

AGENDA

THE MEETING OF THE

DISABILITY PROCEDURES AND SERVICES COMMITTEE

and

BOARD OF RETIREMENT*

LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION

300 NORTH LAKE AVENUE, SUITE 810

PASADENA, CA 91101

9:00 A.M., WEDNESDAY, September 6, 2017 **

*The Committee may take action on any item on the agenda,
and agenda items may be taken out of order.*

COMMITTEE MEMBERS:

Vivian H. Gray, Chair
Marvin Adams, Vice Chair
Alan Bernstein
Ronald Okum
David Muir, Alternate

- I. APPROVAL OF THE MINUTES
 - A. Approval of the minutes of the regular meeting of August 2, 2017
- II. PUBLIC COMMENT
- III. ACTION ITEMS
 - A. Release of Psychiatric/Psychological Medical Records to Unrepresented Applicants
- IV. FOR INFORMATION
- V. REPORT ON STAFF ACTION ITEMS
- VI. GOOD OF THE ORDER
(For information purposes only)
- VII. ADJOURNMENT

***The Board of Retirement has adopted a policy permitting any member of the Board to attend a standing committee meeting open to the public. In the event five (5) or more members of the Board of Retirement (including members appointed to the Committee) are in attendance, the meeting shall constitute a joint meeting of the Committee and the Board of Retirement. Members of the Board of Retirement who are not members of the Committee may attend and participate in a meeting of a Board Committee but may not vote on any matter discussed at the meeting. The only action the Committee may take at the meeting is approval of a recommendation to take further action at a subsequent meeting of the Board.**

****Although the meeting is scheduled for 9:00 a.m., it can start anytime thereafter, depending on the length of the Board of Retirement meeting. Please be on call.**

Assistive Listening Devices are available upon request. American Sign Language (ASL) Interpreters are available with at least three (3) business days notice before the meeting date.

Any documents subject to public disclosure that relate to an agenda item for an open session of the Committee, that are distributed to members of the Committee less than 72 hours prior to the meeting, will be available for public inspection at the time they are distributed to a majority of the Committee, at LACERA's offices at 300 North Lake Avenue, suite 820, Pasadena, California during normal business hours from 9:00 a.m. to 5:00 p.m. Monday through Friday.

Persons requiring an alternative format of this agenda pursuant to Section 202 of the Americans with Disabilities Act of 1990 may request one by calling the Disability Retirement Services Division at 626-564-2419 from 7:30 a.m. to 5:00 p.m. Monday through Friday, but no later than 48 hours prior to the time the meeting is to commence.

MINUTES OF THE MEETING OF THE
DISABILITY PROCEDURES AND SERVICES COMMITTEE
and
Board of Retirement**

LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION
GATEWAY PLAZA - 300 N. LAKE AVENUE, SUITE 810, PASADENA, CA 91101

Wednesday, August 2, 2017 11:12 A.M. – 11:54 A.M.

COMMITTEE MEMBERS

PRESENT: Vivian H. Gray, Chair
Marvin Adams, Vice Chair
Alan Bernstein
Ronald Okum
David Muir, Alternate

ABSENT: NONE

ALSO ATTENDING:

BOARD MEMBERS AT LARGE

Anthony Bravo
Keith Knox

STAFF, ADVISORS, PARTICIPANTS

JJ Popowich
Steven Rice
Vincent Lim
Eugenia Der
Mike Herrera
Allison E. Barrett
Frank Boyd
Angie Guererro
Maria Muro
Michelle Yanes

Ricki Contreras
Vickie Neely
Anna Kwan
Robert Hill
Kerri Wilson
Mario Garrido
Marco Legaspi
Marilu Bretado
Thomas Wicke
Hernan Barrientos

Maria Silva
Jason Waller
Tamara Caldwell
Ruby Minjares
Shamila Freeman
Darren Huey
Justin Stewart
Danny Hang
Russell Lurina

ATTORNEYS
Thomas J. Wicke

GUEST SPEAKER
Mark Ganjianpour, M.D.

The meeting was called to order by Chair Gray at 11:12 a.m.

