal treatment and disparate impact theories of the Fair Housing Act and California's Fair Employment and Housing Act (FEHA). (*Pratt*. at p. 4.)

The disparate impact theory is a particularly vital tool in combating housing discrimination against survivors of gender-based violence. For example, a landlord may have a facially neutral policy of denying all applicants with previous evictions. However, domestic violence survivors often have evictions in their rental history because they are survivors, so this policy has a disparate impact on survivors and in turn women. (Nat. Law Center at p. 3.).

However, domestic violence survivors are often unable to access these fair housing protections because they lack legal representation, which is usually needed to successfully argue their direct evidence, disparate impact or treatment claims. For domestic violence survivors to easily access section 11135, it is imperative that section 11135's regulations clearly define and explain how it prohibits discrimination against domestic violence survivors, which is gender-based discrimination. Adding language to section 14300 clarifying this connection between survivors of gender-based violence and sex discrimination is an important step to take in support of survivors and stopping gender-based discrimination.

We suggest adding a new subsection (d) to section 14300 to reflect these changes:

"(d) discriminate against or deny full access to a person on the basis of such person's status as a victim of domestic violence, as such discrimination has the purpose or effect of differentiating on the basis of sex as defined in sections 14020 (rr) and (ss). "Domestic violence" is as defined in Section 6211 of the Family Code."

Council Response: The Council declines to add the proposed section because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14300 should be stricken entirely. Again, 2 CCR 14300(a) is redundant to concepts already included under 2 CCR 14000, making sex or sexual orientation a protected basis against discrimination. Further, it cross-references definitions to section 2 CCR 14020 in the same statutory scheme, which is unnecessary. 2 CCR 14300(b) again seeks to extend protected status merely on association with person's in a protected class, which creates a huge pool of litigants with no "membership" in the protected class. This is an impermissible expansion of protected basis, which requires legislative action. 2 CCR 14300(c) again expands the protected basis to membership in an organization identified with or promoting interests of persons with a particular sex or sexual orientation – without actually being a member of that protected class. This again expands the class of persons having a protected status beyond what the legislature has done.

Council Response: The Council disagrees with this comment. The language that the commenter proposes to strike is necessary for clarity. The proposed language including membership in an organization as a type of "association" appropriately implements existing legislation, as Section 11135(d) explicitly protects people who are "associated with a person who has, or is perceived to have, any of those characteristics." Membership in a particular organization is one of a non-exhaustive list of examples of how individuals may be associated with persons who are or perceived to be members of a protected class.

Comment: The County requests that the Civil Rights Council clarify whether, pursuant to sections 14026(a)(9)(D) and 14300, single-sex programming or facilities (e.g. single-sex classes, schools, sports, bathrooms, locker rooms, housing, and carceral facilities) are permitted and, if so, describe the circumstances under which single-sex programming is permitted or prohibited. Given that the proposed regulation broadly defines sex, and the regulation specifically calls out segregation as prohibited discrimination, the regulation as drafted may be read to prohibit sex-segregated facilities, programs, and activities that are otherwise permitted under Federal and State law. The County strongly supports gender-inclusive policies and generally does not favor sex-segregated facilities, programs, and activities. But there are instances where for safety reasons or to ensure opportunities for women and girls (including gender expansive individuals), single-sex programs and activities are appropriate or even necessary. Therefore, the County encourages the Civil Rights Council to consider clarifications regarding the circumstances for when single-sex facilities, programs, and activities are appropriate and when such offerings would violate Government Code section 11135, *et seq.*

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

§ 14301. Pregnancy, Childbirth, or Termination of Pregnancy

Comment: [A coalition of commenters writes:] We welcome the addition of this section to the regulations, which has particular significance given the recent assault on reproductive rights following the reversal of *Roe v. Wade* by the United States Supreme Court in 2022. The proposed language makes clear that practices that interfere with pregnant people's rights to fully access policies and programs afforded to persons with temporary disabilities are prohibited.

Council Response: The Council appreciates this comment.

§ 14302. Parental, Family, or Marital Status

Comment: We recommend that the proposed regulations provide definitions of "Parental Status" and "Family Status" in the definitions sections to the extent that they rely on such terms in this section or in others.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: "Marital Status" should not be included in proposed section 14302 because that section prohibits discrimination against specific characteristics to the extent that they are related to sex. However, Marital Status is separately protected in Government Code Section 11135 and it is not dependent on any relationship to sex. The addition of Marital Status to this section will cause confusion and may work to diminish the protection otherwise afforded. This distinction seems to have been forgotten or lost with the renumbering of the proposed regulations.

Council Response: The Council disagrees with this comment and declines to make the suggested change because it does not add clarity. A variety of practices concerning the actual or potential "marital status" of a person may have the purpose or effect of differentiating on the basis of sex. This regulation makes clear that covered entities are prohibited from such practices.

Comment: [A coalition of commenters writes:] We recommend revising this section to include sexual orientation and gender identity to make clear that prohibited practices include discrimination and denial of access to programs and services based on antiquated definitions of "family," as follows:

Any practice of a covered entity concerning the actual or potential parental, family or marital status of an ultimate beneficiary which has the purpose or effect of differentiating on the basis of sex*, sexual orientation, or gender identity* is a prohibited practice.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

§ 14303. Inquiries Regarding and Recording of Gender and Name

Comment: [A coalition of commenters writes:] In accordance with the new definition recommendation under Article II, section (t) "Gender," section 14303 should be re-titled as *"Specific Practices Prohibited–Gender and Gender Identity,"* as the proposed paragraphs below reflect the much broader prohibited practices than only the recording of name/gender discrimination. We recommend adding the language that begins each "Prohibited Practice" for all other protected classes in these regulations, mainly, "Among other prohibited practices, it is prohibited for a covered entity to." This will ensure conformity across protected classes within the regulation.

Council Response: The Council declines to adopt the change recommended by the commenter because the proposed regulations are sufficiently clear without it and implementing the recommendation is unlikely to cause undue delay in the rulemaking.

Comment: This proposed section of the regulations would limit misuse of SOGI information and misgendering in government programs, which are harmful and discriminatory practices the Council is well-situated to regulate. However, the Council should ensure that the proposed language is well-tailored so that it does not have unintentional public policy consequences. Below I describe the concern that some aspects of the proposed regulations, particularly Section 14303(a), may create unintended or counterproductive burdens in at least two ways. First, with regard to SOGI data collection, and second, with regard to the administration of federally funded or federal-state partnership programs. I also briefly raise the question of how these regulations will impact intersex people using government programs and services.

Council Response: The Council addresses the commenter's related comments in the appropriate sections below.

Comment: The Council should evaluate how these proposed regulations would impact intersex people, including how intersex people might experience discrimination in government programs.

> Intersex is an umbrella term for differences in sex traits or reproductive anatomy. Intersex people are born with these differences or develop them in childhood. There are many possible differences in genitalia, hormones, internal anatomy, or chromosomes, compared to the usual two ways that human bodies develop."

The best estimate to date is that intersex people comprise approximately 1.7% of the population, which means that intersex Californians will likely be affected by these regulations. The legislature of California has declared intersex children "part of the fabric of our state's diversity" and affirmed its commitment to the health and well-being of intersex people. Although the needs of intersex people remain understudied, there is evidence that they may experience unique forms of discrimination. The concerns described above regarding the potential of these regulations to limit critical data collection and risk of impeding state and federal program compliance could also affect intersex populations. However, data collection on intersex people is not developed to the same degree as SOGI data collection. Therefore, much more information is needed to understand how these regulations might affect intersex people.

In conclusion, these proposed regulations address an important aspect of SOGI discrimination and provide helpful guidance to prevent agencies and programs in California from engaging in behavior that would violate California's robust nondiscrimination protections. The above comments are offered in the hopes that the regulations will be as enduring and effective as possible in reaching their goals.

Council Response: The Council agrees with this comment in part, to the extent that the comment affirms the importance of SOGI data collection in advancing the civil rights of all Californians, including intersex people. The Council proposes adding "including data collection" to proposed section 14303(a) to make clear that covered entities may request the listed information on a voluntary basis for purposes of data collection efforts.

Subsection 14303(a)

Comment: Proposed Section 14303(a) may hamper SOGI ["sexual orientation and gender identity"] data collection efforts.

California state law requires more than a dozen state agencies to collect data on sexual orientation and gender identity "in the course of collecting demographic data directly or by contract as to the ancestry or ethnic origin of Californians." The legislature emphasized the importance of such data collection because "[d]ue to historical systemic exclusion of data collection of LGBT communities, significant disparities in their health and welfare have been prolonged compared to the broader community. LGBT communities face disproportionately high rates of poverty, suicide, homelessness, isolation, substance abuse, and violence." Collecting SOGI data thus enables policymakers "to respect, embrace, and understand the full diversity of its residents and to collect accurate data to effectively implement and deliver critical state services and programs."

Proposed Section 14303(a) might conflict with the above mandates to collect SOGI information, and thereby impede the ability of state agencies to collect, analyze, and publish such data. The language of this section would create a rebuttable presumption of unlawfulness for all SOGI-related "inquiries," which might interrupt ongoing data collection or discourage future data collection initiatives, even with the "recordkeeping" exception in 14303(a) and the "legally-mandated obligation" exception described in Section 14303(c). This chilling effect would not necessarily be limited to state agencies covered under data collection laws, either – it could also extend broadly to any entity receiving state funding who might seek to conduct research on LGBT experiences. If the Council intends to allow lawful inquiries in the interest of public policy, such as SOGI data collection to address LGBT disparities and discrimination, it may be beneficial to further tailor the scope of Section 14303(a) to better target harmful, unnecessary or otherwise unlawful forms of inquiry.

Alternatively, the language of the regulation could be edited to describe a specific exception for respectful, confidential and affirming SOGI data collection, but such an exception should be broad enough to encompass all forms of respectful and affirming LGBT data collection by covered entities.

