



California's protection & advocacy system
Toll-Free (800) 776-5746

Regional Center Eligibility Hearing Packet

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These materials are to help in preparing for a regional center eligibility hearing for children (age three years and older) or adults who have been denied regional center eligibility.

Section One - Appealing a Denial of Regional Center Eligibility: a practical step-by-step guide to appealing a denial of eligibility for regional center services.

Section Two - Appendices: charts, guides, forms, sample documents, and the law and regulations that govern regional center eligibility issues.

In this packet, we use the term “you” to refer to the child (age three or older) or adult who is trying to get regional center eligibility.

The hearing process in this packet is different from the hearing process for Early Start consumers (age birth to three). The Early Start program provides services and supports for children younger than 3 years old who need early intervention services because they have developmental delays in the areas of cognitive development, physical development, language and speech development, social or emotional development, or self-help skills. Please see our Fact Sheet on Early Start Services to learn your hearing rights in Early Start:

<http://www.disabilityrightsca.org//pubs/F05701.pdf> and read Chapter 12 of Disability Rights California's *Special Education: Rights and Responsibilities* manual.

This packet does not address regional center eligibility *terminations*. If you are already a regional center consumer, but have been terminated from eligibility, please see Q & A number 21 in our Rights under the Lanterman Act publication found here: <http://www.disabilityrightsca.org/pubs/506301Ch02.pdf>

Good luck to you in your hearing! We hope you find this information helpful. If you have questions or need additional assistance, contact Disability Rights California (800) 776-5746 or your local Office of Clients' Rights Advocacy (800) 390-7032.

Table of Contents

| | |
|--|----|
| Chapter 1 – Introduction and Relevant Law/Regulations for Establishing Regional Center Eligibility | 6 |
| The Condition Must Originate Prior to Age Eighteen | 7 |
| The Condition Must Be Likely to Continue Indefinitely | 7 |
| The Condition Must Be Substantially Disabling | 7 |
| Chapter 2 – Overview of Developmental Disabilities | 9 |
| Intellectual Disability | 9 |
| Cerebral Palsy | 10 |
| Autism..... | 10 |
| Epilepsy | 11 |
| 5 th Category | 12 |
| Co-Occurring Mental Health Issues or Learning Disabilities | 12 |
| Chapter 3 – Establishing Diagnoses of Autism, Intellectual Disability, or 5th Category Eligibility | 14 |
| Autism..... | 14 |
| DSM-5 | 14 |
| DDS Best Practices | 15 |
| Intellectual Disability | 17 |
| 5 th Category | 19 |
| Chapter 4 – The Hearing Process | 21 |
| Adequate Notice | 21 |
| Filing for Hearing | 21 |

| | |
|---|----|
| Informal Meeting | 22 |
| Mediation | 22 |
| Motions | 23 |
| Fair Hearing..... | 23 |
| Continuance (Postponement) | 23 |
| Interpreters | 24 |
| Accessibility of the Hearing Location | 24 |
| Getting a Different Judge | 25 |
| Chapter 5 – Preparing for Hearing | 26 |
| Determining Your Legal Argument..... | 26 |
| Collecting Evidence | 26 |
| What are Assessments? | 27 |
| What is the Purpose of an Assessment? | 27 |
| Why Do You Need an Assessment for Regional Center Eligibility? | 27 |
| What is the Assessment Process? | 28 |
| Who Performs Assessments?..... | 28 |
| How Should the Assessment Address Substantial Disability? | 28 |
| What Tests are Used During Assessments? | 28 |
| What if an Assessment Includes Information that Does Not Support Eligibility? ... | 29 |
| Letters..... | 29 |
| Witnesses | 29 |
| Lay Witnesses..... | 30 |
| Expert Witnesses | 31 |

| | |
|---|----|
| Submission of Witness and Exhibit List | 35 |
| Opening Statements | 37 |
| Questioning Witnesses | 37 |
| Regional Center Witnesses..... | 37 |
| Your Witnesses | 37 |
| Closing Statements/Written Closing Brief | 38 |
| After the Hearing | 38 |
| SECTION 2: Appendices..... | 39 |
| Appendix A: FAIR HEARING FLOW CHART..... | 40 |
| Appendix B - Assessment Guide | 41 |
| APPENDIX C – Sample Request to Change Judges..... | 49 |
| Appendix D – Sample List of Witnesses and Exhibits..... | 51 |
| Appendix E - Regional Center Eligibility Law | 53 |

Chapter 1 – Introduction and Relevant Law/Regulations for Establishing Regional Center Eligibility

If you have been denied eligibility for regional center services and do not agree with the regional center’s decision, you have a right to appeal. This manual gives you practical information about the relevant law, how to appeal, and what to expect during the appeal.

Regional center services are available to any person who has a “developmental disability” as defined by the Lanterman Act. Under California law, the Lanterman Act gives people with developmental disabilities the right to services and supports that allow them to live the most independent, productive, and normal lives possible. The Lanterman Act can be found in the Welfare and Institutions Code sections 4400-4906. For a regional center eligibility case, Welfare & Institutions Code Section 4512(a) and California Code of Regulations (CCR), Title 17, Section 54000-54002 provide the relevant law. See <http://www.leginfo.ca.gov/calaw.html>.

To be eligible for services from a regional center, a person must meet the definition of “developmental disability” established in [California](#).¹

Developmental disability means a disability that:

- (1) originates before an individual attains age 18 [years](#)²;
- (2) continues, or can be expected to continue, indefinitely; and (3) constitutes a substantial disability for that individual.
- (4) As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include: (a) mental retardation; (b) cerebral palsy; (c) epilepsy; and (d) autism. This

¹ The California definition of developmental disability differs substantially from the federal definition found at 42 United States Code (USC) Section 6001. For various reasons not discussed in this manual, arguments that California must serve consumers who meet the federal definition have been unsuccessful. [“Return to Main Document”](#)

² The numbers and letters are not part of the statute but are added to help you separate the elements of the claim. [“Return to Main Document”](#)

term shall also include the “5th Category,” which is: (e) disabling conditions found to be closely related to mental retardation; or (f) to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

For regional center eligibility cases, you have the burden of proof. This means that you have to prove that you meet each element of the law in order to win your case.

The Condition Must Originate Prior to Age Eighteen

The definition of developmental disability requires that the condition “originate before the individual attains age 18.” If you are under the age of 18 at the time of your hearing, this element will not be an issue. If you are over the age of 18, you may need to construct a compelling picture of what you were like five, ten, twenty or more years ago. You will need to locate school, medical and other records that will help you to do so. You should also try to find witnesses who knew you when you were younger.

Begin by establishing that you are substantially disabled now, whatever your age. (See the section on page 7 F below, which discusses proving substantial disability.) Then, to prove that the substantial disability originated prior to age 18, seek to establish through testimony and records that you were similarly affected before reaching age 18.

The Condition Must Be Likely to Continue Indefinitely

The important thing to note here is that you need only prove that the condition is likely to continue *indefinitely*, not necessarily forever. Most of our clients do have a condition that will last forever. In any case, it is almost impossible to state with any assurance that a substantial disability will end at a predictable time. This issue sometimes comes up in cases where the regional center is claiming that the condition is “solely psychiatric.” (See chapter 2 below regarding the regulation concerning “solely psychiatric.”) The regional center may assert that with medication, your condition will improve and you will no longer be disabled. In such a case, your biggest challenge will be proving some other cause, such as a neurological dysfunction, that medication cannot cure. If you do that, this element should not present a problem. Regional centers are often willing to stipulate that you meet this element of the definition. If not, you still need to establish it through expert testimony.

The Condition Must Be Substantially Disabling

DDS regulations define a substantial disability as “a major impairment of cognitive and/or social [functioning.](#)”³ While impairments in both cognitive and social impairment are not necessary to fulfill the substantial disability requirement, in practical use, this only applies to persons applying under the basis of autism, cerebral palsy, or epilepsy because those applying under intellectual disability or 5th category will need to show impairments in both domains in order to establish that they are indeed intellectually disabled or qualify under the 5th category.

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care;
- (2) Receptive and expressive language;
- (3) Learning;
- (4) Mobility;
- (5) Self-direction;
- (6) Capacity for independent living; and
- (7) Economic self-sufficiency.

Note: Before August 11, 2003, the law did *not* require impairments in any particular number of areas. If a person was found regional center eligible before then, and the regional center now reassesses his/her eligibility, the person does not have to show impairments in three or more areas.

To meet the criteria for substantial disability, you must prove that you have deficits in at least three of the above areas. Proving this element of your case well is important both to show that you are eligible for services and also to demonstrate to the Administrative Law Judge (ALJ) why it is important for you to receive regional center services. Here you must focus on proving to the judge the severity of your disability and clearly describing all of the areas you need assistance

³ California Code of Regulations, Title 17 (17 CCR) Section 54001. [“Return to Main Document”](#)

Chapter 2 – Overview of Developmental Disabilities

Developmental Disabilities [include](#):⁴

(1) Intellectual Disability (formerly called “Mental [Retardation](#)”)⁵;

(2) Cerebral Palsy;

(3) Epilepsy;

(4) Autism;

(5) Disabling conditions that are found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability (called the “5th Category”).

