

# **LEGAL BASES FOR OBTAINING COMPETENCY TRAINING OUTSIDE AN INSTITUTIONAL SETTING FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES**

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## **INTRODUCTION:**

Individuals with developmental disabilities who are found incompetent to stand trial face the risk of spending a considerable amount of time in jail instead of receiving appropriate services and treatment to restore the individual's competency. Too often, there are limited or no community treatment options available resulting in individuals being institutionalized in order to receive services they need. Disability Rights California prepared this summary of the law in response to questions from advocates about how they can assert individuals with developmental disabilities' rights to receive treatment and services in the community, even when these individuals have been charged with a crime and found incompetent to stand trial.

Understanding individual's rights in this area is complex; requiring knowledge of both the Penal Code and the Lanterman Act. In addition, the law is evolving with at least one court finding due process violations if the state fails to provide treatment.

## **SUMMARY:**

Both the California Penal Code and the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 *et seq.*) regulate the process that follows the court's finding a defendant mentally incompetent to stand trial.

Disability Rights California believes that under the Penal Code and the Lanterman Act, the regional center is responsible for both finding a suitable place for the defendant to receive treatment and for making sure that the proper treatment is provided. Additionally, the Department of Developmental Services (DDS) is responsible for monitoring the regional center's actions and, in some circumstances, providing treatment. CAL. PENAL CODE § 1370.1 (West 1996); CAL. WELF. & INST. CODE § 4648 (West 1998). Pursuant to Welfare and

Institutions Code section 4640.6(g), contracts between DDS and each regional center require that the regional center have or contract for criminal justice expertise to assist the regional center in providing services and support to consumers involved in the criminal justice system as a victim, defendant, inmate, or parolee.

## **ANALYSIS:**

### Summary of California Penal Code Provisions Regarding Incompetence

Section 1370.1 of the California Penal Code applies to a defendant who is found mentally incompetent as the result of a developmental disability. CAL. PENAL CODE § 1367(b) (West 1992). If a defendant is found to be mentally incompetent and to have a developmental disability, then the director of the responsible regional center must make a recommendation for placement for the court to consider. CAL. PENAL CODE § 1370.1(a)(1)(B)(i) (West 1996). In the meantime, the defendant is in the care of the sheriff, who is to deliver the defendant to “a state hospital or developmental center for the care and treatment of the developmentally disabled or any other residential facility approved by the director of the regional center for the developmentally disabled...as will promote the defendant’s speedy attainment of mental competence.” *Id.* The sheriff can only transfer the individual to a place approved by the regional center for treatment. See PENAL CODE § 1370.1(a)(2) (stating that no person shall be admitted to a state hospital, developmental center, or other residential facility or accepted for outpatient status under section 1370.4 without having been evaluated by the regional center director or designee).

Provisions that make it more difficult for the court to order community placement apply if the defendant is charged, or has previously been convicted, as a sex offender, (see, e.g., CAL. PENAL CODE § 1370.1(a)(1)(B)(ii) (providing that the court must order state hospital placement unless it “makes specific findings on the record that an alternative placement would provide more appropriate treatment for the defendant and would not pose a danger to the health and safety of others”)) or if the defendant is charged with one of a specified list of “violent felonies”<sup>1</sup> (see CAL. PENAL CODE § 1370.1(a)(G)

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<sup>1</sup> Pursuant to Penal Code § 1370.1(a)(1)(F), a “violent felony” means an offense specified in § 667.5(c). Penal Code § 667.5(c) defines violent felonies to include such things as murder; voluntary manslaughter; mayhem; rape as defined in the section; sodomy or oral copulation by force, violence, duress, menace, or fear of

(allowing the court to place the defendant on outpatient status “only if the court finds that the placement will not pose a danger to the health or safety of others’’)). Defendants charged only with misdemeanors may be subject to diversion as an alternative to training to restore competency. *See* CAL. PENAL CODE § 1001.20. The court, after giving notice and opportunity to respond to the District Attorney, may also dismiss any misdemeanor charge. *See* CAL. PENAL CODE § 1370.2.