Council Response: The Council agrees with this comment in part, to the extent that the comment affirms the importance of SOGI data collection in advancing the civil rights of all Californians. The Council proposes adding "including data collection" to proposed section 14303(a) to make clear that covered entities may request the listed information on a voluntary basis for purposes of data collection efforts.

Comment: Proposed regulations may create burdens to administration of important benefits.

Section 14303(a) could also create administrative challenges for agencies overseeing programs that rely on federal funding. For example, the CalFresh, CalWorks, and Medi-Cal programs

receive federal funding and are also subject to California's SOGI data collection laws. Under both federal and state law, these programs may be required to ask, collect, and analyze certain types of data, including sex designations. The proposed regulations could impede the ability of these programs to simultaneously comply with California law, including nondiscrimination and SOGI data collection laws, and federal program regulations. As a result, the agencies may experience burdens at the individual or agency level that could ultimately result in errors, delays or other downstream impacts on programs participants – who are often among the most vulnerable Californians.

If the Council seeks to prohibit only unlawful and unnecessary inquiries, but permit lawful inquires, the Council should consider edits to the language proposed under Section 14303(a). It may be helpful to assess whether such data collection is always entirely voluntary, such as whether programs like Medi-Cal or CalWORKs are required to submit sex designation data to federal partners. However, if the Council seeks to reduce or eliminate currently lawful inquiries into sex, gender, and sexual orientation by agencies such as those required by federal or state law, a more workable approach might be to direct the agencies to engage with affected community stakeholders, develop a compliance plan identifying key challenges and proposed solutions, and tailor the regulations to allow for a program-specific or flexible approach with the ultimate goal of protecting the confidentiality, safety and self-determination of LGBT people.

The above concerns notwithstanding, I strongly support and appreciate the Council's commitment to ensuring that state agencies and other covered entities use and respect an individual's preferred name, gender and gender pronouns, as described in Sections 14303(b) and (c).

Council Response: The Council agrees and proposes adding "data collection" as an exception to the prohibited practices in section 14303(a). Section 14303(a) provides an exception for inquiries required under state or federal law or an order of a state or federal court. Therefore, the regulations would not create a conflict with federal program requirements.

Comment: We support the addition of language at 2 C.C.R. Section 14303(a) that prohibits inquiries by a covered entity into a person's sex or gender identity, unless required by other law. This exception, and the related provision at Section 14303(f) allowing reasonable and confidential inquiries for the sole purpose of ensuring access to comparable, safe, and adequate multi-user facilities, are important to ensure covered entities can and will ask about gender identity to maximize individuals' ability to access the version of a gender-segregated program or activity that feels safest and most appropriate for them.

In the last sentence of Section 14303(a), we suggest adding language to clarify that covered entities may ask for voluntary disclosure of gender information for both recordkeeping and "data collection" purposes, so as to avoid inadvertently discouraging covered entities from

engaging in important data collection efforts that help identify population-level needs and ultimately help break down patterns of entrenched discrimination.

Council Response: The Council agrees and proposes adding "data collection" as an exception to the prohibited practices in section 14303(a).

Comment: Subdivision (a) of draft section 14303 would prohibit inquiries by covered entities that would identify a person on the basis of sex, sexual orientation, gender identity or gender expression, or sexual orientation. While the fact that such an inquiry is required by state or federal law is a "permissible defense," under the draft regulations, this would still require an exhaustive review of all CDSS and CDSS-funded programs' data collection practices in this regard and potentially resource-intensive changes to data systems, forms, instructions, etc.

Council Response: The Council recognizes that many covered entities will need to conduct exhaustive internal reviews and make necessary changes to ensure compliance with state anti-discrimination mandates. The Council promulgated these regulations to strengthen civil rights protections for all Californians. However, the Council, in its first modification to the text of the proposed modifications, clarified that a covered entity may request a person to voluntarily provide this information for the purpose of data collection.

Comment: Inquiring into a person's gender or pronouns may be appropriate in some situations to avoid discrimination. CDSS instructs public contact employees to address program applicants and recipients in accordance with their gender identities and use appropriate pronouns. In some situations, it may be appropriate to ask people their pronouns to avoid possibly misgendering them.

Council Response: This comment does not recommend a change to the proposed regulations, and the Council does not propose any changes on the basis of this comment. However, the Council agrees that in some situations it may be appropriate to ask people their pronouns to avoid possibly misgendering them. This information may be requested on a voluntary basis for recordkeeping purposes (for example, on an intake form) under section 14303(a), or a covered entity may be able to establish a permissible defense under section 14303(a). In addition, the Council notes the requirements in 14303(b) to refer to beneficiaries by their requested gender, name, and pronouns.

Comment: Based on the text and the accompanying initial statement of reasons, the County interprets section 14303(a) to prohibit a covered entity from compelling the disclosure of a person's sex as a condition to gaining equal access to benefits, programs, or activities, absent a valid legal defense for requiring such disclosure.

The County agrees that disclosure of an individual's sex should be, in the vast majority of circumstances, voluntary rather than compulsory. However, the proposed language of section 14303(a) could be misinterpreted in a manner that undermines the goal of promoting equality

and inclusion—including by entities that oppose inclusive practices for transgender and nonbinary individuals. For example, the broad prohibition on "[i]nquiries … that directly or indirectly identify a person on the basis of sex" could be misinterpreted to prohibit asking what pronouns a person uses or asking a person's gender in order to accurately translate information about the individual into another language (*e.g.*, for ballots and voter information guides where a
candidate's title or occupation is included), even though such inquiries are often essential and appropriate to promoting inclusive and non-discriminatory treatment. Other circumstances where it may be appropriate or necessary to ask a person's gender or sex include intake processes for supportive housing programs designed for survivors of gender-based violence to assist with safety planning or during the booking process for county jails to ensure inmates, including transgender or gender nonconforming individuals who may be subject to heightened safety risks in certain settings, are housed appropriately and safely.

Accordingly, the County urges the Civil Rights Council to remove language in section 14303(a) that could be mistakenly interpreted to prohibit reasonable and necessary inquiries regarding sex. The Civil Rights Council should further clarify that covered entities are prohibited from *requiring* applicants or participants to disclose their sex in order to obtain access to benefits or services (absent a legal justification for doing so) but are not barred from making respectful
inquiries on the subject where the information is not being sought for illegal purposes.

Council Response: The Council declines to make the suggested changes to section 14303(a) because doing so is not necessary to add clarity to the regulations. The information may be requested on a voluntary basis for recordkeeping under section 14303(a), and the list of permissible defenses in section 14303(a) is non-exhaustive, so covered entities may establish other grounds by which inquiries into a person's sexual orientation or sex, including gender, gender identity, or gender expression, are permitted.

Subsections 14303(b) and (c)

Comment: We support the addition of language at 2 C.C.R. Section 14303(b) and (c) that requires covered entities to honor beneficiaries' requests to be identified by the name, pronoun, and/or gender marker that correspond to their gender identity. However, many Californians bristle at use of the term "preferred" in reference to the gender-aligned name they go by, because it seems to connote a mere whim rather than a core aspect of respectful treatment, because California recognizes common law name changes, and because many transgender and nonbinary individuals who would like to secure court-ordered name changes are unable to do so because of barriers related to cost or criminal record. We suggest either revising these two subsections to state that beneficiaries may request use of a name (and pronoun and gender marker) that "aligns with their gender identity" (and that covered entities

must identify beneficiaries in accordance with such requests), or alternatively substituting the term “lived name” for “preferred name” and defining that term.

Council Response: The Council agrees that the term “preferred” is not universally accepted, for the reasons stated by the commenter. However, the Council declines to make the suggested changes because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Article 12. Specific Practices Prohibited – Disability, Medical Condition, and Genetic Information

§ 14325. Definitions

Comment: 2 CCR 14325 is again just cross-referring back to 2 CCR 14020 definitions for “disability, genetic information and medical condition.” This is not necessary and this section should be stricken in its entirety.

Council Response: The Council declines to make the suggested change because section 14325 is necessary to add clarity to the regulations.

§ 14326. Prohibited Practices on the Basis of Disability

Subsection 14326(a)

Comment: Under Section 14025 of the proposed regulations, it is prohibited for a covered entity to: “(a) discriminate against or deny full and equal access to a person on the basis of the person’s actual or perceived disability.” We support this definition. It prohibits courts from denying full and equal access to justice in a conservatorship proceeding.

Council Response: The Council assumes that the commenter intended to reference Subsection 14326(a), which contains the language cited by the commenter. The Council appreciates this comment.

Comment: 2 CCR 14326 should be stricken entirely. Again, section 14326(a) is redundant to concepts already included under 2 CCR 14000 making actual or perceived disability a protected basis against discrimination. Section 14326(b) again seeks to extend protected status merely on association with persons in a protected class, which creates a huge pool of litigants with no “membership” in the protected class. This is an impermissible expansion of protected basis, which requires legislative action. Section 14326(c) again expands the protected basis to membership in an organization identified with or promoting interests of persons with disabilities – without actually being a member of that protected class. This again expands the class of persons having a protected status beyond what the legislature has done.

Council Response: The Council disagrees with this comment because the proposed language is necessary for clarity. The proposed language including membership in an organization as a type of “association” appropriately implements existing legislation, as Section 11135(d) explicitly

protects people who are "associated with a person who has, or is perceived to have, any of those characteristics." Membership in a particular organization is one of a non-exhaustive list of examples of how individuals may be associated with persons who are or perceived to be members of a protected class.

§ 14327. Reasonable Accommodations

Comment: Under Section 14327 of the proposed regulations, "It unlawful for a covered entity to fail or refuse to provide a reasonable accommodation as needed to afford an individual with a disability a full and equal opportunity to use or enjoy programs, activities or services. Upon receiving a request for a reasonable accommodation, covered entities shall engage in a good faith interactive process to determine an effective reasonable accommodation." This regulation erroneously perpetuates a misconception that a covered entity must only initiate an interactive process upon request for an accommodation. That is not so.