Intellectual Disability

According to the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ([DSM-5](#)),⁶ intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. A person needs to be evaluated (tested) by a licensed clinician to see if they meet the criteria for intellectual disability. The following three criteria must be met:

⁴ Welf. & Inst. Code sec. 4512(a). [“Return to Main Document”](#)

⁵ The Lanterman Act has been revised to change the term “mental retardation” to “intellectual disability.” You may have been assessed prior to this change and have a diagnosis of mental retardation. For purposes of this regional center eligibility manual, the terms are the same, but intellectual disability is the current correct legal term. [“Return to Main Document”](#)

⁶ The DSM-5 is the updated version of the previously used DSM-IV-TR. Any new assessment should use the DSM-5 and the term, “intellectual disability” rather than “mental retardation.” You may have an assessment that provides a diagnosis, such as mental retardation, using the DSM-IV-TR. If possible, you should ask an independent expert for clarification under the DSM-5 if you have an older diagnosis. [“Return to Main Document”](#)

- A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
- B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
- C. Onset of intellectual and adaptive deficits during the developmental period.

The evaluator should specify the level of severity, which the DSM-5 explains is based on the adaptive functioning, and not IQ scores, because it is adaptive functioning that determines the level of supports required.

Note: A diagnosis of intellectual disability is possible for individuals with full scale IQ scores between 71 and 75 if they have significant deficits in the areas of adaptive behavior listed above. The opinion of an independent expert may be required to establish this.

See <http://www.ddhealthinfo.org> for more information.

Cerebral Palsy

Cerebral Palsy is an umbrella term that describes a set of conditions that affect the control a person has over movement. It usually starts at birth or during the first few years of life. Symptoms may change over time, but generally the condition itself is not progressive. It is caused by damage to the parts of the brain that control movement and posture or the failure of those parts to develop appropriately.

See <http://www.nlm.nih.gov/medlineplus/cerebralpalsy.html> for more information.

Autism

The Lanterman Act uses the term, “autism” as one of the five categories of developmental disability. Neither the DSM-IV-TR, nor the DSM-5, uses the term, “autism.”

The DSM-IV-TR described “autistic disorder” as one of five Pervasive Developmental Disorders (PDDs). Other PDDs included were Pervasive Developmental Disorder-

Not Otherwise Specified (PDD-NOS), Asperger's Disorder, Rett Syndrome, and Childhood Disintegrative Disorder. In the DSM-IV-TR, although diagnoses of Asperger's Disorder and autistic disorder were similar, there were some differences. The primary way that Asperger's Disorder differed from Autistic Disorder is that a diagnosis of Autistic Disorder required a significant language delay and an onset before the age of 3.

Some regional centers took the position that people with Asperger's Disorder were not eligible for regional center services under the Lanterman Act category of "autism." Some regional centers also took the position that people with PDD-NOS were not eligible for regional center services under "autism," although they may have been eligible for services under "5th category." (See below for information about eligibility under "5th category"). Some regional centers allowed people to qualify as "high functioning autism," if they had higher IQ scores, which was difficult to distinguish from Asperger's.

In past hearings for regional center eligibility, most judges said that the Lanterman Act term "autism" meant "autistic disorder" in the DSM-IV-TR (and not Asperger's or PDD-NOS). Therefore, many people who had Asperger's or PDD-NOS were found not to meet the legal criteria for regional center eligibility.

The DSM-5 uses the diagnosis, "Autism Spectrum Disorder" (ASD). ASD is the new term in the DSM-5 that refers to the former Pervasive Developmental Disorders, at all levels of severity. This includes conditions that used to be separately called Autistic Disorder, PDD-NOS, and Asperger's Disorder. Because the DSM-5 is the current version, this publication addresses eligibility under the Lanterman Act's category of "autism" as "Autism Spectrum Disorder." This is consistent with what judges are saying in the newer hearing decisions.

You may have an assessment that diagnoses you with one of the former terms from the DSM-IV-TR. You may need to get a new assessment or have an expert clarify how you meet DSM-5 criteria for ASD even though you did not meet the DSM-IV-TR criteria for autistic disorder.

See <http://www.ddhealthinfo.org> for more information about autism and other developmental disabilities.

Epilepsy

Epilepsy is a neurological condition that produces seizures. A seizure occurs when there is a brief electrical disturbance in the brain and can last from a few seconds to a few minutes. Some seizures result in a brief disruption in the senses while others

may result in short periods of unconsciousness. More information about epilepsy can be found here:

<http://www.ddhealthinfo.org>

<http://www.epilepsyfoundation.org>

5th Category

A person may be found to have a developmental disability under California law even if he/she does not have one of the four conditions listed above (intellectual disability, autism, cerebral palsy, or epilepsy). A person may be eligible under what has come to be known as the “5th category” if he/she:

- Has a condition “closely related” to intellectual disability; or
- Requires treatment “similar to” persons with intellectual disability.

The law is not clear about what “closely related to” or “similar to” intellectual disability means. However, an example might be a person whose IQ is too high for a diagnosis of intellectual disability, but who has significant deficits in adaptive skills that result in him/her functioning like a person with intellectual disability. As noted above in the “autism” section, a person with the former diagnosis of PDD-NOS may qualify for regional center services under either autism, given the new ASD diagnosis in the DSM-5, or under the 5th [category](#).⁷

Co-Occurring Mental Health Issues or Learning Disabilities

Some people with developmental disabilities have co-occurring mental health issues or learning disabilities. Section 54000(c)(1) of Title 17 of the California Code of

⁷ A recent appellate decision has imposed an additional requirement on 5th category eligibility. The judge in that case interpreted 5th category eligibility as requiring “both a cognitive element and an adaptive functioning element.” *Samantha C. v. State Dep’t of Developmental Services*, 2010 WL 2542214 at 15 (California Court Appellate June 25, 2010). This may make it more difficult to establish eligibility if you have Asperger’s, because your **adaptive** functioning impairments are comparable to those associated with autism, but you may have little or no **cognitive** impairment. However, if you have a past diagnosis of Asperger’s, you should still request an evaluation. [“Return to Main Document”](#)

Regulations states that, for the purposes of regional center eligibility, the term “developmental disability” “shall not include handicapping conditions” which are “solely psychiatric.” Section 54000(c)(2) states that the term “developmental disability” shall not include conditions which are “solely learning [disabilities.](#)”⁸

Note: Even if there is an applicant with a psychiatric condition or a learning disability, this does not automatically preclude his or her eligibility for Regional Center services. If you are not sure what is causing the impairment—a psychiatric condition, learning disability, or something else—request an evaluation by the Regional Center for a developmental disability. Regional centers must provide services to consumers who have a developmental disability even if that disability is coupled with psychiatric disorders or learning disorders, or both.

⁸ These regulations were upheld in *Samantha C.* at 10. [“Return to Main Document”](#)

Chapter 3 – Establishing Diagnoses of Autism, Intellectual Disability, or 5th Category Eligibility

Psychologists make their diagnoses according to the DSM-5 (the prior version was called the DSM-IV-TR), the universally-accepted diagnostic manual for psychology. Because the Lanterman Act eligibility criteria are different from the DSM diagnostic criteria, you will need to familiarize yourself with both. Your expert should be able to help you understand this information in greater detail. Because Cerebral Palsy and Epilepsy are medical diagnoses which medical doctors can make accurately, we will concentrate on the remaining three categories, all of which fall under the inexact science of psychology.

Autism

When using the DSM-5 diagnostic criteria for Autism Spectrum Disorder (ASD), expert diagnoses can differ greatly. This variation can depend on factors such as the expert's background, the choice of standardized measure, and the information which the expert considered. You should not try to be an expert in diagnosing ASD. The ASD information in this manual is provided as a reference and should not replace an expert evaluator's diagnosis or opinion. Therefore, you should always refer to your expert for opinions, explanation, and analysis.

DSM-5

The DSM-5 diagnostic criteria for autism spectrum disorder are:

A. Persistent deficits in social communication & social interaction across multiple contexts, as manifested by the following, currently or by history (must meet all 3 symptoms):

1. Deficits in social-emotional reciprocity, ranging from abnormal social approach and failure of normal back and forth conversation; to reduced sharing of interests, emotions, affect; to failure to initiate or respond to social interactions.
2. Deficits in nonverbal communicative behaviors used for social interaction, ranging from poorly integrated- verbal and nonverbal communication, to abnormalities in eye contact and body-language, or deficits in understanding and use of nonverbal communication, to total lack of facial expressions and non-verbal communication.
3. Deficits in developing, maintaining, and understanding relationships, ranging from difficulties adjusting behavior to suit various social contexts to difficulties in sharing imaginative play or making friends to absence of interest in peers.