Within 90 days of admission, the director of the hospital, developmental center, or facility to which the defendant is committed must make a written report to the director of the regional center about the defendant’s progress. CAL. PENAL CODE § 1370.1(b)(1) (West 1996). If the defendant is on outpatient status, the outpatient supervisor must make the written report. *Id.* Another report is to be filed 150 days after admission. These reports about the defendant’s progress are to be submitted to the court and to the director of the regional center. *Id.*

Section 1370.1(b)(2) of the Penal Code states that “any defendant who has been committed or has been on outpatient status for 18 months and is still hospitalized or on outpatient status shall be returned to the committing court” for a hearing. CAL. PENAL CODE § 1370.1(b)(2) (West 1996). Again, the director of the regional center receives a copy of the order. *Id.* If it is determined that no treatment is being given, then the defendant shall be returned to the committing court. CAL. PENAL CODE § 1370.1(b)(3) (West 1996). A copy of this order would go to the regional center director or executive director of the developmental center. CAL. PENAL CODE § 1370.1(b)(3) (West 1996).

At the end of three years from the date of commitment or a period of commitment equal to the maximum term of imprisonment provided by law for the most serious offense charged in the information, indictment, or

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immediate and unlawful bodily injury on the victim or another person; lewd acts on a child under the age of 14 years as defined in the section; any felony punishable by death or imprisonment in the state prison for life; robbery; arson as defined in the section; attempted murder; kidnapping; assault with the intent to commit mayhem, rape, sodomy, or oral copulation as defined in the section; continuous sexual abuse of a child as defined in the section; and carjacking as defined in the section. *See* Penal Code § 667.5(c) for additional “violent felony” definitions.

misdemeanor complaint, whichever is shorter, any defendant who has not become mentally competent shall be returned to the committing court. CAL. PENAL CODE § 1370.1(c)(1)(A) (West 1996). The court shall notify the regional center director or designee and the executive director of the developmental center of that return and of any resulting court orders. CAL. PENAL CODE § 1370.1(c)(1)(B) (West 1996).

## Regional Center Responsibility to Ensure Appropriate Services

Because the sheriff can only transfer the individual to a place approved by the regional center for treatment, questions arise about the regional center's responsibilities when it cannot locate a placement or the recommended placement is full. Disability Rights California believes that the regional center is obligated to locate a placement that can actually provide services and treatment needed to restore the individual to competence. The regional center's responsibility to *locate* placement is based on reading the following statutory requirements together: (1) the requirement of Penal Code section 1370.1(b)(3) that the defendant must be placed somewhere that will promote the speedy restoration of competence<sup>2</sup>; and (2) the responsibility of regional centers under the Lanterman Act to provide needed services once the defendant is placed.

If necessary to achieve the above, a district attorney or public defender could move to join the regional center as a necessary party to the criminal action, or the defendant could assert his/her right to regional center services to restore competency under the Lanterman Act. *See, e.g.*, CAL. WELF. & INST. CODE § 4648(a) (West 1998). The statute's reference to finding a facility that will "promote the defendant's speedy attainment of mental competence" suggests that the goal in committing a defendant is to aid the individual in receiving treatment and to work toward becoming competent to stand trial. CAL. PENAL CODE § 1370.1(b)(3). Such a goal is not served if the regional center recommends an institution that is too full to actually admit the defendant.

Similarly, it is inconsistent with the regional center's responsibilities for the individual to remain in jail without receiving appropriate services and supports. The Lanterman Act implies that the responsibilities of the regional center do not stop at merely the recommendation of where to treat a developmentally disabled

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<sup>2</sup> The defendant must also be returned to court if an evaluation shows that "no treatment for the defendant's mental impairment is being conducted." *See* CAL. PENAL CODE § 1370.1(b)(3).

person who has been declared incompetent to stand trial. If the IPP states that an individual needs treatment, then it becomes the regional center's responsibility to provide that treatment. CAL. WELF. & INST. CODE § 4648(a) (West 1998). If the individual sits in jail and is not receiving treatment because the proposed placement is full, then the provider selected by the regional center is essentially unable to provide services.

The Lanterman Act states that the regional center would have the responsibility of finding another provider for the individual, determining another method of finding treatment, or asking DDS for funds so that the regional center can develop a program to provide the service. CAL. WELF. & INST. CODE § 4647(a) (West 1999); CAL. WELF. & INST. CODE § 4648(e)(2) (West 1998). Although the Penal Code speaks only to the regional center's responsibility to recommend a treatment facility, the regional center's responsibilities to actually provide the treatment are extended by the Lanterman Act. CAL. WELF. & INST. CODE §§ 4647, 4648.