The Council explained its reason for this regulation as follows: "The provision is necessary to ensure that individuals with disabilities are able to fully and equally access programs and services." Civil Rights Council, Initial Statement of Reasons, p. 71. However, many people with mental or developmental disabilities are unable to make a request for accommodations. The nature and severity of their disabilities prevents them from doing so.

Any program or activity that is funded by the state shall meet the protections and prohibitions of Title II of the ADA and federal rules and regulations implementing the ADA. Cal. Gvt. Code Sec. 11135. A public entity must offer accommodations for known physical or mental limitations. (Title II Technical Assistance Manual of DOJ.) Even without a request, an entity has an obligation to provide an accommodation when it knows or reasonably should know that a person has a disability and needs a modification. (DOJ Guidance Memo to Criminal Justice Agencies, January 2017.)

Some people with disabilities are not able to make an ADA accommodation request. A public entity's duty to look into and provide accommodations may be triggered when the need for accommodation is obvious. *Updike v. Multnomah County*, 870 F.3d 939 (9th Cir 2017). It is the knowledge of a disability and the need for accommodation that gives rise to a legal duty, not a request. *Pierce v. District of Columbia*, 128 F.Supp.3d 250 (D.D.C. 2015).

A request for accommodation is not necessary if a public entity has knowledge that a person has a disability that may require an accommodation in order to participate fully in the services. Sometimes the disability and need are obvious. *Robertson v. Las Animas*, 500 F.3d 1185 (10th Cir. 2007).

The failure to expressly request an accommodation is not fatal to an ADA claim where an entity otherwise had knowledge of an individual's disability and needs but took no action. *A.G. v. Paradise Valley*, 815 F.3d 1195 (9th Cir. 2016). The import of the ADA is that a covered entity should provide an accommodation for known disabilities. A request is one way, but not the only

way, an entity gains such knowledge. To require a request from those who are unable to make a request would eliminate an entire class of disabled persons from the protection of the ADA. *Brady v. Walmart*, 531 F.3d 127 (2nd Cir. 2008).

The Judicial Branch erroneously informs court users that disability accommodations are only provided on request. Rule 1.100 of the California Rules of Court focuses solely on requests. It is silent about the court's duty to provide accommodations or initiate an interactive process for disabilities that are known or obvious. A Judicial Council brochure published in 2017 states: "If no request for an accommodation is made, the court need not provide one." Websites, booklets, and other educational materials published by covered entities within the Judicial Branch are all premised on the need for a request. This proposed regulation reinforces this misunderstanding.

We propose an amendment to Section 14327. A sentence should be added at the end: "It unlawful for a covered entity to fail or refuse to provide a reasonable accommodation as needed to afford an individual with a disability a full and equal opportunity to use or enjoy programs, activities or services. Upon receiving a request for a reasonable accommodation, covered entities shall engage in a good faith interactive process to determine an effective reasonable accommodation. **Even without a request, an interactive process should be initiated when a qualified disability is known or obvious.**"

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] Strike the phrase "or services" and add the word "or" between "program" and "activity" because services are included within the definition of "program or activity."

Council Response: The Council agrees with this comment and proposes to make this change.

Comment: CDSS is currently in compliance with, and ensures the entities it oversees are also in compliance with, the Americans with Disabilities Act of 1990 (ADA) and implementing regulations. Pursuant to these regulations, a government entity must provide a qualified individual with a disability with the accommodation they have requested, except in the limited circumstances in which doing so would fundamentally alter the nature of the program, service or activity; or impose an undue financial or administrative burden, taking into account the resources available to the program, service, or activity. (28 CFR § 35.150.)

Section 14327 would make it "unlawful for a covered entity to fail or refuse to provide a reasonable accommodation as needed to afford an individual with a disability a full and equal opportunity to use or enjoy programs, activities or services." "Reasonable accommodation" or "reasonable modification" would be defined by section 14020(pp) using language similar to that used in Section 202 of the ADA. The ISOR clarifies that it is CRD's intent to use the ADA meaning

for purposes of its regulations. However, the draft regulations do not incorporate the ADA's above-described test for a request's reasonableness. Thus, in cases of requests for accommodations that are unusual or difficult to provide, a covered entity would be left to determine whether the accommodation is "needed to afford an individual with a disability a full and equal opportunity" regardless of the burden placed on the entity or the nature of the program. CDSS proposes that the test for reasonableness of an accommodation request described in Part 35.150 of Title 28 of the Code of Federal Regulations be incorporated into CRD's regulations.

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: 2 CCR 14327 should be stricken entirely. This seeks to have covered entities engage in reasonable accommodation with any individual with a disability. The legislature has provided that employers must reasonably accommodate employees or job applicants with disabilities, but not any person who might have a disability. Rather than ensuring access to programs for persons with disabilities who are not employees, this attempts to make interaction and providing reasonable accommodation mandatory for any person with a disability. That is an unreasonable expansion of obligations and rights – which the legislature has not done.

Council Response: The Council disagrees with this comment. Covered entities are required to provide reasonable accommodations to individuals with disabilities so that they have full and equal opportunity to use or enjoy programs, activities, or services. This protection is not limited to employees and job applicants.

§ 14328. Medical Condition

Comment: 2 CCR 14328 should be stricken entirely. Again, it is redundant to concepts already included under 2 CCR 14000 making medical condition a protected basis against discrimination. Further, it cross-references definitions to section 14020 in the same statutory scheme, which is unnecessary.

Council Response: The Council declines to make the suggested change because section 14328 is necessary to add clarity to the regulations.

§ 14329. Genetic Information

Comment: 2 CCR 14329 should be stricken entirely. Again, it is redundant to concepts already included under 2 CCR 14000 making genetic information a protected basis against discrimination. Further, it cross-references definitions to section 14020 in the same statutory scheme, which is unnecessary.

Council Response: The Council declines to make the suggested change because section 14329 is necessary to add clarity to the regulations

§ 14330. Confidentiality

Subsection 14330(a)

Comment: 2 CCR 14330(a) should be revised to remove the reference to information "concerning a request for a reasonable accommodation" since this may not apply to all purposes and it is already covered in reference to information concerning disability or medical condition. Therefore, the employer's obligation to preserve information, when an employee requests reasonable accommodation, will already be covered by the confidentiality provisions in this section.

Council Response: The Council declines to strike this language because it is necessary to add clarity to the regulations.

§ 14331. Assistance Animals

Comment: In general, the Council should consider clarifying in this section that lack of vaccination records and an animal license shall not be the basis for denial of permission to have an assistance animal.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14331(a)

Comment: 2 CCR 14331(a) should be stricken entirely. It cross--references the definition for "assistance animals" to section 14020 in the same statutory scheme, which is unnecessary. Similarly, the cross-reference text in 14331(b), again referring back to 14120 for a definition for "service animal", should be stricken as unnecessary. The cross-reference text for "direct threat" definition in 14120 should also be deleted as unnecessary. The cross-reference text in 14331(c), again referring back to 14120 for a "support animal" and "direct threat" definition in 14120 should be deleted as unnecessary. And the cross-reference in 14331(d) for the "assistance animal" definition under 14120 should be deleted as unnecessary.

Council Response: The Council declines to strike this language because it is necessary for clarity.

Subsection 14331(b)

Comment: [A coalition of commenters writes:] Subsection (b) states in part, "Individuals with disabilities are permitted to have service animals [as defined] in all locations and facilities operated or controlled by covered entities." This may not be accurate in all circumstances. The Council should consider revising this proposed section to clarify that the access right extends to all areas of a public entity's facilities where members of the public, participants in services,

programs or activities, or invitees, as relevant, are allowed to go, consistent with 28 C.F.R. § 35.136(g).

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14331(d)(3)

Comment: [A coalition of commenters writes:] Subsection (d)(3) should be revised as follows:

[Provisions applicable to all assistance animals as defined in section 14020(f) include:] An individual with an assistance animal may be required to cover the costs of repairs for damage the animal causes to the premises, excluding ordinary wear and tear, if it is the provider's usual practice to charge for such damage;

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14331(d)(6)

Comment: [A coalition of commenters writes:] Subsection (d)(6) discusses reasonable conditions that may be imposed on the use of an assistance animal. This proposed section should include clarification that animal behavior that may constitute a nuisance does not include occasional barks, others' allergies, or others' fear of animals.

Council Response: The Council declines to implement the suggested change because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in rulemaking.

Subsection 14331(d)(8)

Comment: [A coalition of commenters writes:] We recommend an organizational change to move section 14331(d)(8) ["If an individual with a disability is denied permission..."] to the end of section 14331 (d) so that it becomes 14331(d)(9). This will efficiently ensure that the exceptions to the requirement for assistance animals are discussed first to have a clear timeline of when an individual would be denied permission in section 14331(d)(8).

Council Response: The Council agrees with this comment and proposes to implement the change to increase clarity.

Comment: [A coalition of commenters writes:] Subsection (d)(8) discusses denial of permission to have an assistance animal; this proposed section should be amended to be consistent with federal regulations pertaining to service animals. Specifically, if permission is denied, the individual with a disability shall be given the opportunity to participate in the service, program,

or activity without having the service animal on the premises. 28 CFR 35.136(c) ("If a public entity properly excludes a service animal [], it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.").

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Subsection 14331(d)(9)

Comment: 2 CCR 14331(d)(9) again cross-references to the definition of "direct threat" in 2 CCR 14120 and this should be deleted as unnecessary (including both instances of reiterated information in parentheses). Similarly, the cross-reference under 14331(d)(9)(A) and (B) to 14120 for the definition of "assistance animal" should be deleted as unnecessary. And the repeated cross-reference under 14331(d)(9)(C) for "assistance animal" definition to 14120 should be deleted.