Specify the current severity, based on social communication impairments and restricted, repetitive patterns of behavior: Level 1 (requiring support), Level 2 (requiring substantial support), or Level 3 (requiring very substantial support)

B. Restricted, repetitive behavior, interests, or activities (must meet 2 of 4 symptoms)

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases)
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day)
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to/ preoccupation with unusual objects, excessively circumscribed or perseverative interests)
4. Hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, fascination with lights or movement)

Specify the current severity, based on social communication impairments and restricted, repetitive patterns of behavior: Level 1 (requiring support), Level 2 (requiring substantial support), or Level 3 (requiring very substantial support)

C. Symptoms must be present in early childhood (but may not become fully manifest until later)

D. Symptoms significantly impair everyday functioning

E. These disturbances are not better explained by intellectual disability or global developmental delay

Page 51 of the DSM-5 explains, “Individuals with a well-established DSM-IV diagnosis of autistic disorder, Asperger’s Disorder, or pervasive developmental disorder not otherwise specified should be given the diagnosis of autism spectrum disorder. Individuals who have marked deficits in social communication but whose symptoms do not otherwise meet criteria for autism spectrum disorder should be evaluated for social communication disorder.”

DDS Best Practices

DDS has published Autistic Spectrum Disorders: Best Practice Guidelines for Screening, Diagnosis and [Assessment](#).⁹ This resource suggests the following components of a best practice evaluation: record review; medical evaluation; parent/caregiver interview; direct patient evaluation (interview, direct observation); psychological evaluation (cognitive assessment, adaptive functioning assessment, mental health assessment); communication assessment; evaluation of social competence and functioning; restrictive behaviors, interests and activities; family functioning. Specifically, the Best Practice Guidelines state that the Autism Diagnostic Interview – Revised (ADI-R) is the most reliable standardized measure to obtain an early developmental history of autistic behaviors. The ADI-R, when combined with the Autism Diagnostic Observation Schedule (“ADOS,” another standardized measure), will produce an 85% reliable [diagnosis](#).¹⁰ However, due to the resources available to a claimant or her local regional center, these guidelines are not always followed correctly.

There are several common psychiatric diagnoses which present quite similarly to autism spectrum disorder. These include Obsessive-Compulsive Disorder, Childhood Schizophrenia, Oppositional Defiant Disorder, and Attention-Deficit/Hyperactivity Disorder (ADHD). While the DSM-IV-TR stated that autism and ADHD are incompatible diagnoses (page 74), the DSM-5 encourages diagnosing co-occurring disorders in order to better describe the person and lead to possible additional treatment.

In differentiating between these conditions, ALJs rely on the credibility of opposing expert testimony, as well as on the behavioral differences generally exhibited by people with the different diagnoses. For instance, the Best Practice Guidelines explains that an individual with autism will be able to focus on the few activities within her limited areas of interest, while an individual with ADHD will have difficulty focusing on any activity. Likewise, an individual with autism spectrum disorder will not attempt to conceal inappropriate or aggressive behaviors, while an individual with Oppositional Defiant

⁹ http://www.dds.ca.gov/Autism/docs/ASD_Best_Practice2002.pdf. [“Return to Main Document”](#)

¹⁰ Cronin, Pegeen, PhD., Lecture: “A Psychological View of Regional Center Eligibility”, 06/07/2011 at Public Counsel in Los Angeles. [“Return to Main Document”](#)

Disorder will try to hide actions she knows are [wrong](#).¹¹ In a hearing decision, for example, an ALJ may note that a Claimant hated himself and became depressed because of his drooling problem and his being ostracized. About this, a psychologist who is testifying as an expert witness for the regional center may opine that an autistic person would not care what other people said or thought about him. In this example, an ALJ who has no particular knowledge of psychology would be able to analyze evidence of the claimant's behavior with some of the insight of an expert.

Intellectual Disability

Intellectual disability eligibility can be difficult to prove in borderline cases because the analysis follows strict standards set forth in the DSM-5. Regional center professionals seldom err in applying these standards. However, if you consult an independent expert, then he/she will be able to tell you if there is an error in the regional center testing, analysis, or results.

The essential feature of intellectual disability are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, as compared to the person's peers who are the same in age, gender, and sociocultural status (Criterion B) with an onset during the developmental period (Criterion C). DSM-5, page 37.

“Criterion A refers to intellectual functions that involve reasoning, problem-solving, planning, abstract thinking, judgement, learning from instruction and experience, and practical understanding.” DSM-5, page 37. It is usually measured by a valid intelligence test where you are given an intelligence quotient (IQ) score. A diagnosis of mild intellectual disability requires that an individual have an IQ of 50-55 to approximately 70. However, there is a measurement error of approximately 5 points in assessing IQ, so experts may diagnose intellectual disability in a person with an IQ between 70 and 75, if he or she exhibits significant deficits in adaptive behavior. In practice, it is exceedingly rare for an ALJ to find intellectual disability eligibility when the claimant has an IQ of 70-75. OAH decisions tend to employ a sharp IQ cutoff of 69 for intellectual disability, reserving scores of 70-75 for 5th category eligibility. From an advocacy perspective, a claimant with an IQ of 70-75 should argue that

¹¹ http://www.dds.ca.gov/Autism/docs/ASD_Best_Practice2002.pdf, page 121-22.
[“Return to Main Document”](#)

measurement error includes her IQ score within the range of intellectual disability eligibility. However, this approach has been largely unsuccessful so far.

Criterion B measures adaptive functioning, or “how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background.” DSM-5, page 37. The DSM-5 notes that one can measure deficits in adaptive functioning from clinical evaluation of the person, as well as standardized measures completed by people who know the person.

DSM-5 explains that adaptive functioning involves adaptive reasoning in three domains:

- 1) Conceptual (academic): Memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem-solving, judgement in novel situations.
- 2) Social: Awareness of others’ thoughts, feelings, and experiences, empathy, friendship skills, communication skills, social judgement.
- 3) Practical: Learning and self-management across settings including personal care, working, money management, recreation, behavior, and task organization.

Criterion B is met when, in direct relation to the intellectual impairment, a person is impaired in at least one domain, so much that they need ongoing support to perform adequately in one or more life settings (school, work, home, or community). DSM-5, page 38.

Criterion B is one area where the Association of Regional Center Agencies (ARCA) [Guidelines](http://www.arcanet.org/pdfs/5th.category.guidelines.pdf)¹² are narrower than the DSM-5 diagnostic criteria. In measuring adaptive functioning, the Guidelines exclude those deficits caused by psychiatric [conditions](http://www.arcanet.org/pdfs/5th.category.guidelines.pdf).¹³ The DSM-5, on the other hand, states that “The diagnosis of intellectual disability should be made whenever Criteria A, B, and C are met. DSM-5, page 39. Further, mental disorders co-occur with intellectual disability three to four times higher than the general public. DSM-5, page 40. Since they so frequently co-occur *with* the

¹² <http://www.arcanet.org/pdfs/5th.category.guidelines.pdf>. [“Return to Main Document”](#)

¹³ www.arcanet.org/pdfs/5th.category.guidelines.pdf, page 3. [“Return to Main Document”](#)

intellectual disability, it is hard to exclude the person because of them. Although the ARCA Guidelines refer to 5th category eligibility, courts also apply this narrow standard to intellectual disability eligibility determinations.

It should be noted that the presence of deficits in adaptive functioning caused by psychiatric conditions does not necessarily violate the "Solely" element. That element excludes psychiatric disorders where impaired functioning originated as a result of the psychiatric disorder. A claimant whose poor adaptive functioning is further impaired by psychiatric conditions could still satisfy the "Solely" element as long as her impaired functioning did not originate as the result of the psychiatric disorder. See Samantha C. v. State Dept. of Developmental Services, 185 Cal. App. 4th 1462, 1493 (2010).

Ultimately, however, Criterion B seldom poses a difficulty for an otherwise qualified claimant. Although it is possible for a claimant to satisfy Criterion A and not Criterion B, a claimant with an IQ under 70 will almost certainly display deficits in at least two of the skill areas listed above. Moreover, due to considerable overlap in criteria, a claimant who has satisfied the Substantial Disability Element will probably also satisfy Criterion B.

Criterion C is identical to the Before Eighteen Element, and thus poses no extra difficulty for an otherwise qualified claimant.

5th Category

The 5th Category eligibility is a legal category, not a medical or psychological diagnosis. However, psychologists and other experts can provide opinions, based on evidence, to help prove 5th Category eligibility.

The 5th Category includes two distinct options for eligibility:

1. Disabling conditions found to be closely related to intellectual disability.
2. Disabling conditions requiring treatment similar to that required for individuals with intellectual disability.

Because the Lanterman Act was only recently revised to replace the term "mental retardation" with the term "intellectual disability," most past hearing and court decisions use "mental retardation."