I. APPROVAL OF THE MINUTES

A. Approval of minutes of the regular meeting of July 5, 2017

Mr. Bernstein made a motion, Mr. Adams seconded, to approve the minutes of the regular meeting of July 5, 2017. The motion passed unanimously.

II. PUBLIC COMMENT

III. ACTION ITEMS

A. Late-Filed Applications – Government Code Section 31722

Mr. Muir made a motion, Mr. Okum seconded that the Disability Procedures & Services Committee instruct staff to forward the proposed changes to terminate LACERA's Late-Filed Application Policy to the Board of Retirement for final adoption. The motion passed unanimously.

Mr. Boyd stated that upon reviewing LACAERA's Late-Filed policy, it was determined that the policy does not comply with Government Code Section 31722. Mr. Boyd also stated that the recommendation will allow staff to make the determination case by case.

IV. FOR INFORMATION

A. Distinguishing Normal Degenerative Changes Vs Cumulative Trauma Injuries in Patients with Arduous Vs Sedentary Jobs – Presentation as submitted by Mark Ganjianpour, M.D.

Dr. Ganjianpour referenced different case studies to include sedentary and arduous work. Dr. Ganjianpour states that there are many factors that are looked at when distinguishing normal degenerative changes and cumulative trauma. Dr. Ganjianpour stated that these factors include type of job, age, years working in the type of job, medical records, and interactive process notes.

Medical records are crucial because they will allow the physician to ask about previous injuries and obtain any additional information needed. Dr. Ganjianpour also discussed the substantial and measurable contribution in CT, reliance on neutral physician evaluators (AME/QME), and not having medical records.

Dr. Ganjianpour stated that there are arthritic markers in our bodies and stated that if CT or MRI scan shows arthritis in more than one area, it is usually degenerative and not cumulative. If it is a single joint with arthritis, it will most likely be cumulative trauma from arduous work. Ms. Gray asked how can arthritic degenerative markers be determined? Dr. Ganjianpour stated that DNA sample testing, CT's, and MRI's can be done to determine this.

Dr. Campese stated that there are cases where the member may have been injured but the question is "did this happen at work?" Dr. Ganjianpour stated that this is why it is important to look at medical records and any documentation; however, if there is no documentation, it will be difficult to make that determination.

V. REPORT ON STAFF ACTION ITEMS

VI. GOOD OF THE ORDER

VII. ADJOURNMENT

With no further business to come before the Disability Procedures and Services Committee, the meeting was adjourned at 11:54 a.m.

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August 24, 2017

To: Disability Procedures & Services Committee
Vivian H. Gray, Chair
Marvin Adams, Vice Chair
Alan Bernstein
Ronald Okum
David Muir, Alternate

From: Francis J. Boyd, 
Senior Staff Counsel

For: September 6, 2017 Disability Procedures & Services Committee

Subject: **RELEASE OF PSYCHIATRIC/PSYCHOLOGICAL MEDICAL RECORDS
TO UNREPRESENTED APPLICANTS**

RECOMMENDATION

That the Disability Procedures & Services Committee recommend to the Board of Retirement that it adopt the recommended policy statement contained in this memorandum regarding the release of psychiatric/psychological medical records to unrepresented applicants.

INTRODUCTION

The Disability Litigation Office has brought to my attention some concerns regarding the release of psychiatric medical records to applicants who are representing themselves in the disability retirement appeal process. While investigating their concerns, I came across documents referring to a Board policy prohibiting the release of psychiatric reports to unrepresented applicants without a court order. However, I was unable to locate an actual written policy adopted by the Board of Retirement. LACERA's current practice of withholding evidence at the appeal level raises due process issues that may be challenged in court. In my opinion, it is important that the Board establish a written policy that documents LACERA's position on this issue.