Council Response: The Council declines to make the suggested changes because section 14331(d)(9) is necessary to add clarity to the regulations.

§ 14332. Integrated Setting

Comment: [A coalition of commenters writes:] For consistency and to avoid confusion, after the word "administer," insert "conduct, or operate."

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: [A coalition of commenters writes:] We recommend adding the definition of "integrated setting" to the language already housed in the section, or, in the alternative, include the definition in Article 2. "General Definition." As currently read, section 11135 does not define "integrated setting" itself, instead stating that it is prohibited to fail to administer an integrated setting. The definition of "integrated setting" can be duplicated from HUD and is as follows: "The most integrated setting is one that enables individuals with disabilities to interact with persons without disabilities to the fullest extent possible, consistent with the requirements of the Americans with Disabilities Act (42 U.S.C. 12101 et seq.) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)." (24 C.F.R. § 5.151; see also 28 C.F.R., part 35, appendix B (2010) [addressing 28 CFR 35.130 and providing guidance on the American with Disabilities Act regulation].)

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

§ 14333. Communications

Comment: [A coalition of commenters writes:] Subsection (a) provides that "covered entities shall give priority to the expressed preference for the method of communication requested by an individual with a disability." The proposed regulation should specify that "shall give priority to" means that the covered entity must provide the requested method of communication *unless* it would constitute an undue burden or fundamental alteration. A covered entity's showing of equally effective alternative auxiliary aid or modification should not override an individual's requested auxiliary aid or service of choice if the requested auxiliary aid or service is able to be provided without undue burden.

Due to the overlap regarding prohibited practices based on ancestry, ethnic group identification, national origin, and disabilities, we recommend this addition to end of this section:

14333 (d) The prohibitions and sanctions in this section shall be in addition to the definitions, prohibitions, and sanctions imposed in sections 14020, 14100, and 14101, and shall not be interpreted in a manner that would frustrate or undermine their purpose.

Council Response: The Council declines to adopt the language suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Comment: Please see the attached document, "California Civil Rights and Americans with Disabilities Act (ADA) Telecommunications". My colleagues and I had a Zoom meeting with Senator Edward Markey on April 22, 2021, and the United States Department of Justice (DOJ) on September 30, 2021, regarding Americans with Disabilities Act (ADA) Title II 28 C.F.R. §35.161 and §35.162. The purpose of the meeting was to request consideration in updating or clarifying the Americans with Disabilities Act Title II 28 C.F.R. §35.161 and §35.162 to allow individuals with disabilities, including individuals who are deaf, deafblind, or hard of hearing or have speech disabilities, access and communication with 9-1-1 emergency service directly via equally effective telecommunications technologies (voice, video, text, and data). The topic regarding 9-1-1 emergency services that we discussed also applies to N-1-1 codes such as 2-1-1, 3-1-1, and 5-1-1 non-emergency services.

DOJ was asked to be aware of the language when Section 35.161 was codified, and all levels of government agencies believed that their obligations were satisfied by supporting only the antiquated analog technology, Teletypewriter for the Deaf (TTY).

Senator Markey is currently updating the 21st Century Communications and Video Accessibility Act of 2010 (CVAA), which may be cited as the "Communications, Video, and Technology Accessibility Act of 2022 (CVTA)''.

In reference to emergency notifications and alerts, individuals who are deaf, deafblind, and hard of hearing and individuals who have other disabilities such as cognitive disabilities,

blindness, or low vision have continued to face many challenges in getting information through media and technology. They should be able to simultaneously receive emergency notifications and alerts via Wireless Emergency Alert (WEA), Short Message Service (SMS), Multi-media Message Service (MMS), and an equally effective emergency notification system.

[The document attached to the commenter's comments, in pertinent part, included the following recommendations regarding revisions to the ADA regulations regarding Telecommunications and Telephone Emergency Services:]

It is recommended that ADA Sections 35.161 and 35.161 be modified and replace text telephones (TTYs) with Synchronous Communication and equally effective Telecommunication Technologies.

§ 35.161 Telecommunications

Current Language: (a) Where a public entity communicates by telephone with applicants and beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

Proposed language: (a) Where a public entity telecommunicates with applicants and beneficiaries, the entity shall provide direct synchronous communication via equally effective telecommunications technologies (voice, video, text, or data) shall be used to communicate with individuals who are deaf or hard of hearing or have speech disabilities.

§ 35.162 Telephone Emergency Services

Current Language: Telephone emergency services, including 911 services, shall provide direct access to individuals who use TDD's and computer modems.

Proposed Language: Public entities that provide emergency call services (9-1-1 and Next Generation 9-1-1), alerts, and notifications must make them readily accessible to and usable by individuals with disabilities via equally effective telecommunications technologies (voice, video, text, or data).

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Subsection 14333(a)

Comment: Under Section 14327 of the proposed regulations, "(a) It is a prohibited practice for a covered entity to fail to take appropriate steps to ensure that communications with individuals with disabilities . . . are as effective as communications with others. Covered entities shall give priority to the expressed preference for the method of communication requested by an individual with a disability. (b) For purposes of this article, individuals with disabilities include

persons with developmental, mental health, or intellectual disabilities who have limited ability to understand English." We support this regulation and commend the Council for broadening the regulation beyond the customary scope of visual or hearing disabilities to include communication problems experienced by people with mental or developmental disabilities.* This will require courts, especially in probate conservatorship proceeding where 100% of conservatees or propose conservatees have problems understanding what is said to them, or processing information, or expressing themselves in a way that would constitute effective communication. Although this regulation is declarative of existing law, compliance courts will need to make changes in the way they interact with litigants who have known mental disabilities that interfere with effective communication. Under current policies and practices, courts are not doing anything to ensure effective communication by litigants with mental or developmental disabilities.

(**The Council proposes to add this new subsection to clarify that a broad range of individuals with disabilities may have communication-related disabilities, including people with developmental, mental health, or intellectual disabilities and people with manual and sensory disabilities. This is necessary to dispel stereotypes that only people who are blind or deaf need communication assistance and to ensure that the full range of people with disabilities covered by Article 9.5 receive communication assistance as needed.*) Civil Rights Council, Initial Statement of Reasons, p. 80.

Council Response: The Council assumes that the commenter intended to reference proposed subsection 14333(a), which contains the language cited by the commenter. The Council appreciates the comment.

§ 14334. Self-Evaluation

Comment: [A coalition of commenters writes:] Subsection (b) states, "A self-evaluation performed by a recipient as required by a federal agency under the provisions of section 504 of the Rehabilitation Act of 1973 should be permitted to satisfy the provisions of subsection (a) (1) of this section." We recommend clarifying that any "substitute" evaluations be no more than five years old and that new self-evaluations be completed at minimum every ten years. The Council may wish to clarify whether, and to what extent, an ADA self-evaluation conducted pursuant to 28 CFR 35.105 would satisfy the provisions of subsection (a)(1).

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

§ 14335. Program Accessibility

No comments received.

§ 14336. Methods of Ensuring Program Accessibility

Comment: [A coalition of commenters writes:] We suggest the following additional language to section 14336 as proposed:

[Second sentence]: A covered entity is not required to make structural changes in existing facilities where other methods are equally effective in achieving compliance with section 14335.

[Add after current last sentence]: A covered entity's compliance with section 14335 cannot be contingent upon the cooperation of third persons.

The proposed caveat that a covered entity's compliance cannot be contingent upon the cooperation of third parties is consistent with relevant case law. (See *Sarfaty v. City of Los Angeles*, No. 2:17-CV-03594-SVW-KS, 2020 WL 4697906, at *6 (C.D. Cal. Aug. 12, 2020); see also *Am. Council of the Blind v. Paulson,* 525 F.3d 1256, 1269 (D.C. Cir. 2008); *Disabled in Action v. Board of Elections in the City of New York,* 752 F.3d 189, 200 (2d Cir. 2014) (access "should not be contingent on the happenstance that others are available to help").)

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

§ 14337. Time Period for Compliance

Comment: [A coalition of commenters writes:] For consistency and to avoid confusion, replace the word "discriminatory" with the more inclusive term "prohibited."

Council Response: The Council declines to replace the word "discriminatory" with the term "prohibited," because the proposed regulations are sufficiently clear without this change.

§ 14338. Transition Plan

Comment: [A coalition of commenters writes:] This section describes the development of transition plans where structural changes to facilities are necessary to meet the requirements of section 14335 (Program Accessibility). We recommend clarifying whether a transition plan created for the purposes of complying with the ADA meets the requirements set forth in this section; and if so, that such transition plan be no more than five years old.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comment: We also suggest that a clause be added to require updates or progress reports to a transition plan be provided every two years.

Council Response: The Council declines to adopt the changes suggested by the commenter because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

§ 14339. Notice of the Availability of Accessible Facilities

No comments received.

§ 14340. New Construction

No comments received.

§ 14341. Alteration

No comments received.

§ 14342. Accessibility Standards

No comments received.

§ 14343. Accessible Transportation

Comment: [A coalition of commenters writes:] We applaud the Council for including the vital aspect of transportation to a person's civil rights, as transportation can affect many other parts of a disabled individual's life needs including whether a person is able to pursue a career, schooling, or find housing.

Council Response: The Council appreciates this comment.

Comment: Subsection (b) references section 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended, as well as certain U.S. Department of Transportation implementing regulations. Here, we suggest also specifically referencing U.S. Department of Justice regulations at 28 C.F.R. parts 35 and 36, which may also apply in some circumstances.

Council Response: The Council agrees with this comment and proposes to implement the suggested change.

COMMENTS RECEIVED DURING APRIL 3, 2023, PUBLIC HEARING [Government Code Section 11346.9(a)(3)].