The "closely related" option applies to conditions "very similar to mental retardation," with many of the same, or close to the same, factors required in classifying a person as mentally retarded." Mason v. Office of Administrative Hearings, 89 Cal. App. 4th 1119, 1129 (2001). In practice, this usually means IQ scores between 70 and 75

with adaptive functioning scores in the intellectual disability range. However, if IQ scores between 70 and 75 are within the “margin of error” for intellectual disability, then people with IQ scores *above* 75 could be eligible under the 5th Category.

The “similar treatment” option applies to conditions which *require*, rather than merely benefit from, the treatment required for a person with intellectual disability. (Below-average cognitive and adaptive functioning scores also help prove “similar treatment” eligibility.) “Treatment” has traditionally been interpreted narrowly. Regional center guidelines suggest that people with intellectual disability will require treatment such as training for skills rather than just motivation; long-term training rather than short-term, remedial training; habilitation rather than rehabilitation; training with steps broken down into small, discrete units taught through repetition; and educational supports with modifications across many skill areas.

However, a recent case in the California Court of Appeals has suggested a broader interpretation of “treatment,” including “help with cooking, public transportation, money management, rehabilitative and vocational training, independent living skills training, specialized teaching and skill development approaches, and supported employment services.” Samantha C. v. State Dept. of Developmental Services, 185 Cal. App. 4th 1462, 1493 (2010). It is worth pointing out at your hearing that this is the legal standard which currently applies.

See appendix B for an Assessment Guide which can be given to an independent evaluator to determine whether a person has a developmental disability under the Lanterman Developmental Disabilities Services Act.

See “5th Category Eligibility Publication” on our website at <http://www.disabilityrightsca.org/pubs/551001.pdf> for more information about establishing regional center eligibility under the 5th Category.

Chapter 4 – The Hearing Process

Adequate Notice

You have a right to a written notice of action (NOA) when a regional center denies your application for services. The regional center notice must tell you which laws allow it to make its decision and the facts upon which it based its denial. This information helps you decide if you should appeal, and it helps you prepare for your hearing. The notice must say:

- what the regional center will do
- why they are doing it
- when they are doing it
- the law, rule, or policy that the regional center claims lets them do it
- how and where to file an appeal
- the deadlines for filing an appeal
- information about what happens in the appeal process
- how to review your regional center records
- where to get advocacy help.

Once you receive the NOA, you can file for hearing if you disagree. You must appeal within 30 days from when you receive the NOA. If the regional center denies you services without giving you notice, you can still appeal - you do not need a notice in order to appeal. Just fill out the Fair Hearing Request Form, which can be found at <http://www.dds.ca.gov/Forms/FairHearing/DS1805.pdf>.

Filing for Hearing

To file for hearing, complete and return the Fair Hearing Request Form that the regional center sent with your NOA. Send your hearing request to your regional center. If you are uncertain about who to send it to, send it to both your local regional center and the Office of Administrative Hearings at 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833 or fax it to (916) 376-6318.

Informal Meeting

When you file the Fair Hearing Request Form, you have the option of choosing to have an informal meeting and/or a mediation with the regional center prior to the hearing. The informal meeting is the first step in the appeal process. It is a meeting between you (and your representative, if you have one) and a regional center representative. The purpose is to resolve the issue or at least narrow the issues at the hearing. This is your opportunity to meet with a regional center administrator and talk him/her into making you eligible for regional center services. You do not have to participate in an informal meeting but if you request one, the regional center must provide one. A Fair Hearing Timeline Flow Chart is included as Appendix A.

Within 5 working days after an informal meeting, the regional center director or the person acting for the director must send you a written decision. The written decision must identify each issue that was presented at the informal meeting, decide on each issue identified, state the facts supporting each decision, and identify the laws, regulations and policies upon which each decision is based. It must also explain how to appeal the decision.

If you agree with the informal decision, you can withdraw your request for a hearing by completing the form “Notification of Resolution” provided by the regional center. The decision will go into effect 10 days after the receipt by the regional center of the “Notification of Resolution.”

If you disagree with the informal decision, you indicate disagreement by continuing with the scheduled mediation or hearing.

Mediation

If you disagree with the informal decision, or would like another opportunity for resolution, the next step is mediation. You or the regional center may decide not to participate in mediation. Many regional centers do not participate. If you request a mediation and the regional center denies it, then the next step is a fair hearing.

A mediation is a meeting where an independent, trained mediator meets with you and a regional center representative. It takes place within 30 days of your request for hearing. The mediator tries to find common ground and new solutions. The mediator has no power to force an agreement. If you reach an agreement, you sign an agreement and the appeal process stops. If you do not reach agreement, you proceed to fair hearing.

Everyone should seriously consider mediation. Mediation is a good idea because it gives you and the regional center another chance to reach an agreement. The mediator is independent, and will try to help you reach an agreement. However, it does take some time. Other than that, you have nothing to lose. Even if mediation does not work for you, you will have more information about the regional center's case. That information can be helpful in your fair hearing. If you think there is no hope for an agreement, you can decide NOT to mediate (called "waiving" mediation). But, many people who think there is no hope for agreement end up reaching an agreement in mediation. If you (or the regional center) waive mediation, make sure you are prepared for your hearing. Your hearing may be scheduled sooner than if you go to mediation.

Motions

A motion is a request to the administrative law judge to make a decision about an issue in the case before the hearing. Examples of motions include motions to dismiss based on applicable statutes of limitations or motions to void subpoenas.

The Administrative Procedure Act (APA) does not apply to regional center hearings, but it is a useful guide regarding responding to motions. The APA can be found at <http://www.dgs.ca.gov/oah/GeneralJurisdiction/APAHearings.aspx>.

Fair Hearing

The final step in the appeal process is the fair hearing. It takes place within 50 days of your hearing request unless a delay is requested for good cause. Five (5) calendar days before hearing, you and the regional center must send each other your exhibits and a list of witnesses. See Appendix E for a sample exhibit and witness list. The hearing is held before an Administrative Law Judge (ALJ). At the hearing, the regional center has to present its case first. The ALJ will issue a written decision 10 days after the hearing.

Continuance (Postponement)

Either you or the regional center may ask for the hearing or mediation date to be changed. To postpone the hearing date, you file a "Motion for Continuance of Hearing and Waiver of Time." Here is the link to the motion form:

<http://www.documents.dgs.ca.gov/oah/forms/DDS RFC Form.pdf>

The form has a space where you need to explain the reason why you need to continue the hearing. OAH will grant a continuance if "good cause" is shown. You may also attach any documents that support your need for a continuance.

The form also requires you to call the regional center representative and ask if he or she will agree to continue the hearing. In the space provided, you should write the name and phone number of the person that you spoke with. Then, select whether the person has agreed to or opposed the continuance of the hearing. You should ask the regional center representative for a fax number or email address to send the completed form for him or her to sign.

The Claimant or the Claimant's Authorized Representative should sign the section entitled "Waiver of the Time Set by Law for Lanterman Act Fair Hearing and Decision." In order to be granted a continuance, you must agree to waive the hearing timelines.

Remember to fax or email the form to the regional center representative and ask him or her to sign where indicated. Once completed and signed, you should fax the form to one of the following OAH fax numbers, depending on where the hearing will take place:

OAH Sacramento: 916-376-6318

OAH Los Angeles: 916-376-6395

OAH San Diego: 916-376-6318

OAH Oakland: 916-376-6318

If you do not have enough time to send a written motion, you may try calling OAH and requesting a continuance over the phone. After you file the motion to continue the hearing, you may check the OAH website to see whether or not the motion has been granted: <http://www.dgs.ca.gov/oah/GeneralJurisdiction/Continuances.aspx>

You will need to enter the OAH case number in order to perform the search.

Interpreters

If you or a witness needs a sign or language interpreter, immediately contact OAH so that a certified interpreter can be provided at no cost.

Accessibility of the Hearing Location

Hearing locations must be accessible to persons with disabilities. You should check with OAH in advance to assure accessibility. If individuals with disabilities require a reasonable accommodation to attend the hearing, contact OAH as soon as possible so arrangements can be made.

Getting a Different Judge

Not all judges are the same and you need to learn about your judge prior to the hearing. You may be able to get a different judge if the one assigned to you has a history of bias or prejudice. You do this by filing a motion to recuse the judge. A sample motion to recuse is included in Appendix C.

To find information about the judge assigned to your case, log onto the website for OAH at <http://www.dgs.ca.gov/oah/GeneralJurisdiction/Calendar.aspx> (general jurisdiction calendar) and enter your case number. The judge will be assigned close to the hearing date. Then, go to the link at <http://www.dgs.ca.gov/oah/DDSHearings/DDSDecisions.aspx> and enter the judge's name. You will see a list of the cases the judge has decided. Read some of the cases and determine if this is a judge who you want to decide your case. If not, then file a motion to recuse the judge. Simply send or fax the motion to recuse with your information to OAH. If you do not hear from OAH as to whether a new judge has been provided, then call OAH prior to the hearing to determine the outcome of your request. Normally, the request will be granted.