LEGAL AUTHORITY

The Board of Retirement has the plenary authority and fiduciary responsibility to administer the retirement system, and it holds executive, legislative, and quasi-judicial powers. It has the sole authority to determine eligibility for a disability retirement. In

administering its duties, the Board has the authority to promulgate rules, regulations, and policies.¹

BACKGROUND

Roger M. Whitby, Principal Deputy County Counsel, Opinion Letter

In 1982, the Board of Retirement sought advice from the Office of County Counsel concerning the release of psychiatric reports to applicants whose disability applications were denied and who were representing themselves. On January 4, 1983, Roger M. Whitby, Principal Deputy County Counsel, provided an opinion letter to the Board on this issue wherein he expressed concerns about release of such information in light of the case of *Tarasoff v. Regents of University of California*.² In *Tarasoff*, a psychologist employed by the University of California, his superior, and the Regents of the University were held liable for the death of a girl who was killed by a man who had confided his intention to kill her to the psychologist. The California Supreme Court held that the psychologist had a duty to use reasonable care in warning the victim of the danger.

Mr. Witby advised that, under *Tarasoff*, it was possible that a court might hold the Board of Retirement liable for injuries resulting from the release of a psychiatric report to an applicant where it was reasonably foreseeable that release of the report might result in the injury to the applicant or some other person. He then advised the following:

. . . it is our advice that psychiatric reports should not be released to an applicant under circumstances where the therapist recommends against showing the report to the applicant and where the applicant has a history of violence, or where the therapist indicates that if the report is shown to the applicant, the applicant is likely to harm himself, the retirement staff, the therapist, or some other person.

Mr. Whitby stated that other than a situation where the therapist indicates that such harm or violence is likely to occur, the psychiatric reports would probably have to be shown to unsuccessful applicants in connection with their appeals, even if the therapist has included some general boilerplate language to the effect that the report should not be shown to the applicant. Mr. Whitby added:

We are concerned about the possible damaging psychological effects of allowing an applicant to review psychiatric reports relating to himself, as well as the effect of such a practice on your Board's ability to obtain candid reports from psychiatrists. However, we believe that the applicant's right to due process outweighs these considerations.

¹ Cal. Const., art. XVI, § 17, subd. (a) and (b); Gov. Code Sec. 31725; *Preciado v. County of Ventura, et al.* (1982) 143 Cal.App.3d 783, 789.

² *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425.

He then stated that “from a standpoint of protecting yourselves from liability, we believe that it is preferable to have a court order you to release a report rather than to have the court hold you liable for injuries resulting from releasing the report on your own volition.”

October 5, 1983 Board of Retirement Meeting

On October 5, 1983, this matter came to the Board for a vote. The initial motion was to “withhold from applicants any information where a psychiatrist has specifically said that this information should not be disclosed to the applicant.” However, several substitute motions were made and ultimately the issue was held over to the November 1983 meeting. The Board minutes from this meeting refer to an “existing Board policy with regard to the release of disability investigation packets to applicants acting in pro per who have been diagnosed as mentally or emotionally ill.” I have been unable to locate such a policy. In reviewing the minutes for the meetings from November 1983 through November 1984, I was unable to confirm that the Board took any action on Mr. Whitby’s opinion letter.

Disability Litigation Office Policy Regarding Release of Psychiatric Records to Unrepresented Applicants

Daniel McCoy, Chief Counsel of Disability Litigation from 1996 to 2007, authored Policies and Procedures of the LACERA Disability Litigation Office wherein he stated the following:

It is the policy of the Board of Retirement, adopting the recommendation of the Office of the County Counsel, that psychiatric reports on an applicant’s psychiatric evaluation are not to be given directly to the applicant without an order of a court.

Disability Litigation’s policy states that reports may be given to the applicant’s treating physician or to an attorney if the applicant gives, in writing, an unequivocal consent. It then explains:

On occasion, the applicant has no treating physician and does not have an attorney. Implementation of the policy will, in effect, deny the applicant a fair hearing, which LACERA has a fiduciary duty to provide. In this kind of case, the record must reviewed [sic] for evidence supporting LACERA’s refusal to provide the applicant with copies of psychiatric reports and records. Psychiatric reports favorable to the applicant’s position will usually be evidence that supports LACERA’s refusal to provide the applicant with copies of the psychiatric reports and records. However, this is not true in every case. Where the evidence favorable to the applicant’s position does not support LACERA’s refusal to provide copies of

psychiatric reports and records to the applicant, and the applicant has been found by LACERA's consultant in psychiatry not to have a mental disorder, the record must be developed on whether there is a reasonable basis for LACERA's refusal to provide copies of psychiatric reports and records to the applicant. The attorney may ask LACERA's consultant in psychiatry whether allowing the applicant to have a [sic] copies of the psychiatric reports an [sic] records would create a risk of harm to the applicant or anyone else. If LACERA's consultant finds that there is no risk of harm, and there is no evidence to the contrary, the applicant *pro se* may be provided with a copy of the psychiatric report. If LACERA's consultant opines that there is a risk of harm, a copy of the report is not to be given directly to the applicant without a court order.