Comments from Councilmembers

Councilmember Comment: The Council should consider adding "non-binary" to the categories set forth in proposed section 14020(rr).

Council Response: The Council declines to adopt the change suggested by the commenter because the proposed regulations are sufficiently clear without it and implementing the change is likely to cause undue delay in the rulemaking.

Councilmember Comment: Proposed subsection 14303(e) mentions permissible defenses but unclear what would constitute such a defense because the corresponding FEHA regulation does not have similar language.

Council Response: The Council declines to implement changes based on this comment because the proposed regulations are sufficiently clear without them and implementing the changes is likely to cause undue delay in the rulemaking.

Comments from the Public

Comment: Richard Grow urged that the Council move quickly to implement these regulations and noted that the regulations were also important for environmental justice issues.

Council Response: The Council appreciates this comment and recognizes the need for expediency in implementing the proposed regulation. No further response is required because the commenter did not recommend changes to the proposed regulations.

Comment: Kendra Muller, an attorney speaking on behalf of Disability Rights California, noted that the Council's attentiveness to experts in the field have led to comprehensive proposed regulations. Ms. Muller also highlighted several comments included in a letter submitted by a coalition of civil rights organizations on April 3, 2023 ("April 2023 Coalition Letter").

Council Response: The Council appreciates this comment. Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Pui-Yee Yu, a staff attorney with the Legal Aid Foundation of Los Angeles, expressed appreciation for the work of the Council and also highlighted several comments included in the April 2023 Coalition Letter, including comments regarding equitable language access.

Council Response: The Council appreciates this comment. Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Claudia Center, an attorney from the Disability Rights Education and Defense Fund, expressed strong support for the draft regulations and highlighted several comments included in the April 2023 Coalition Letter, including the importance of clarifying the scope and length of time of coverage as well as the definitions of "direct threat," "qualified interpreting," and "video remote interpreting."

Council Response: The Council appreciates this comment. Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Ashley Werner with the Leadership Council for Justice and Accountability endorsed the April 2023 Coalition Letter and highlighted the importance of recognizing environmental disparities in entities covered by Article 9.5.

Council Response: The Council appreciates this comment. Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Cynthia Martinez, Program Coordinator at California Rural Legal Assistance, thanked the Council for its efforts and endorsed the April 2023 Coalition Letter, highlighting the importance of the definitions of "qualified interpreter" and "alternative communication services."

Council Response: The Council appreciates this comment. Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Andrew Menor from Asian Resources, Inc. commended the Council and endorsed the April 2023 Coalition Letter, emphasizing the importance of the definitions and requirements necessary to ensure language access.

Council Response: The Council appreciates this comment. Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Thomas Coleman, Legal Director of the Spectrum Institute, commended the Council and highlighted several comments set forth in the Spectrum Institute's written comment letter, focusing on accommodations for individuals with developmental and mental disabilities in the judicial process.

Council Response: The Council appreciates this comment. Summaries of and responses to the comments included in the Spectrum Institute's letter are set forth in the appropriate sections above.

Comment: Kel O'Hara from Equal Rights Advocates highlighted suggestions contained in the April 2023 Coalition Letter, including that the regulations should guard against increasing legal attacks against transgender Americans.

Council Response: The Council appreciates this comment. Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Nisha Vyas from the Western Center on Law and Poverty endorsed the Coalition Letter.

Council Response: Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Gladys Limon, an environmental justice and civil rights attorney commenting in her personal capacity, referenced the April 2023 Coalition Letter, highlighting the importance of these proposed regulations for communities disproportionately affected by environmental harms and emphasizing revisions to the language to provide more clarity and ensure that the state protections are as strong as the federal protections.

Council Response: The Council appreciates this comment. Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Diane Chiling from Bay Area Legal Aid endorsed the April 2023 Coalition Letter and highlighted the importance of regulations regarding qualified interpreters, particularly in the context of ensuring disability accommodations and multilingual access in the Civil Rights Department Complaint Process.

Council Response: Summaries of and responses to the comments included in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Fausto Sanchez, a community worker for California Rural Legal Assistance, emphasized the importance of alternative communication access for individuals who speak less common languages.

Council Response: Summaries and responses to comments regarding language access, including comments raised in the April 2023 Coalition Letter, are set forth in the appropriate sections above.

Comment: Archie Roundtree, Jr., Registered Legal Services Attorney for Justice in Aging, voiced support for the proposed regulations and stated that they will help to address age discrimination.

Council Response: The Council appreciates this comment.

Comment: Kevin Baker expressed appreciation for the work done on these proposed regulations by former Councilmembers Brodsky and Schur. He praised the proposed regulations and expressed hope that they will be passed soon.

Council Response: The Council appreciates this comment.

COMMENTS RECEIVED DURING AUGUST 29, 2023, COUNCIL MEETING [Government Code Section 11346.9(a)(3)].

Comments from Councilmembers

Comment: In proposed section 14026(a)(4), the phrase "to receive" should be added before the language "as truly effective a program or activity as that provided to others."

Council Response: The Council agrees with this comment in part and accordingly proposes to add "to" prior to the language beginning "as truly effective." However, the Council disagrees that the addition of "receive" is necessary for clarity and declines to add that language.

Comment: A Councilmember, referencing proposed section 14026(a)(3) and (a)(4) questioned how the effectiveness of "full and equal access" is measured, or whether that was a term of art.

Council Response: The Council clarified during the meeting that "full and equal access" is a term of art.

Comments from the Public

Comment: Dara Schur, in her individual capacity and not as an attorney with Disability Rights California, commented on several aspects of the First Modification to the Proposed Text, including the following:

- "Diagnosis" should not be removed in proposed section 14020(p)(4), because the term is used in case law, is not necessarily encompassed in a "history" or "record" of disability, and knowledge of a diagnosis alone can lead to discriminatory conduct. Further, removing "diagnosis" in the definition of "physical disability" is inconsistent with its inclusion in the definition of "mental disability."
- The definition of "perceived as having an impairment" in proposed section 14020(p)(6) should be reinstated because the concept is included in other contexts including the FEHA statute and implementing regulations.
- The definition of "translator" should be restored. Likewise, "or a qualified translator" after "alternative communications services in the section
- The Council should further consider adopting many of the suggestions made by other commenters, if not in the current rulemaking, then in a future rulemaking.

Council Response: The Council agrees in part with this comment, to the extent it recommends reinstating "diagnosis" in the definition of "physical disability" in order to remain consistent with the definition of "mental disability."

The Council declines to adopt the remainder of the changes suggested by the commenter because the regulations are clear without them and implementing the changes would likely cause undue delay in the rulemaking.

Comment: Joann Lee from the Legal Aid Foundation of Los Angeles, a member of the coalition that submitted the Coalition letter during the initial 45-day comment period, noted her disappointment that the revised regulations are not aligned with current, more comprehensive language access rights and urged changes in line with written comments in a letter submitted

by a coalition of civil rights organizations on September 15, 2023 (September 2023 Coalition Letter).

Council Response: Summaries and responses to comments regarding language access, including comments raised in the September 2023 Coalition Letter, are set forth in the appropriate sections below.

Comment: Kel O'Hara from Equal Rights Advocates, a member of the coalition that submitted the April 2023 Coalition Letter during the initial 45-day comment period, noted her disappointment that the Council did not implement changes to the definitions of "sex" and "gender" as suggested in the Coalition Letter.

Council Response: This comment reiterates a comment previously made during the 45-day comment period. As such, it is not responsive to the text noticed for the first 15-day comment period and is therefore outside the scope. No further response is required per Government Code section 11346.9(a)(3). However, the Council notes that summaries and responses to comments raised in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Ashley Werner from the Leadership Council for Justice and Accountability, a member of the coalition that submitted the Coalition Letter during the initial 45-day comment period, noted that she did not recognize any changes in the latest version of the proposed regulations that implemented previous suggestions to clarify that programs and activities are not adversely affecting protected classes and fully encompass the environmental justice issue.

Council Response: This comment reiterates comments previously made during the 45-day comment period. As such, it is not responsive to the text noticed for the first 15-day comment period and is therefore outside the scope. No further response is required per Government Code section 11346.9(a)(3). However, the Council notes that summaries and responses to comments raised in the April 2023 Coalition Letter are set forth in the appropriate sections above.

Comment: Lisa Cooley asked what the department is doing to ensure that affordable accessible housing is made available to people with disabilities.

Council Response: This comment falls outside the scope of the rulemaking; accordingly, no further response is required per Government Code section 11346.9(a)(3).

COMMENTS RECEIVED DURING THE FIRST 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)] AND ADDITIONAL REVISIONS

Article 1. General Matters

Comment: While we continue to commend the Council's many valuable proposals, and urge the swift adoption of final regulations after so many years of delay, we are disappointed that almost none of the recommendations set forth in our comments of April 3, 2023 are reflected

in the First Modifications. We urge the Council to promptly address our unresolved issues in further revisions following adoption of the initial set of regulations.

Council Response: This comment reiterates previously submitted commits and falls outside the scope of the proposed language submitted for the first 15-day comment period; accordingly, no further response is required per Government Code section 11346.9(a)(3).

Comment: What is the department doing to increase access to affordable and accessible housing for people who have disabilities?

Council Response: This comment falls outside the scope of the rulemaking; accordingly, no further response is required per Government Code section 11346.9(a)(3).

Article 2. General Definitions

§ 14020. Definitions

Subsection 14020(c). "Age"

Comment: DWR reiterates that California Code of Regulations section 14020(c) provides a definition for age discrimination that conflicts with statutory definitions. Government Code 12926(b) is very clear that age discrimination is limited to those who have reached a 40th birthday. The definition provided under these regulations is ambiguous and uncertain to give any guidance for avoiding discriminatory practices or effect. Whereas "age distinction" or "age-related term" may need explanation, the sentence defining "age" is not necessary. GC 11135 specifies that the definitions in this section have the same meaning as those in GC 12926.