Chapter 5 – Preparing for Hearing

Determining Your Legal Argument

Your legal argument is the law you are relying on to establish eligibility for regional center services and the facts which support your claim. In order to prepare your legal argument:

- Review the law which applies to regional center eligibility. The relevant law can be found in Appendix F.
- Search for and read previous Fair Hearing decisions at the following link:
<http://www.dgs.ca.gov/oah/DDSHearings/DDSDecisions.aspx>.

Collecting Evidence

Evidence consists of the facts that support your claim. You should gather any written evidence that supports your legal argument. Some examples of evidence might be existing documents and reports. You should also look through your own personal records. You may also want to ask family members and anyone else close to the case to identify and help you get copies of every document that may have even the remotest relevance. To be thorough, you can request records from schools, health providers, and government agencies that might have information about you. You should get a copy of every document that may have even the remotest relevance. *Do not wait to request documents.* Gathering documents often takes more time than you anticipate. They will help you to understand what additional information you will need to secure and where the problems may come up in this case. Read every document that you have. You can begin to decide which documents will be important evidence, but don't discard the other documents. Often, you will not know which documents are important until an expert has looked at everything.

Most of the information relating to your case will be in the form of documents or reports. Ask the Regional Center for a copy of your case file. You have a right to see any records in your Regional Center file, including records the Regional Center obtained from outside agencies or individuals. The Regional Center must give you access to your records within three working days after a written or oral request to see

[them.](#)¹⁴ If you want, the Regional Center must also help you understand your records.

You may want to subpoena an agency to produce records *at* your hearing. A subpoena duces tecum compels an agency to bring records that they have and to verify to the court that the documents or records have not been altered. The agency may verify this by declaration or by direct testimony, as you require. A subpoena form can be found at the following link:

<http://www.documents.dgs.ca.gov/oah/forms/oah1-subpoena.pdf#search=subpoena%20Form&view=FitH&pagemode=none>

Once you have your documents, draw a line down the middle of a piece of paper and list the facts and evidence you have on one side and facts or evidence the regional center has on the other side. This helps you see where you may need evidence to counter evidence that the regional center has. Other than the documents that already exist, you may need to get additional documentary evidence to support your case, such as an assessment report by an expert.

What are Assessments?

Assessments offer a formal way to measure and classify traits, abilities, feelings, symptoms, and other psychological occurrences through the use of standardized testing and activities. In addition to assessing personality and emotional functioning, testing can evaluate brain functioning in the areas of intellectual ability, memory, language, perception, concentration and attention, and motor and sensory functions.

What is the Purpose of an Assessment?

A formal assessment, usually involving testing, is used to diagnose or rule out various conditions. Assessments provide deeper understanding of issues than cannot be found during routine therapy or medical visits. They also help identify strengths and weaknesses, facilitate diagnostic decisions, and aid in treatment planning.

Why Do You Need an Assessment for Regional Center Eligibility?

¹⁴ Welf. & Inst. Code Section 4725-4729. [“Return to Main Document”](#)

You need an assessment to prove that you have a developmental disability that would qualify you for regional center services. The assessment is a big part of your evidence. The assessment should address whether you have a developmental disability using the legal criteria, including whether the disability is a “substantial disability,” and should identify the tests used to make that determination.

What is the Assessment Process?

The assessment process can include a review of records, extensive interviewing of you and your parent or guardian, the assessor’s observations, consultations with other professionals, self-administered subjective questionnaires, and face-to-face testing with objective tests. The expert will select appropriate measures based on the suspected problems being assessed. The assessment also involves writing a report. An assessment report should ideally contain the following categories: the source of the referral, background information (reports reviewed, interviews, etc.), behavioral observations during testing, the tests administered, a summary of test results (including when appropriate, intellectual functioning, attention and concentration, auditory and verbal perception, motor abilities, language, memory, current emotional status). It should also include diagnostic impressions and, most importantly, a section that pulls it all together, describing why the psychologist has reached the conclusions he or she has.

Who Performs Assessments?

It is best practice to use a licensed psychologist or neuropsychologist to perform an assessment for regional center eligibility purposes. You should also make sure the expert can testify about the assessment results, because having an assessment report *and* testimony is the best evidence to have in your hearing.

How Should the Assessment Address Substantial Disability?

In order to determine “substantial disability” the assessment should address whether there are limitations in three or more of the following areas of major life activity: receptive and expressive language; learning; self-care; mobility; self-direction; capacity for independent living and economic self-sufficiency. The assessment should list each area of substantial disability and then explain how you meet each area that you actually meet. It is helpful if the assessor could also list the available evidence that shows how you meet the area of substantial disability. For example, for self-direction, the assessor could describe how you are substantially disabled in the area of self-direction and then list three documents that demonstrate this.

What Tests are Used During Assessments?

There are several different tests that can be used to determine intellectual functioning, both verbal and nonverbal. There are also specific tests to assist in making a diagnosis of an Autism Spectrum Disorder (ASD). You should talk with the expert who is doing the assessment about which tests they are using and why.

What if an Assessment Includes Information that Does Not Support Eligibility?

It is possible that you will have information or test results that seem to not support eligibility for regional center. This is called unfavorable evidence. You should not ignore this evidence if the regional center has access to it. Instead, you should consult with the expert to ask questions about the unfavorable evidence. You should ask the expert to explain how the unfavorable evidence hurts the case and if it hurts enough that you should not go to hearing. You should ask the expert if the evidence can be explained in a way that does not hurt the case. For example, does your expert have a different opinion about the unfavorable information? Was the unfavorable information interpreted in the wrong way by a different evaluator? Is any of the unfavorable information inconsistent with other information that you have? Most cases have some kind of unfavorable facts. However, you should try to anticipate the regional center's arguments about those unfavorable facts and then use your expert to refute them.

See the Assessment Guide (Appendix B) for more detail on what an expert should include in their assessment for regional center eligibility.

Letters

Letters from professionals and other people who know you may be very helpful. Letters will not be given the same weight as the oral testimony of a live witness, but will be considered and are admissible in administrative hearings. They are a simple and straightforward means of supporting the facts you can establish through testimony. Your expert can refer to and draw conclusions from them.

Witnesses

Your witnesses are the heart of your case. Documents are important, but few cases are going to be won or lost because of the documentary evidence. These cases tend to be expert-driven. Few cases are won on the force of expert testimony alone, but none can be won without good expert testimony. Remember, the Regional Center is going to have an expert witness testify that you *are not* eligible. You therefore need an expert who testifies that you *are* eligible. The quality of the testimony that you can secure from your expert will be a critical factor in the outcome of your case. At the same time, do not underestimate the value of testimony from lay or other non-expert

witnesses. Their testimony provides critical information that your expert would not know from his or her own observation. They can provide a chronology of events and provide a practical view of who you are. Because “lay” witnesses are often given too little consideration, we begin with them.

Lay Witnesses

Lay witnesses can significantly enhance the case you present. These witnesses are the one thing you have which the Regional Center will not. Because lay witnesses will testify about facts they know about you, think about who knows you the best. Family members are usually a good choice, as are current or former teachers or employers. Choose lay witnesses who will appear objective and unbiased to the ALJ. Cases are often significantly enhanced by the lay and non-expert witnesses you can present. Such witnesses are the one thing you have which the regional center will not. Both of you will have experts but only your side will have the practical, down-to-earth information and stories that only lay witnesses who know you well can provide. Therefore, one of the first questions you must ask the person who knows you best, probably a parent or other family member, is to list all of the potential witnesses both lay and expert. It is helpful if they can claim some degree of objectivity, i.e. are not friends of the parents. However, that is not absolutely necessary. Lay witnesses are often accorded a great deal of credibility by the ALJs. Locating such witnesses often takes diligence and possibly good fortune. It is well worth the effort.

Lay witness testimony can be used by your expert as the basis for his or her opinion and can corroborate the opinion of your expert. If test results predict that you should have difficulty learning new tasks or remembering information, witnesses who know you will be able to provide stories that illustrate this problem. Stories about efforts to teach you practical skills, like how to operate a DVD player or bake a cake, are often the most revealing. Can you make a purchase and understand how much change to expect? Do you remember where the car is parked at the mall or know how to safely get to a nearby store? The job of your lay witnesses is to tell stories that make you come alive, that demonstrate the real struggles you have with tasks that most people find simple.

Some professionals, such as teachers, care home operators or trainers with vocational programs, may serve as both expert and lay witnesses in these cases. They are not experts in the same sense as a licensed psychologist, because they cannot, for instance, provide an opinion concerning your diagnosis. They can provide a great deal of information concerning adaptive skills, learning characteristics and needs. On the question of “treatment needs,” these people may be able to

provide an opinion if they have special experience, expertise or training in teaching children or adults with intellectual disability.