Mr. Whitby's January 4, 1983, opinion letter is included with the above policy statement.

LACERA Currently Does Not Release Psychiatric Medical Records to Pro Se Applicants

When an applicant appeals a denial decision by the Board of Retirement, Disability Retirement Services (DRS) sends the applicant a copy of the "Board Packet" which includes a copy of the panel physician's report(s). When the application involves a psychiatric or psychological condition and the applicant is not represented by counsel, the panel psychiatrist report is not included in the packet and all references to the report in the Disability Retirement Evaluation Report are redacted. The applicant is notified that the panel psychiatrist report is being withheld and that the report has been redacted. If an unrepresented applicant requests copies of all the medical evidence obtained by DRS, psychiatric records are not sent to the applicant and any reference to the psychiatric evidence is redacted. Any requests for a copy of the panel psychiatrist's report is handled by the Disability Litigation Office under its above-referenced policy.

LAW

*Tarasoff v. Regents of University of California*³ is a 1976 decision which held that the parents of a murdered girl could state a cause of action against a psychologist and the hospital for which he worked when the psychologist failed to warn that his patient had threatened to kill the girl. It held that a special relationship between a doctor or psychotherapist and patient could support affirmative duties for the benefit of third persons.⁴

In *Hedlund v. Superior Court*,⁵ a 1983 decision, the minor son of a woman shot by a psychologist's patient sued for emotional injuries suffered after the assailant's therapist

³*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425.

⁴ *Id.* at p. 433.

⁵ *Hedlund v. Superior Court* (1983) 34 Cal.3d 695.

failed to warn him of a known threat against his mother. The son, who was seated next to his mother when she was shot, asserted the therapist owed him a duty on the theory that it was foreseeable he would be injured if the patient's threats materialized.⁶ The Supreme Court agreed. It held that a therapist's duty to warn potential victims of a patient's threatened violence extends "to persons in close relationship to the object of the patient's threat . . ."⁷

California Legislature Enacted Civil Code Section 43.92 in Response to the *Tarasoff* and *Hedlund* Decisions

County Counsel's 1983 opinion letter was written in the wake of the broad liability issues raised in the *Tarasoff* and *Hedlund* decisions. In reaction to these decisions, the Legislature in 1985 enacted California Civil Code section 43.92 which sharply limited the scope of liability for psychotherapists as defined by statute.⁸ Section 43.92(a) states the following:

There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to protect from a patient's threatened violent behavior or failing to predict and protect from a patient's violent behavior **except if the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.** (Emphasis added.)

Section 43.92 represents a legislative effort to strike an appropriate balance between conflicting policy interests—the need to preserve patient confidence and protecting the safety of someone whom the patient intends to harm.⁹

California Health & Safety Code Section 123115

California Health & Safety Code Section 123115(b) allows a health care provider to decline a patient's request to review or receive mental health records when the provider **"determines there is a substantial risk of significant adverse or detrimental consequences to a patient in seeing or receiving a copy of mental health records requested by the patient."** Subsection (b)(1) requires the health care provider to explain the reasons for refusing to permit inspection or provide copies of the records, including a "description of the specific adverse or detrimental consequences to the patient that the provider anticipates would occur if inspection or copying were permitted."

⁶ *Id.* at p. 705.

⁷ *Id.* at 706.

⁸ *Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 815.

⁹ *Ewing v. Goldstein, supra*, 120 Cal.App.4th, 807, 816.

Health Insurance Portability and Accountability Act (HIPAA)

Under statutory authority from the Federal Health Insurance Portability and Accountability Act, the Secretary of the Department of Health and Human Services promulgated regulations to protect the privacy of medical records. 45 C.F.R. Section 164.524 sets forth an individual's right of access to protected health information. This regulation allows for a medical provider to deny access to the medical records if the provider determines **“that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person.”**¹⁰ While LACERA has been advised by outside counsel that the organization's disability operations are not subject to HIPAA, it is relevant to consider its provisions as guidance in drafting policy.