Council Response: This comment reiterates a comment previously made during the 45-day comment period. As such, it is not responsive to the text noticed for the first 15-day comment period. The Council directs the commenter to its response to this comment when made during the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Subsection 14020(g). "Associated with"

Comment: Various sections of the proposed regulations provide that "associated with" means "membership in or association with an organization identified with or seeking to promote the interests of a protected class." However, Section 11135 protects "persons" or individuals from being discriminated on the basis of an intrinsic protected characteristic, not membership.

2 CCR 14020(g), which defines "[a]ssociated with" needs to be limited to those who have some association with a person of a protected class and not just those who support a cause or are affiliated with associations or organizations that advocate the interests of members of protected classes. In the Fair Employment and Housing Act (FEHA), "association" is mentioned in Government Code section 12926(o). In this definition, it clearly limits association "with a person who has, or is perceived to have, any protected characteristics." Government Code

section 11135, subdivision (d) similarly protects "a perception that a person has any of those characteristics or that the person is **associated with a person** who has, or is perceived to have, any of those characteristics. (emphasis added.) Section 11135 requires a relationship with a person who has a protected characteristic. But it does not encompass a relationship with an advocacy association. What if the association is composed of members of a protected class and those that are not in the protected class? How would an individual claiming discrimination prove their claim when it is based on membership with an organization? The intent of the statute is to protect against discrimination when associated with a person with a disability or other protected characteristic. The statute protects individuals or persons based on their intrinsic characteristics or the intrinsic characteristics of those individuals with whom they associate. The statute does not support the expansive definition of including membership or association with organizations, schools, clubs, associations or just being on the premises of some place associated with a protected class. This is incidental affiliation and not an intrinsic characteristic of a person or some relationship with a person in a protected class. This will create needless litigation and confusion. Although the Council made no changes responsive to comments, it is too important to not urge the Council to reconsider deleting this expansive language from 2 CCR 14020 and other sections with similar language.

Council Response: The Council considered this comment during the 45-day comment period and addresses it in that section of this document. The Council made no changes to this subsection for purposes of the first 15-day notice other than replacing "churches, temples, or mosques," with "places of worship" – a modification that the above commenter does not mention. In any event, the Council declines to implement the change suggested by the commenter for the same reasons it set forth in response to this comment when made during the 45-day comment period.

Subsection 14020(m). "Covered Entity"

Comment: 2 CCR 14020(m)(7) defines a "covered entity" subject to GC 11135 as one to which "state support is extended" in addition to those that receive state support. This is broader than GC 11135 which applies only to those entities receiving state support in some way. Also, it would be impossible to apply these regulations practically to any entity that might be a target, but which never receives those state funds. Therefore, this language should be stricken.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council directs the commenter to its response to this comment during the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Subsection 14020(p). "Disability"

Subsection 14020(p)(4). "Physical Disability"

Comment: Subsection (p)(4) defines "Physical Disability." The Council should not delete the word "diagnosis" from the definition. Discrimination on the basis of a diagnosis (such as a diagnosis of cancer or HIV) needs to be protected in the same way that actual records or history of a disease are protected. A third party may learn of a diagnosis and discriminate on that basis alone without knowing the persons' medical history or without having seen medical records. The FEHA regulations acknowledge this. For example, at 2 CCR § 11065(d)(7)(a), the FEHA regulations note that "Medical condition" is a term specifically defined at Government Code section 12926, to mean . . . any cancer-related physical or mental health impairment from a *diagnosis*, record or history of cancer . . ." (emphasis added).

The Council appropriately does not propose deleting the word "diagnosis" from the parallel provision under "Mental Disability" in Subsection (p)(3) and should not do so here.

Council Response: The Council notes that this comment was submitted between the first 45-day comment period and the first 15-day comment period; accordingly, it was not timely. Regardless, the Council has considered it substantively, and agrees with the comment. It proposes to reinstate the term "diagnosis" in (p)(4).

Comment: Subsection (p)(4) of Section 14020 defines "Physical Disability." The Council should not delete the word "diagnosis" from the definition. Discrimination on the basis of a diagnosis (such as a diagnosis of cancer or HIV) must be protected in the same way that actual records or history of a disease are protected. A third party may learn of a diagnosis and discriminate on that basis alone without knowing the persons' medical history or without having seen medical records.

FEHA and its regulations acknowledge this. For example, at 2 CCR § 11065(d)(7)(a), they note that "Medical condition" is a term specifically defined at Government Code section 12926 to mean . . . any cancer-related physical or mental health impairment from a diagnosis, record or history of cancer . . .." (emphasis added). This term is used also in FEHA under "medical condition" at Government Code section 12926(i)(1).

Definitions under Government Code section 11135(c) are to have the same meaning as the definitions in Government Code section 12926. The Council is still free to further interpret those definitions, consistent with interpretations under FEHA and FEHA regulations. Therefore, there is no barrier to including "diagnosis" in Section 14020(p)(4)(C). This is particularly true since "diagnosis" remains in the definition of "mental disability" at Section 14020(p)(3)(C). The Council appropriately does not propose deleting the word "diagnosis" from the parallel provision under "Mental disability" in Subsection (p)(3)(C) and should not do so here.

Council Response: The Council agrees with the comment and proposes to reinstate the term "diagnosis" in (p)(4).

Subsection 14020(p)(6). "Perceived as having an impairment"

Comment: This Subsection defines "Perceived as having an impairment" and should not be deleted. While there may be some overlap between this term and the terms "regarded as" or "treated as," it is important to leave the term in as it is sometimes used in caselaw. Moreover, the FEHA regulations define "perceived disability" at 2 CCR § 11065(d)(5). Likewise, (p)(6)(A) through (p)(6)(C) are important definitional components and should not be deleted.

Council Response: The Council notes that this comment was submitted between the first 45-day comment period and the first 15-day comment period; accordingly, it was not timely. Regardless, the Council has considered it substantively and declines to reinstate this language because the proposed regulations are sufficiently clear without it.

Comment: This Subsection defines "Perceived as having an impairment" and should not be deleted. While there may be some overlap between this term and the terms "regarded as" or "treated as," it is important to retain "perceive as" because it is a distinct and longstanding term used in caselaw. Moreover, the FEHA regulations define "perceived disability" at 2 CCR § 11065(d)(5). Likewise, (p)(6)(A) through (p)(6)(C) are important definitional components and should not be deleted.

If this section was deleted because people "perceived as" belonging to a protected class are separately protected under Section 14020(ff), it should be reinstated here because subsection (ff) lacks the subparagraphs currently included in Section 140202(p)(6). Subsections (p)(6)(A) through (p)(6)(C) should also remain, and similar subsections should be added to (ff.). Alternatively, the term "perceived as having" and the subsections could be added to Section 14020(p)(3)(E) and (4)(E) so that those sections cover "regarded or treated as" AND "perceived as," along with the subsections currently in (p)(6).

Council Response: The Council declines to reinstate this language because the proposed regulations are sufficiently clear without it.

Subsection 14020(p)(12)

Comment: 2 CCR 14020(p)(12) basically restates many of the concepts covered by GC 12926(m)(1)(A). However, it again goes broader than the statutory scheme and includes "reproductive functions" as a major life activity. This is not provided under the statute, but rather pregnancy and disability related to pregnancy care. What was newly included as a protected basis under FEHA was reproductive health decision-making, but not reproductive functions. Since this impermissibly expands the scope of the underlying law and its intent, it should be removed.

Council Response: This subsection was not substantively amended in the language noticed for the first 15-day comment period. The Council merely corrected an inadvertent reference to subparagraph (p)(6) to subparagraph (p)(11). In any event, the Council responded to this comment in its responses to comments made during the 45-day comment period, and it disagrees with this comment for the reasons stated in that response.

Subsection 14020(y). "Intersectional discrimination"

Comment: 2 CCR 14020(y) was unchanged by the Council but seeks to create some new basis for discrimination that is not needed, redundant and will create confusion. It basically created a "catch phrase" for identifying two or more protected areas of discrimination. This definition and any reference to "intersectional discrimination" throughout this regulatory scheme should be struck since alleging discrimination must be specific to the protected basis anyway, and the grouping of intersectional discrimination will not help plaintiffs or defendants or compliance. Of note, this term was used in 14000(e) with no reference to what it meant.

Council Response: This comment reiterates a comment previously made during the 45-day comment period. As such, it is not responsive to the text noticed for the first 15-day comment period. The Council directs the commenter to its response to this comment when made during the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Subsection 14020(dd). "National origin"

Comment: 2 CCR 14020(dd)(1)(D) and (1)(E) are inconsistent with Government Code section 11135. The statute does not protect membership in or association with an "organization," but association with a person who has or is perceived to have a protected characteristic or class. It does not protect the incidental mere "attendance or participation" in a place of worship or other religious institution generally used by person of a "national origin group," as stated in the Council's proposed regulations. Merely attending an event at a location or paying a membership fee does not impute those intrinsic characteristics and protected characteristics to a person. This is adding an "associational discrimination" status that is only supposed to be tied to a person and not an entity. This is already encompassed in perception of membership in a protected class, which would then conceivably be a factual determination of what lead to that perception.

Council Response: The Council considered this comment during the 45-day comment period and addresses it in that section of this document. The Council made no changes to this subsection for purposes of the first 15-day notice other than replacing "churches, temples, or mosques," with "places of worship" – a modification that the above commenter does not mention. In any event, the Council maintains its declination to implement the change suggested by the commenter for the same reasons it set forth in response to this comment when made during the 45-day comment period.