Expert Witnesses

Your expert witness must know you within her area of expertise. This is the area in which she may testify about her opinions, not just facts she knows about you. For instance, your special education teacher would know you from the classroom setting, or a psychologist would know you from when she evaluated you. If you are choosing between similar witnesses, for instance two psychologists, consider who has greater expertise on the subject of your case, who will appear more authoritative at the hearing, and whose opinion supports your argument most strongly.

A witness does not need to have a Ph.D. to be an expert. An expert is simply someone who, because of education, experience or training, has sufficient expertise to assist the judge in understanding the facts of the case and reaching a decision. Experts can express opinions in testimony. Generally, lay witnesses cannot - they can only relay facts. For example, a regular education teacher can provide an opinion about the nature of a child's learning needs. If a regular education teacher has had a number of children with intellectual disabilities in class, he or she may be able to express an "expert" opinion about whether or not the child needs similar teaching approaches to a child with intellectual disability. A special education teacher, who may have additional training and experience, is more likely to be able to express an expert opinion in an eligibility case than a general education teacher. Other people who may be able to provide "expert" testimony on some aspects of your case include psychologists, physicians, physical therapists, occupational therapists, speech therapists, counselors, mental health professionals, behaviorists, care home operators, In-Home Supportive Services (IHSS) workers, staff from day programs, and others.

Most experts used in eligibility cases will be psychologists or psychiatrists. Psychology and psychiatry are not exact sciences. According to the cautionary statement in the DSM-5, page 25:

When the DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-5 mental disorder...does not imply that an individual with such a condition meets legal criteria for the presence of a

mental disorder or specified legal standard...For the latter, additional information is usually required beyond that contained in the DSM-5 diagnosis, which might include information about the individual's functional impairments and how these impairments affect the particular abilities in question.

It may be important in a particular case to remind the ALJ that a diagnosis is often open to dispute. You, at least, need to keep it in mind. You will often be faced with testimony by two experts that is diametrically opposed.

An expert, because of special training, expertise and experience, is allowed to express an opinion *within* his or her area of expertise. A clinical psychologist can offer an opinion of whether or not a person has intellectual disability, autism spectrum disorder, or a solely psychiatric condition. A psychologist will not be allowed to diagnose cerebral palsy - because that is a medical diagnosis - instead, your expert will need to be a medical doctor (MD). An expert's opinion will be given more or less weight by the ALJ depending on his or her degree of expertise, knowledge of the facts and some intangibles. For example, medical doctors can, technically, diagnose intellectual disability, but most don't have a great depth of knowledge or experience in doing so. Relying on an MD as your primary expert in an intellectual disability or 5th category case will likely be unsuccessful.

An expert's opinion is only as good as the foundation on which it is built. The foundation consists of the information he or she has, which comes from reviewing existing documents, conducting interviews, and administering tests. Your job is to make sure that your expert has seen all of the documents, had access to all of the people you can find who have important information to relay and had the time and opportunity to administer the tests he or she feels are necessary. There is nothing more damaging to your case than to have your expert confronted with information, such as a document with unhelpful revelations, for the first time on cross examination. *[Practice tip: There may be a temptation to not hand the bad stuff over. Resist it. A good expert will do one of two things with unhelpful facts. He or she will explain to you why the facts aren't so bad after all or will agree that they are devastating to your case and help you decide whether there is sufficient merit to go ahead or not.]*

You should rely heavily on your expert to determine how to present a particular case. Your initial task will be to explain the elements of a case as clearly as you can. Don't expect that he or she knows what "developmental disability" means in California. You need make sure your expert has the exact legal definition of developmental disability. It is your job to focus the expert on the aspect of the case that is legally

relevant, and to not waste time on those that are not. With the legal definition of developmental disability in her hand, your expert will then be better able to help you understand the *factual* aspects of the case that are important and those that are not.

Because these cases tend to rely on expert opinions and because the 5th category cases in particular have a murky statutory standard, the credibility of your expert is critical. You need to be very careful to present testimony about your expert's training, credentials and experience in general and the information he or she used to form an opinion in this case. An opinion, that appears conclusory and without any foundation, is not persuasive.

Don't be afraid to ask your expert challenging questions. The other side will. Ask for authority, including references to journal articles that support important points. Check it out to make sure that it will hold up. When she provides an opinion in her testimony, ask her for the basis of her opinion.

Many experts are not experienced as witnesses. They may have significant clinical expertise but may not be familiar with being challenged in a hostile environment. They may also not be comfortable or prepared for a situation where everything they say, and definitely every expression of doubt or ambiguity, can be used against them. Many psychologists and doctors are more familiar with a more cordial clinical atmosphere where they can explore opinions and question their own conclusions. If your expert is inexperienced, be sure that he or she understands testimony must be presented clearly and unequivocally when at all possible. At the same time, your expert should be prepared to address weaknesses in his or her opinion when questioned. Anticipate those that you can and consider a response beforehand. If there is a legitimate question raised, it is often best to not be defensive but acknowledge it and then explain why it does not change the ultimate conclusion.

Preparing Witnesses

What a witness testifies to is also called evidence. Some witnesses will need to be subpoenaed. This means that a legal order is issued compelling them to attend the hearing to testify. You should subpoena witnesses and ask witnesses to testify as soon as you get a hearing date so people will be available. A subpoena form can be found at the following link: <http://www.documents.dgs.ca.gov/oah/forms/oah1-subpoena.pdf#search=Subpoena%20Form&view=FitH&pagemode=none>.

Your witnesses, in particular your expert witnesses, will actually help prepare *you* to some extent. Once you have determined who your witnesses will be, if possible, plan at least two sessions with each witness. Before the first meeting with an expert, give the expert copies of all information that could be relevant to her expert opinion.

If you are meeting with an expert like a psychologist, who is qualified to make a diagnosis, give her a copy of the Lanterman Act eligibility criteria. These criteria are legal categories, so they could differ from the criteria the expert would ordinarily use to make her diagnosis. Do not withhold information from your expert just because you do not think it will support your argument. If your expert has not seen all relevant information, her testimony at the hearing will be unconvincing.

Treat the first session like an interview. You want to find out as much as possible about the witness' opinion, whether or not it supports your argument. The witness should talk more than you. If you are meeting with an expert who is qualified to make diagnoses, learn her opinion about all evaluations and assessments of you. If you are meeting with a lay witness, learn what he remembers about your history, behaviors, abilities, and difficulties. You may want to ask your lay witnesses questions that show whether or not the factual observations underlying your evaluations and assessments are true. The information from your witnesses will provide the basis for your case – you will highlight the strengths and minimize the weaknesses of your argument, and do the opposite for the Regional Center's argument.

Between the sessions with your witnesses, review what they have told you.

Think about what you want the ALJ to learn from your witnesses' testimony.

You should prepare questions for your witnesses in advance. Review these questions with the witnesses to make sure the witnesses understand what information you are trying to get and that the answer is helpful to you. If the witness' answer doesn't help you, then don't ask the question in the hearing.

Keep a few things in mind so that your questioning will follow the rules of the court: start with general questions which will help the ALJ understand your subsequent, more specific questions; only ask questions within your witness' direct knowledge and area of expertise; ask one question at a time; only ask questions relevant to the eligibility criteria you are trying to prove. For experts, plan to ask a few questions at the beginning of your direct examination to demonstrate the expert's training, credentials, experience, and the information she used to form an opinion about your case.

In your second session with your witnesses, you can try out your questions to see if the witnesses answer in the way you expected and in the way they previously answered. In order to best present your argument, you may need to change the way you ask some questions. However, you should tell the witnesses that the questions and answers are not a script. Instead, your questions should be designed so that

your witnesses' natural and honest responses will be the information you need to come out in the hearing. Consider the weak points of your witnesses' testimony and explain to your witnesses that the Regional Center will bring up these issues during cross-examination. Speak with your witnesses to find a way for them to answer these questions truthfully while doing minimal harm to your case. If a witness' testimony is complicated or if you get answers that are very different from what you anticipated, you may need to do a third session.

The last witness preparation session is best done between five and ten days before the hearing. This gives you enough time to fix any problems, but it isn't so far ahead that the witnesses forget the points to cover during testimony. During the hearing, you should not ask questions to which you don't know the answer, but you can ask follow-up questions to improve the answers you do get from your experts.

You should also prepare to testify, since you are the best witness for you, your child, or whomever you are helping. Be prepared to talk about your developmental history and to provide examples of why the disability meets the definition of "substantial disability" as discussed before on page 6.