DISCUSSION

I have been unable to locate a Board-adopted policy regarding the release of psychiatric medical records to applicants representing themselves. In practice, LACERA does not release psychiatric reports and records to applicants without a court order. It appears that the only written policy related to this issue is the Disability Litigation Office's policy which is based on the January 4, 1983 County Counsel opinion letter. As noted above, there have been changes in the law since this opinion was authored, so it is my recommendation that the Board adopt an updated policy.

It is important for this Committee to understand that California Civil Code section 43.92, California Health & Safety Code section 123115, and the HIPAA statutes discussed above place the responsibility of determining whether or not it is safe for patients to have access to their psychiatric records on the medical provider. The common denominator in these statutes is whether or not access to the records poses a substantial risk of significant adverse or detrimental consequences to the patient or another person. While LACERA is not a medical provider, these statutes provide perspective in determining LACERA's policy on this issue.

In an appeal of a disability retirement decision, LACERA owes its members due process, and access to the report(s) upon which the Board based its decision is crucial for members to move forward in their appeal. The Board's policy must strike a balance between ensuring due process and the potential safety concerns involved in releasing psychiatric medical records.

RECOMMENDED POLICY STATEMENT

Considering these issues, it is my recommendation that the Board of Retirement adopt the following policy addressing the release of LACERA's panel psychiatrist's/psychologist's report and the psychiatric/psychological records obtained by DRS during its investigation:

¹⁰ 45 C.F.R. 164.524(a)(3)(i) (Emphasis added.)

Release of Psychiatric/Psychological Records/Reports Policy

It is the policy of the Board of Retirement, that psychiatric/psychological reports and/or psychiatric/psychological records are not to be given directly to the applicant without confirmation from the authoring psychiatrist, psychologist, or therapist that release of the report or records does not pose a substantial risk of significant adverse or detrimental consequences to the applicant or another person. Psychiatric/psychological records and reports will be given to the applicant with a court order.

It is recommended that the implementation of this policy be handled in the following manner:

- **Release of LACERA's Panel Psychiatrist/Psychologist Report**

When an applicant has appealed the Board's decision on a psychiatric/psychological claim and is not represented by an attorney, Disability Retirement Services will obtain a statement from LACERA's panel psychiatrist/psychologist stating whether or not the release of the report to the applicant would pose a substantial risk of significant adverse or detrimental consequences to the patient or another person. The physician will be required to explain the specific reasons for withholding the report. (This question could be incorporated into the panel physician guidelines which would provide instruction to DRS as to how to handle the matter at the time the appeal is received.)

- **Release of Psychiatric/Psychological Records Obtained by Disability Retirement Services During Its Investigation**

When an unrepresented applicant who has appealed the Board's decision on a psychiatric/psychological claim requests copies of the medical records obtained during the investigation of the application, Disability Retirement Services will not release any psychiatric or psychological records until it receives confirmation from the authoring doctor that the release of the report or records to the applicant does not pose a substantial risk of significant adverse or detrimental consequences to the patient or another person.

CONCLUSION

In an appeal of a disability retirement decision, LACERA owes its applicants due process, and access to the report(s) upon which the Board based its decision is crucial for applicants to move forward in their appeal. However, public policy necessitates consideration of the potential safety concerns involved in releasing psychiatric/psychological medical records. It is important that the Board establish a written policy that documents LACERA's position on this issue.

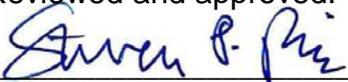
Re: Release of Psychiatric Medical Records

August 24, 2017

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I therefore recommend that the Disability Procedures & Services Committee recommend to the Board of Retirement that it adopt the policy statement, as described above, addressing the release of psychiatric/psychological medical records to unrepresented applicants.

Reviewed and approved.

A handwritten signature in blue ink, appearing to read "Steven P. Rice", is written over a horizontal line.

Steven P. Rice, Chief Counsel

Attachment

c: Each Member, Board of Retirement