Subsection 14020(oo). "Reasonable Accommodations" or "Reasonable Modifications"

Comment: 2 CCR 14020(oo) has been added to define what might be the breadth of adjustments in reasonable accommodation. However, the text includes changes or modifications to "licensing, ordinances and regulations." A reasonable accommodation is generally what is in the potential ability of the employer/entity to provide without undue

hardship. Regulations are not crafted for one individual's needs – and perhaps transitory needs. Neither are licensing, ordinances, and regulations. Those are crafted for broader application and not for the individual's circumstance. This is not provided for under the existing statute reference for GC 12926(p) definition. Requiring changes in licensing or regulation for reasonable accommodation for one person could very much conflict with the mandates under which those licenses and regulations are developed and is usurping the power of other entities to determine what is generally necessary for those needs. These references should be removed from the text.

Council Response: This subsection was neither added nor substantively modified in the text noticed for the first 15-day period. The Council simply corrected the alphabetical order of the definitions by switching proposed subsection 14020(oo) (previously the definition of "recipient") and proposed subsection 14020(pp) (previously the definition of "reasonable accommodation" or "reasonable modification.") In any event, the Council declines to delete the references raised in the comment above.

Article 3. Prohibited Practices Relating to All Groups Protected by Article 9.5

§ 14025. General Prohibitions

No comments received.

§ 14026. Discriminatory Practices and Unlawful Denial of Full and Equal Access

Comment: 2 CCR 14026(a)(4) inserted the word "to" and that makes the last sentence unclear. The Council should consider striking the phrase "as truly effective" to provide clarity that the action must be necessary to provide access to a program or activity.

Council Response: The Council disagrees with this comment because the addition of "to" enhances, rather than detracts from, the clarity of this subsection.

Comment: 2 CCR 14026(a)(9)(A) again seeks to expand a protected class to simply having a membership affiliation with some organization that might have an association with a protected class. The legislature has not extended protected class rights to membership and all language referring to this should be stricken.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council directs the commenter to its response to this comment when it was raised during the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

§ 14027. Standards for Determining Discrimination and Unlawful Denial of Full and Equal Access

No comments received.

§ 14028. Types of Evidence and Proof in Intentional Discrimination Cases

Comment: 2 CCR 14028(a) and (b) include an extensive regulatory scheme about "evidence" to prove discrimination. In California, there are extensive statutes promulgated to give guidance about what "evidence" may be used and the limitations of that kind of evidence. State and federal courts opine about evidence and what value it may have and this entire section with discussion of the value of this evidence should be deleted.

Council Response: The Council disagrees with this comment and declines to delete the section for the same reason set forth in its response to this comment when made during the 45-day comment period.

§ 14029. Types of Evidence and Proof in Disparate Impact Discrimination Cases

No comments received.

§ 14030. Other Proof Provisions

No comments received.

Article 4. Remedial Actions

No comments received.

Article 5. Harassment, Coercion, Intimidation, and Retaliation

§ 14070. "Harassment Prohibited"

Comment: 2 CCR 14070(e) pertains to liability for harassment by third parties. DWR reiterates that the U.S. Supreme Court held in *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644 that a theory of direct liability only made sense where "the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action." The Council relied on the U.S. Supreme Court's decision in Davis, which acknowledged that the "power to take action against third parties" is an important consideration in determining liability; yet, the proposed regulations fail to state that the level of "control over the alleged harassment" is a factor to be considered in cases of harassment by third parties.

Similarly, the FEHA also requires some level of control over third parties. Specifically, Government Code section 12940(j)(1) provides that "[i]n reviewing cases involving the acts of nonemployees, the extent of the **employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered**." (emphasis added.) Thus, under the FEHA, control and responsibility over third parties is considered. The same should be the case under these implementing regulations for Government Code section 11135 which rely on the FEHA's definitions under Government Code section 12926. Failing to mention that "control and any other legal responsibility" over a third

party is a factor will create ambiguity in the law by requiring parties to guess whether such a factor must be read into Government Code section 11135 and these implementing regulations – which are extensive. For these reasons, the Council should add the concept of "control and legal responsibility" to the determination of liability for third-party harassment.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

§ 14071. Retaliation Generally

No comments received.

§ 14072. Coercion, Intimidation, Threats, or Interference with Rights Prohibited

No comments received.

Article 6. Specific Practices Prohibited – Age

§ 14080. Definitions

No comments received.

§ 14081. Practices Prohibited on the Basis of Age

Comment: 2 CCR 14081(c) should be removed because it expands protected status to "membership in an organization identified with or seeking to promote interests of persons of a specific age." Not only is this indefinite about what age is referenced by "specific," but it seeks to expand protected status for membership rights. This is not tied to actually being a member of the protected class or even somehow associated with someone of a protected class. It is strictly about membership. With the definition of age being ambiguous in these regulations and the impermissible expansion of protected class to membership in some group, the entire section should be removed. At a minimum, section (c) should be deleted entirely.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

§ 14082. Statutory Exceptions to the Rules Against Age Discrimination

No comments received.

§ 14083. Definition of "Normal Operation" and "Statutory Objective"

No comments received.

§ 14084. Exceptions to the Rules Against Age Discrimination: Normal Operation or Statutory Objective of Any Program or Activity

No comments received.

§ 14085. Burden of Proof

No comments received.

§ 14086. State Agency Review of Policies and Procedures

No comments received.

§ 14087. Recipient Review of Age Distinctions

No comments received.

§ 14088. State Agency Review of Recipient Age Distinctions

No comments received.

Article 7. Specific Practices Prohibited – Ancestry, Ethnic Group Identification, and National Origin

Comment: With respect to Article 7, we are deeply disappointed that the modified proposal is not aligned with improvements to language rights that have evolved over the past several years. The importance of language justice in our communities is well known, and especially highlighted during the recent pandemic. We have seen the denial and/or lack of interpreters and lack of translated materials; increased reliance on machine translations alone, which has proven to be very dangerous; and heightened barriers to digital doors as many operations and portals moved to an online format. We have also seen positive responses from many government officials and entities that have taken steps to promote language justice and clarify what it means to provide meaningful language access in a comprehensive manner. The federal government's Equity Executive Order and other directives illustrate a revamping and modernizing of language access plans across all federal agencies. The U.S. Department of Justice most recently released its modernized Language Access Plan on August 15, 2023, which also embraces many of these evolving principles. Governor Newson's Equity Order also addresses the need for enhanced language access, and statutes have addressed the need for more comprehensive and expansive language rights. Many counties and cities have addressed the need for strengthening language access comprehensively and holistically, requiring the development of comprehensive language access plans and policies. The use of the five-factor analysis and the lack of clarity regarding protections and safeguards around meaningful language services are especially concerning.

Council Response: The Council acknowledges the commentator's disappointment. No further response is required by the Council because this comment is not asking for a particular change in the proposed regulations but rather is making general statements.

Comment: The section 11135 regulations have great potential to demonstrate California's leadership in promoting language justice. Given the enormous diversity in our state, we should be that leader and celebrate the vast language abilities in our communities. Regrettably, if not

revised the proposed modifications will further contribute to the confusion of an already murky patchwork of substandard language access directives. It is especially unfortunate because our community members do not differentiate between city, county, state, or federal departments and agencies, as all of these programs, benefits, and services are critical. The same high level of protections and standards should apply to all, as our linguistically diverse communities deserve to be able to access all programs, services, and benefits with dignity and respect.

Council Response: The Council appreciates this comment. No further response is required by the Council because this comment is not asking for a particular change in the proposed regulations but rather is making a general statement.

§ 14100. Definitions

Subsection 14100(b). "Alternative Communication Services":

Comment: For clarity, the second sentence in Subsection (b), "Alternative communication services," should be modified as follows:

> Alternative communication services include, but are not limited to, the provision of the services of a multi-lingual employee or a qualified interpreter or a qualified translator for the benefit of…."

Counsel response: The Council declines to adopt the proposed language. The Council notes that this comment was submitted between the first 45-day comment period and the first 15-day comment period; accordingly, it was not timely. Further, because the Council did not propose any modifications to this subdivision in the text noticed for the first 15-day comment period, this comment is outside the scope of this rulemaking. No further response is required per Government Code section 11346.9(a)(3).

Subsection 14100(f). "Translator"

Comment: The Commission should not delete the definition of "Translator" in Subsection (f). Translation services are distinct from interpretation services, and translation services are specifically referenced in Subsection (b), which defines "Alternative communication services."

Council response: The Council notes that this comment was submitted between the first 45-day comment period and the first 15-day comment period; accordingly, it was not timely. Regardless, the Council has considered it substantively, and declines to restore the definition of "translator" because the term is not used outside of the "definitions" section, and reinstating the term is not necessary for clarity and would likely cause an undue delay in this rulemaking.

Comment: Specific to the current proposed modifications, the Council should not delete the definition of "Translator" in Subsection (f) of Section 14100. Translation services are distinct from interpretation services, and translation services are specifically referenced in subsection (b), which defines "Alternative communication services." It is critical to understand the difference between the word "interpreting" and "translation," since these terms are frequently

conflated inaccurately. Interpreting refers to spoken/oral or sign language transmission of language. Translation refers to converting written text from one language into another. In existing mandates, there are different legal requirements for when it is necessary to provide spoken or signed interpreting services and when it is necessary to provide proactive written translation services.

As a general principle, all interpreter services must be provided free of charge and without delay for each individual with LEP regardless of the language population's size, cost to the entity, significance of the communication, or proportion of the number of users of the language to the general population. Translation services, on the other hand have varying requirements based on the mandate, regulations, guidance, or other policies, sometimes predicated on numerical population considerations, the importance of the services or written document, and other relevant factors) Because of pervasive misuse of the terms "interpreter" and "translator," any threshold limitations on proactive translation requirements (written language) are commonly conflated with interpreting requirements (spoken or sign language). As a result, there is a widespread misunderstanding among funding recipients that spoken or sign language interpreters are only required for larger language groups. Existing language access mandates are clear on this: spoken and sign language interpreting by a qualified interpreter is always required, no matter how small the population of users of the language in the service area. The Section 11135 regulations should be equally clear on this or they will only increase confusion and violations of existing mandates. As we laid out in our previous comments, which are incorporated herein by reference, the definition of "translator" should not only be retained, but amended as set forth in our April 3, 2023, letter.