The law requires that the regional center be involved in the process once a defendant is declared mentally incompetent to stand trial. The regional center is made aware of the defendant's progress at various intervals, and must know if the defendant is not receiving treatment. One problem may be the wording of the law, which requires the reports be submitted following "admission" to the facility after 90 and 150 days. *See* CAL. PENAL CODE § 1370.1(b)(1) (West 1996). This may mean no progress reports are done while the defendant waits in jail for admission. However, the regional center would be notified regardless of admission to a facility after the 18 month and 3 year time lines referenced above. *See* CAL. PENAL CODE §§ 1370.1(b)(2) and (c)(1) (West 1996).

Even if reports are not submitted to the regional center, as described above, the regional center has responsibilities to review a client's IPP under the Lanterman Act. The Lanterman Act states that individual program plans "shall be reviewed and modified by the planning team...as necessary, in response to the person's achievement or changing needs." CAL. WELF. & INST. CODE § 4646.5 (West 2002). An individual who is jailed after being declared mentally incompetent to stand trial would, as a result, no doubt have changing needs.

The regional center would be made aware of the change because the court orders a medical examination from the regional center and transmits "to the regional center a copy of the orders." CAL. WELF. & INST. CODE § 4654 (West 1978) (stating the purpose of the mental examination shall be to determine if developmental disability is the primary diagnosis). The client's change in

circumstances should trigger an IPP meeting that would not only make the regional center aware of the client's status, but would require the regional center to determine what services the client needs and then determine a way to implement the services.

The regional center has a responsibility to provide or help to provide needed services that it does not already offer. The regional center may determine in an IPP meeting that the individual needs a particular service. The regional center must fulfill what is stated in the IPP, and if no provider is available they must do whatever they can to find one. Assoc. for Retarded Citizens-Calif. v. Dept. of Developmental Services, 38 Cal.3d 384, 388 (1985). This may include asking providers from different areas to come to the individual to provide the services, or looking into whether a provider would be willing to develop new services.

In addition, the regional center may request funds from DDS to develop a program to provide the needed services. CAL. WELF. & INST. CODE § 4648(e) (West 1997). Further, if a regional center states that it does not offer a particular service or refuses to provide a service, such a decision may be appealed by the consumer/defendant. CAL. WELF. & INST. CODE § 4710.5 (West 1998).

“If the regional center determines, or is informed by the consumer's parents, legal guardian, conservator, or authorized representative that the community placement of a consumer is at risk of failing, and that admittance to a state developmental center is a likelihood, the regional center shall immediately notify the appropriate regional resource development project, the consumer, and the consumer's parents, legal guardian, or conservator.” CAL. WELF. & INST. CODE § 4418.7(a)(West 2002). The statute exhibits how the regional center and regional resource development project (RRDP) become involved during the referral process. As a result, the RRDP should deflect admission into a developmental center (here usually Porterville Developmental Center) and try to find less restrictive settings to promote the necessary competence training in the community if possible. CAL. WELF. & INST. CODE § 4418.7 (West 2002).

Department of Developmental Services Responsibility to Ensure Appropriate Services

Although DDS has the responsibility “through appropriate and regular monitoring activities” to ensure that the regional center meets its obligations in providing services to individuals with developmental disabilities, DDS may also, in fact, have some responsibility to provide those services. CAL. WELF. & INST. CODE § 4501 (West 1997). In the event that “there are identified gaps in the system of services and supports or where there are identified consumers for whom no provider will provide services and supports contained in his or her individual program plan, the department may provide the services and supports directly.” CAL. WELF. & INST. CODE § 4648(g) (West 1998). If the regional center must deny a service in the IPP due to a lack of funds, then the regional center must also notify DDS in writing that the service was denied because of the lack of funds in the budget of the regional center. CAL. WELF. & INST. CODE § 4710(d) (West 2000).

Thus, DDS’s primary responsibility is to provide sufficient funding to the regional center so that the regional center may provide the needed services to the defendants. However, in the instance of a gap in services, DDS does have the authority to provide those services directly. In that regard, DDS would share responsibility for situations where a defendant is sitting in jail and not receiving any sort of treatment.