You should also develop cross-examination questions for the witnesses you believe the Regional Center will call. You will want to ask a series of short questions that highlight the weaknesses in the Regional Center's argument. While your expert can also testify about these weaknesses, it is more convincing for the ALJ to hear the Regional Center's own experts admit to the weaknesses. It will also be effective for the Regional Center experts to answer questions which highlight the strengths of your argument. Lastly, you can ask questions which will make the Regional Center experts look less credible. Only ask these questions if you have a good reason to believe that the Regional Center will not have a good answer. For example, some Regional Center witnesses will testify based on records and have never met you or your child. You could ask, "You have never even met me, correct?" Or, "You have never even met my child, have you?" Remember to ask specific questions, so that if the Regional Center answers "Yes, but . . ." you can ask the judge to ignore the rest of the answer because it does not directly respond to your original question.

Submission of Witness and Exhibit List

At least 5 *calendar* days before the hearing, you and the regional center must exchange lists of possible witnesses and copies of the documents you may introduce at the hearing. That means you and the regional center must receive the documents and list 5 days before the hearing. The list of witnesses must include a short statement telling what each witness will testify about. A Sample Witness and Exhibit

List is included in Appendix E. The ALJ can prevent the introduction of any documents and testimony of any witness that is not disclosed 5 calendar days before the hearing.

Chapter 6 – During and After the Hearing

Arrive at the hearing with plenty of time to spare. The hearing can be a lengthy process, so you may want to bring water, snacks, or even lunch. Bring a pen and paper to write down your observations of the proceedings.

Opening Statements

An opening statement must include a description of what you are asking for and why, as well as the law that supports you.

You should give an opening statement. An opening statement is not mandatory, but it is helpful to explain to the judge what the hearing is about. Be certain to describe yourself (or your child) to the ALJ so that he/she understands what you need (or your child needs). Your opening statement should be brief. The regional center will give an opening statement first.

Questioning Witnesses

Regional Center Witnesses

The regional center will present its witnesses first. You can ask the regional center witness questions (this is called “cross-examination”). Good questions will elicit answers that show that the witness doesn’t understand something or doesn’t remember facts. You may also ask questions to show that a witness is taking sides, changing what he/she said earlier or might not be telling the truth.

Pay attention to the witness’ testimony during direct examination by the Regional Center – you might notice a weakness to bring up later during your cross-examination. Otherwise, you should stick to asking the cross-examination questions that you prepared before the hearing. It is not a good idea to ask a question to which you do not already know the answer, unless you think that the probable answer will greatly benefit your argument.

Your Witnesses

You will have the opportunity to ask your witnesses questions (called direct-examination). They should only talk about things that they have done or seen or heard themselves. You should only ask short, simple, clear questions.

In addition to presenting your main argument, you can ask your witnesses questions to disprove things that the Regional Center witnesses might have said. Otherwise, you should stick to asking the questions that you prepared before the hearing. Feel

free to ask follow-up questions if your witness' answer is not clear. When you are questioning an expert witness, be sure to reference the evidence about which the expert is testifying, and give the ALJ time to find the evidence in your packet.

The Regional Center will have the opportunity to cross-examine your witnesses. The ALJ can also ask questions of any witnesses. After the Regional Center has cross-examined your witnesses, you will have the opportunity to do a re-direct examination. At this point, you can have your witness clarify or rephrase anything negative that might have come up during cross-examination.

Closing Statements/Written Closing Brief

As you go through the hearing, you may realize that the judge does not have all the information to make an accurate decision. If so, you can ask the judge to "keep the record open." The judge does not have to give you permission to do this. However if the judge allows the record to be kept open, it will allow you to give the judge more documents and information after the hearing.

The ALJ will usually ask for a closing statement to sum up the evidence gathered. This is a good opportunity to recap what was presented at the hearing and restate your position that you are entitled to be made eligible for regional center services. Sometimes, both sides will agree to do a written closing brief rather than an oral closing statement. This option will allow you to think about all the testimony from the hearing before you sum up your argument. A written closing brief should provide the information and facts that you have presented and set out the law that supports your case. In your closing brief, you can include any additional evidence that the ALJ allowed after the hearing if the record was kept open.

After the Hearing

After your hearing, the ALJ has 10 days to write a decision, unless you have waived the timeline by asking for a continuance (postponement). The decision must be made no more than 80 days after you requested your appeal. The ALJ's decision must:

- Be written in simple, everyday language
- Include a summary of the facts
- Include a statement about the evidence the ALJ used to make the decision
- Include a decision on every issue or question that was in the hearing request and presented during the hearing
- State the laws, regulations and policies that support the ALJ's decision.

SECTION 2: Appendices

Appendix A - Fair Hearing Timeline Flow Charts

Appendix B - Assessment Guide

Appendix C - Sample Request to Change Judges

Appendix D - Sample List of Witnesses and Exhibits

Appendix E - Regional Center Eligibility Law (statutes and regulations)

Appendix A: FAIR HEARING FLOW CHART

Request a Fair Hearing if: (1) the regional center decides, without your agreement, to cut, reduce, or change a service or support in your IPP; (2) you request a service or support and the regional center denies your request; (3) you are notified that you are not eligible or are no longer eligible for regional center services.

Question 1: Are you currently receiving a service or support that the regional center wants to cut, reduce, or change?

YES > File your request for hearing within 10 days of the date you received the notice and your service or support will continue until there is a final administrative decision. GO TO Question 2

NO > You must file your request for hearing within 30 days of being notified by the regional center. GO TO Question 2

Question 2: Do you want to have an optional informal meeting?

YES > An informal meeting must be held within 10 days of regional center's receipt of your request for a hearing, unless you agree to longer time.

You must receive a written decision from the regional center within 5 days of the informal meeting. GO TO Question 3

NO > GO TO Question 4 regarding optional mediation.

Question 3: Are you satisfied with the regional center's decision?

YES > Tell the regional center that you withdraw your request for Fair Hearing. Services agreed to in your informal meeting decision will begin within 10 days of receiving your withdrawal. GO NO FURTHER.

NO > GO TO Question 4 regarding optional mediation.

Question 4: Do you want to have the optional mediation?

YES > Does the regional center accept mediation? They must accept mediation within 5 days.

If regional center accepts, mediation will be held within 30 days of the regional center's receipt of your request for a hearing, unless you agree to longer time. GO TO Question 5

If regional center does NOT accept mediation within 5 days, your case proceeds to Fair Hearing. GO TO Question 6

NO > You may proceed to a Fair Hearing. GO TO Question 6

Question 5: Did you reach an agreement in mediation?

YES > Tell the regional center that you withdraw your request for Fair Hearing. Services agreed to in your written resolution will begin within 10 days of receiving your withdrawal. GO NO FURTHER

NO > You may proceed to a Fair Hearing. GO TO Question 6

Question 6: Do you want to proceed with a Fair Hearing?

YES > A Fair Hearing will be held within 50 days of the regional center's receipt of your request for a hearing, unless a judge grants longer time for good cause.

A Fair Hearing decision must be issued within 10 working days of the last day of the hearing and no later than 80 days after your initial request for hearing unless you waived the timeline by asking for a continuance (postponement)

If the service is funded by the Medi-Cal Home and Community Based Waiver then the decision is reviewed by DHCS within 90 days of the hearing request. The decision may be adopted, overturned, or written differently. GO TO Question 7

NO > You may withdraw from the Fair Hearing by contacting OAH.

Question 7: Are you satisfied with the Fair Hearing decision?

YES > Services and supports will be provided as decided in the Fair Hearing decision.

NO > You have 90 days to file a Writ of Administrative Mandamus in superior court. You can contact Disability Rights California or a private attorney for help.

NOTE: The regional center can proceed with a cut or a reduction in services within 10 days unless your attorney gets a court order to continue the services while the court decides on your appeal.

Appendix B - Assessment Guide

Use for psychological, neuropsychological, and other assessments to determine whether a person has a developmental disability under the Lanterman Developmental Disabilities Services Act.

You have been asked to conduct an assessment of (insert name here) to determine whether (insert name here) has a developmental disability under California law. Your assessment must address and answer the following questions and include a description of the clinical findings and

other data on which your determinations are based. These findings and other evidence may include the results of standardized and other tests you conduct with (insert name here), reviews of (insert name here) records, interviews of (insert name here) or other persons who know (insert name here), and any other inquiries and procedures you use to address and answer the following:

1. Does (insert name here) have intellectual disability, cerebral palsy, epilepsy, or autism?

Intellectual Disability

Cerebral Palsy

Epilepsy

Autism

2. What were the diagnostic criteria, and the clinical source(s) of those criteria (e.g., the DSM-V), used to make the determination(s) under #1 above?

What clinical findings, facts, records, test results, or other data support the determination(s) made under #1 above in relationship to the diagnostic criteria listed under #2 above?

When did the condition(s) identified under #1 originate, and on what clinical findings, facts, records, test results, or other data is this determination based?

Will the condition(s) identified under #1 be likely to continue indefinitely, and on what clinical findings, facts, records, test results or other data is this determination based?

3. Does the condition(s) identified in #1 above constitute a “Substantial Disability” for (insert name here) as the term “Substantial Disability” is defined below:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential;

Note, as used in (1), the term “cognitive” means: the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience.