Further, the issues caused by deletion of the definition of "Translator" mirror some of the concerns that animated our April 3 comments on the definitions of "Alternative communication services" at 14100(b) and "Multilingual employee" at 14100 (c), which were not adopted by the Council in its most recent modification but remain worthy of consideration.

Council Response: The Council declines to restore the definition of "translator" because the term is not used outside of the "definitions" section, and reinstating the term is not necessary for clarity and would likely cause an undue delay in this rulemaking.

§ 14101. Prohibited Practices on the Bases of Ancestry, Ethnic Group Identification, and National Origin.

Comment: 2 CCR 14101(c) should be stricken because it expands protected status to "membership in an organization identified with, or seeking to promote interests of persons of a particular ancestry, ethnic group identification or national origin." This seeks to legislate an expansion of protected status for membership, which is not tied to actually being a member of the protected class. This is the legislature's prerogative if they choose to make any expansion.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council directs the commenter to its response to this comment during

the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Article 8. Specific Practices Prohibited – Color and Race

§ 14125. Definitions

No comments received.

§ 14126. Prohibited Practices on the Basis of Color and Race.

Comment: 2 CCR 14126(c) again expands the protected basis to membership in an organization identified with or promoting interests of persons of a race or color – without actually being a member of that protected class. This again expands the class of persons having a protected status beyond what the legislature has done and for no other reason than having some sort of membership status. It creates a huge pool of potential litigants with nothing but maybe a supporting interest in the protected class but no "membership" in the protected class. This same objection applies to 2 CCR 14153 (c) (marital status), 2 CCR 14181(c) (religion), 2 CCR 14300(c) (sex or sexual orientation), and 2 CCR 14326(c) (disability).

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council directs the commenter to its response to this comment during the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Article 9. Specific Practices Prohibited – Marital Status

No comments.

Article 10. Specific Practices Prohibited – Religion

No comments.

Article 11. Specific Practices Prohibited – Sex and Sexual Orientation

§ 14300. Prohibited Practices on the Basis of Sex or Sex Orientation

Comment: Article 11 § 14300 of the regulations details specific practices prohibited on the basis of sex. As explained below, discrimination against domestic violence survivors is often a form of sex discrimination, FVAP, along with other legal and advocacy organizations requested in its March 2023 comment letter that language be added to the regulations to clarify that discrimination against domestic violence survivors may be sex discrimination. Although the proposed modifications to the regulations significantly update the definition of sex to clarify the types of gender discrimination that is unlawful under Government Code Section 11135, no updates clarified that discrimination on the bases of a person's status as a victim of domestic violence may be gender discrimination. Therefore, we respectfully request the proposed modifications be edited to ensure all people who are discriminated against on the basis of sex

receive legal protections. Specifically, we suggest adding the following subsection (d) to Article 11 section 14300:

"(d) discriminate against or deny full access to a person on the basis of such person's status as a victim of domestic violence, as such discrimination has the purpose or effect of differentiating on the basis of sex as defined in sections 14020 (rr) and (ss). "Domestic violence" is as defined in Section 6211 of the Family Code."

Discrimination against domestic violence survivors is frequently sex discrimination. Women are much more likely than men to be survivors of domestic violence. Such findings are unsurprising because gender is often a motivating factor for domestic violence. Statistics show that disparities between the socially or culturally constructed roles assigned to women and those assigned to men are at the root of domestic violence. Thus, discrimination against someone because they are a domestic violence survivor will most likely be or result in discrimination against women.3 Adding language to Article 11 § 14300 clarifying this connection between victims of domestic violence and sex discrimination is an important step to stop illegal discrimination against victims of domestic violence.

For these reasons, we ask for the inclusion of language to Article 11 which clarifies that discrimination against victims of domestic violence may be sex discrimination.

Council Response: This is a reiteration of a comment submitted during the first 45-day comment period, and the Council refers to its previous response declining to adopt the suggested language. This comment is outside the scope of the language noticed for the first 15-day period. No further response is required per Government Code section 11346.9(a)(3).

§ 14301. Pregnancy, Childbirth, or Termination of Pregnancy.

No comments received.

§ 14302. Parental, Family, or Marital Status

No comments received.

§ 14303. Inquiries Regarding and Recording of Gender and Name

No comments received.

Article 12. Specific Practices Prohibited – Disability, Medical Condition, and Genetic Information

Comments regarding this Article included those raised by Dara Schur during the August 10, 2023, Council meeting and the reiteration of those raised in the Coalition Letter received during the initial 45-day period, all of which are addressed above.

§ 14325. Definitions

No comments received.

§ 14326. Prohibited Practices on the Basis of Disability

No comments received.

§ 14327. Reasonable Accommodations

No comments received.

§ 14328. Medical Condition

No comments received.

§ 14329. Genetic Information

No comments received.

§ 14330. Confidentiality

No comments received.

§ 14331. Assistance Animals

Subsection 14331(d)(6).

Comment: The “or” after “danger” is a typo and should be deleted.

Council Response: The Council agrees with this comment and proposes to implement the requested change, along with other non-substantive typographical corrections, prior to submitting these proposed regulations for consideration by the Office of Administrative Law.

§ 14332. Integrated Setting

No comments received.

§ 14333. Communications

No comments received.

§ 14334. Self-Evaluation

No comments received.

§ 14335. Program Accessibility

No comments received.

§ 14336. Methods of Ensuring Program Accessibility

No comments received.

§ 14337. Time Period for Compliance

No comments received.

§ 14338. Transition Plan

No comments received.

§ 14339. Notice of the Availability of Accessible Facilities

No comments received.

§ 14340. New Construction

No comments received.

§ 14341. Alteration

No comments received.

§ 14342. Accessibility Standards

No comments received.

§ 14343. Accessible Transportation

No comments received.

COMMENTS RECEIVED DURING OCTOBER 11, 2023, COUNCIL MEETING [Government Code Section 11346.9(a)(3)].

No comments received.

COMMENTS RECEIVED DURING THE SECOND 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)] AND ADDITIONAL REVISIONS

General Comments:

Comment: I would like to challenge the phrase "Sex ASSIGNED at birth" the phrase in and of itself discriminates against protected classes such as Christians, Catholics, Muslims and Jews. As founder of the Interfaith Statewide Coalition, I speak as a representative of these protected religious classes, and it is against our religious beliefs that sex is "assigned". According to the Koran, Bible, and Torah, sex is determined by God our Creator. It is not "assigned" by any person, doctor or government entity. This phrase also contradicts the Declaration of Independence which says that we have been "endowed by our CREATOR with inalienable rights of life, liberty and the pursuit of happiness". When we DENY our CREATOR we are inadvertently giving up our inalienable rights and we from the Interfaith Statewide Coalition are NOT willing to do that.

Council Response: This comment is outside the scope of the text proposed for the second 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: [W]e are disappointed that a number of changes we suggested in our comments from April 3, 2023, and September 15, 2023, did not make it into the latest iteration of the regulations. We continue to urge the Council to consider our previous comments, which we resubmit along with this letter, and incorporate them into the final regulations. Should the Council decline to do so at this time, we urge it to retain such comments and refer to them in any future updates to these regulations.

Council Response: This comment reiterates comments made during previous comment periods and is therefore outside the scope of the text proposed for the second 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: While we continue to commend the Council's thoughtful approach to these regulations, we were disappointed to see that the majority of recommendations that we and other members of our coalition made regarding the proposed regulations were not reflected in the First Modified Text.

Council Response: This comment reiterates comments made during previous comment periods and is therefore outside the scope of the text proposed for the second 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: I would like to understand rules of evidence that's acceptable. Are audio video recordings and acceptable form of proof of discrimination and harms?

Council Response: This comment does not recommend any changes to the proposed text and is outside the scope of the text noticed for the second 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: Make sure that people who have disabilities have an easier time finding affordable housing with a waiting list that includes priority for people who have disabilities.

Council Response: This comment does not recommend any changes to the proposed text and is outside the scope of the text noticed for the second 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Article 1. General Matters

No comments received.

Article 2. General Definitions

§ 14020. General definitions.

Subsection 14020(p). "Disability."

Comment: We continue to appreciate and express our gratitude for the Council's work and the many essential changes it has already included in these regulations, including its reinsertion of

the word “diagnosis” into the definition of physical disability. Accordingly, we still urge the Council to adopt these regulations promptly.

Council Response: The Council appreciates this comment.

Article 3 through Article 12.

No comments received.

UNTIMELY COMMENTS

Article 1. General Matters

§ 14000. Purpose of This Subchapter

Comment *(submitted 9/29/2023)*: In section 14000, the name of the California State University should be specific. For example, I would recommend “…to the California State University Chancellors Office, the system, and all the CSU campuses, auxiliaries, and affiliates.”

It leaves out the man foundations, satellite campuses, and other entities on campus.

Would this revision affect voluntary benefits including short and long-term leave? I know many staff that have been discriminated against for pre-existing conditions including both physical and mental disabilities.

The CSU should not be doing business with any entity, organization, or business that discriminates based on these conditions whether they are non-voluntary or voluntary benefits.

Council Response: This comment is untimely and is outside the scope of the text noticed for the first 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Article 2. General Definitions

§ 14020. Definitions

Subsection 14020(p). “Disability”

Comment *(submitted 5/1/2023)*: Expand the definition of disability to include individuals who have intellectual and developmental disabilities.

Council Response: This comment is untimely and is outside the scope of the text noticed for the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3). However, the Council notes that the definition of “disability” set forth in the proposed regulations encompasses both individuals who have intellectual disabilities and those who have developmental disabilities.