#### Application of ADA/Least Restrictive Requirements to Jail Settings

Under the Americans with Disabilities Act (ADA), no “qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of services, programs, or activities of a public entity, or be subject to discrimination by such entity.” 42 USC § 12132 (1990). A public entity includes any state or local government and any “department, agency, special purpose district, or other instrumentality of a State or States or local government.” 42 USC § 12131 (1990). DDS and its instrumentalities, the courts and the criminal justice system are public entities to which the ADA applies.

A regional center, which is engaged in the provision of public services, may be discriminating against individuals with developmental disabilities if the regional center forces the individuals to be treated in an institutional setting. Olmstead v. L.C., 527 U.S. 581, 600 (1999). In Olmstead, the U.S. Supreme Court held that unjustified segregation of persons with disabilities is a form of discrimination under the ADA. *Id.* A person is unjustifiably placed in an institutional setting if the individual is qualified to be treated in, and could

benefit from, community settings and the individual does not oppose placement in a community setting. *Id* at 600-02.

The mandate of the ADA, as described in Olmstead, that an individual who can be treated in a community setting should not be forced into institutionalization also reflects the goals of the Lanterman Act. The Lanterman Act states that individuals with developmental disabilities have “a right to treatment and habilitation services and supports in the least restrictive environment.” CAL. WELF. & INST. CODE § 4502(a) (West 1992). Additionally, the Penal Code provides that a court may order an individual to undergo outpatient treatment as long as the individual would benefit from such treatment, is not a danger to the health and safety of others, and both the person in charge of the residential facility and the patient himself agree to outpatient therapy. CAL. PENAL CODE § 1370.4 (West 1985). Together, the ADA, the Lanterman Act, and the California Penal Code all require that when outpatient treatment would be appropriate, the regional center cannot merely stop its efforts to find treatment and provide services just because the state developmental center is full. The regional center must make an effort to find the least restrictive environment possible, and cannot absolve itself of responsibility to the defendant just because a more restrictive setting is at full capacity.

### Substantive Due Process Claims Based Upon Failure to Treat

A recent Ninth Circuit Court of Appeals case, Oregon Advocacy Center v. Mink, established that for defendants found incompetent to stand trial committed to the state hospital for treatment, waiting for “weeks and months” for transfer violated their due process right to treatment. 322 F.3d 1101, 1120 (2003). The Ninth Circuit, following Supreme Court precedent, recognized that individuals who are committed for treatment, not punishment, are entitled to the restorative services that correspond to the purpose of the confinement, and better conditions of confinement than made available to individuals convicted of crimes committed to penal institutions. *Id.* at 1121-1122.

The Supreme Court, Ninth Circuit, and other circuits have laid the groundwork for recognizing a heightened treatment standard for individuals confined for nonpunitive purposes. These courts are in agreement that the origin of the right to treatment is the Due Process Clause of the 14<sup>th</sup>

Amendment, rather than the 8<sup>th</sup> Amendment prohibition against cruel and unusual punishment, because such individuals are not being punished.<sup>3</sup>

In Jackson v. Indiana, the Supreme Court held that for individuals found incompetent to stand trial, substantive due process requires that the nature and duration of commitment bear a reasonable relation to the purpose for which the person is committed. The state is not allowed to detain an individual longer than the reasonable period of time necessary to determine whether there is a substantial probability that capacity will be restored; if it is not substantially probable that sanity can be restored, then customary civil commitment proceedings must be instituted.

Thus, in addition to the regional center and DDS responsibilities outlined above, individual consumers with developmental disabilities may have substantive due process claims for failure to provide treatment as directed by the court to restore competency. Violations of constitutional rights can be pursued in individual litigation in cases where consumer defendants are left in county jails for long periods of time while receiving no competency training to restore their functioning.

Contact Disability Rights California at 800-776-5746 or 800-576-9269 (TTY) if you have questions about this memorandum.

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<sup>3</sup> *E.g.*, Jackson v. Indiana, 406 U.S. 715 (1972); Bell v. Wolfish, 441 U.S. 520 (1979); Youngberg v. Romeo, 457 U.S. 307 (1982); Ohlinger v. Watson, 652 F.2d 775 (9<sup>th</sup> Cir. 1981); Sharp v. Weston, 233 F.3d 1166 (2000); Oregon Advocacy Center v. Mink.