Yes () or No (). If yes, on the basis of what clinical findings, facts, records, test results, or other data is this determination made?

and

(2) The existence of significant functional limitations in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

Yes () or No (). If yes, on the basis of what clinical findings, facts, records, test results, or other data is this determination made?

(B) Learning;

Yes () or No (). If yes, on the basis of what clinical findings, facts, records, test results, or other data is this determination made?

(C) Self-care;

Yes () or No (). If yes, on the basis of what clinical findings, facts, records, test results, or other data is this determination made?

(D) Mobility;

Yes () or No (). If yes, on the basis of what clinical findings, facts, records, test results, or other data is this determination made?

(E) Self-direction;

Yes () or No (). If yes, on the basis of what clinical findings, facts, records, test results, or other data is this determination made?

(F) Capacity for independent living;

Yes () or No (). If yes, on the basis of what clinical findings, facts, records, test results, or other data is this determination made?

(G) Economic self-sufficiency.

Yes () or No (). If yes, on the basis of what clinical findings, facts, records, test results, or other data is this determination made?

(3) In making your determination concerning whether (insert name here)'s disability, as identified under #1 above, constituted a Substantial Disability, did you consult with (insert name here), or his/her parents, guardians, conservators, educators, advocates, or any other individuals, and if so whom did you consult?

4. If you find that (insert name here) does not have one of the four conditions listed in #1 above, your assessment must also consider whether (insert name here) has a condition which is closely related to intellectual disability.

A. In your professional opinion, what are the clinical characteristics of Intellectual Disability, and, for each characteristic you list, what, if any (beyond your practice experience), is the empirical, diagnostic, or professional source which supports your identification of that characteristic as a characteristic of Intellectual Disability?

(Enter information here) - Source in support of identification:

(Enter information here)

(Enter information here) - Source in support of identification:

(Enter information here)

(Enter information here) - Source in support of identification:

(Enter information here)

(Enter information here) - Source in support of identification:

(Enter information here)

B. Which, if any, of the characteristics identified above does (enter name here) present with, and, for each characteristic identified, on what clinical findings, facts, records, test results, or other data is the determination of the presence of that characteristic in (enter information here) based?

(Enter information here) based on (enter information here)

(Enter information here) based on (enter information here)

(Enter information here) based on (enter information here)

C. Did (enter name here)'s condition, as described by the characteristics you identified him/her as having under B. above, originate before the age of 18?

Yes () or No (). If yes, on what clinical findings, facts, records, test results, or other data is this determination based?

D. Is (enter name here)'s condition, as described by the characteristics you identified him/her as having under B. above, likely to continue indefinitely?

Yes () or No (). If yes, on what clinical findings, facts, records, test results, or other data is this determination based?

E. Does (enter name here)'s condition, as described by the characteristics you identified him/her as having under B. above, constitute a Substantial Disability for him/her, as Substantial Disability is defined under 6. (1), (2) (A) through (G), and (3) above?

Yes () or No (). If yes, please list and describe on what clinical findings, facts, records, test results, or other data each determination under 6. (1), (2) (A) through (G), and (3) above is based?

5. If you find that (enter name here) does not have one of the four conditions listed in #1 above, or a condition described under #7 above, your assessment must also consider whether (enter name here) has a condition which requires treatment similar to that required for persons with intellectual disability.

F. In your professional opinion, what are the treatment requirements for persons with Intellectual Disability, and for each treatment requirement you list, what, if any (beyond your practice experience), is the empirical, diagnostic, or professional source which supports your identification of that treatment requirement as one required for persons with Intellectual Disability?

(Enter information here) - Source in support of identification:

(Enter information here)

(Enter information here) - Source in support of identification:

(Enter information here)

(Enter information here) - Source in support of identification:

(Enter information here)

A. Which, if any, of the treatment requirements identified above does (insert name here) require, and, for each treatment requirement identified, on what clinical findings, facts, records, test results, or other data is the determination of that identification based?

(Enter information here) based on (Enter information here)

(Enter information here) based on (Enter information here)

(Enter information here) based on (Enter information here)

B. If (insert name here) requires a treatment which is not listed under A. above, but which is similar to one of those, please list each such similar treatment, describe which treatment requirement listed under A. above it is similar to and why, and describe the clinical findings, facts, records, test results, or other data which support the determination that (insert name here) requires each such treatment.

(Insert information here), which is similar to (insert information here), because (insert information here), and which (insert information here) requires based on (insert information here)

(Insert information here), which is similar to (insert information here), because (Insert information here), and which (Insert information here) requires based on (Insert information here)

C. Did (insert name here)'s condition, as described by his/her treatment requirements listed under B. and/or C. above, originate before the age of 18?

Yes () or No (). If yes, on what clinical findings, facts, records, test results, or other data is this determination based?

D. Is (insert name here)'s condition, as described by his/her treatment requirements listed under B. and/or C. above, likely to continue indefinitely? Yes () or No (). If yes, on what clinical findings, facts, records, test results, or other data is this determination based?

E. Does (insert name here)'s condition, as described by the treatment requirements you identified him/her as having under B. and/or C. above, constitute a Substantial Disability for him/her, as Substantial Disability is defined under 6. (1), (2) (A) through (G), and (3) above? Yes () or No (). If yes, please list and describe on what clinical findings, facts, records, test results, or other data each determination under 6. (1), (2)(A) through (G), and (3) above is based.

APPENDIX C – Sample Request to Change Judges

VIA FACSIMILE (213) 576-7244

September 20, 2015

Janis S. Rovner
Presiding Administrative Law Judge
Office of Administrative Hearings
320 W. Fourth Street, Ste. 630
Los Angeles, CA 90013
Re: Peremptory Challenge

John Doe v Harbor Regional Center
OAH No. 201511100000
Hearing Date: September 28, 2015

Dear Judge Rovner:

I am writing on behalf of John Doe to request that a different judge be assigned to hear his case on September 28, 2015. The currently assigned judge is Vincent Nafarrete. We ask that this change be made pursuant to Title 1 of the California Code of Regulations, Section 1034 and Government Code section 11425.40. Enclosed is the prescribed declaration required under that section.

Thank you for your consideration. Please feel free to contact me at (213) 555-5555 if necessary.

Sincerely,

Jane Doe

Enclosure

Declaration of Jane Doe

Mother of John Doe

I, Jane Doe, declare that:

- 1) I am the parent for a party to the pending matter.
- 2) The Judge assigned to the Hearing is prejudiced against the interest of the party so that the declarant believes that her son cannot have a fair and impartial Hearing before the Judge, Vincent Nafarrete.

This Declaration is under penalty of perjury under the laws of the state of California and is signed September 20, 2015, at Los Angeles, California.

Sincerely,

Jane Doe

Appendix D – Sample List of Witnesses and Exhibits

Your Name

Your Street Address

Your City, State, and Zip Code

Your Telephone Number

Authorized Representative for [Name of Regional Center Client]

OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF CALIFORNIA

In the Matter of:

Claimants Name,

Claimant,

and

REGIONAL CENTER,

Service Agency

Case No.:

Hearing Date:

Hearing Time:

Hearing Place:

Administrative Law Judge:

CLAIMANT'S WITNESS LIST AND EVIDENCE

WITNESS LIST

- 1) Witness Name will testify as to [describe what they will testify about.]
- 2) Witness Name, is being subpoenaed to testify regarding [describe what they will testify about.]

EVIDENCE LIST

- 1) Opening Brief
- 2) Hearing Documentation
 - a. Request for Service dated [Insert Date]
 - b. Denial Letter dated [Insert Date]
 - c. Hearing Request dated [Insert Date]
 - d. Notification of Hearing
- 3) Information about Program
- 4) Resumes of Program Staff
- 5) Progress Report from [Insert name of program] dated [Insert Date]
- 6) Progress Report from [Insert name of program] dated [Insert Date]
- 7) Psychological Evaluation by [Insert Name of Assessor] dated [Insert Date]
- 8) IPP dated [Insert Date]
- 9) Declaration of [Insert Name] dated [Insert Date]
- 10) Citations for Judicial Notice
 - a. WIC section 4512
 - b. Title 17 CCR sections 54000-54002

Appendix E - Regional Center Eligibility Law

WELFARE AND INSTITUTIONS CODE SECTION 4512(a)

4512. As used in this division:

(a) "Developmental disability" means a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

17 CCR section 54000. Developmental Disability.

(a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

- (1) Originate before age eighteen;
- (2) Be likely to continue indefinitely;
- (3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

- (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric

disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

17 CCR section 54001. Substantial Disability.

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

17 CCR section 54002. Cognitive.

“Cognitive” as used in this chapter means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.

Disability Rights California is funded by a variety of sources, for a complete list of funders, go to <http://www.disabilityrightsca.org/Documents/ListofGrantsAndContracts.html>.