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9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA
 12 SACRAMENTO DIVISION

13
 14 **RALPH COLEMAN, et al.,**

15 Plaintiffs,

16 v.

17 **GAVIN NEWSOM, et al.,**

18 Defendants.
 19

2:90-cv-00520 KJM-DB (PC)

**DEFENDANTS’ RESPONSE TO
 COURT’S APRIL 6, 2020 ORDER**

Judge: The Hon. Kimberly J. Mueller

20 **INTRODUCTION**

21 Whether Defendants’ response to the COVID-19 pandemic violates the Eighth Amendment
 22 of the U.S. Constitution cannot be evaluated by looking at just one factor alone, *i.e.*, the amount
 23 of physical distancing between inmates. Rather, the Eighth Amendment’s deliberate indifference
 24 standard considers the totality of prison administrators’ response to a potential harm or injury that
 25 demonstrates their subjective intent and whether their actions were “reasonable” in relation to the
 26 nature of the potential harm. Here, Defendants have taken a number of significant and bold steps
 27 to address the COVID-19 pandemic—and will continue to take further steps to address the daily
 28 evolving pandemic—and it is in this context that the constitutionality of their response must be

1 evaluated. Further, the COVID-19 pandemic imposes challenges across all disciplines within
2 CDCR, but most notably the delivery of medical care. For this reason, and to avoid the risk of
3 separate and possibly conflicting decisions pertaining to the delivery of medical care in CDCR's
4 prisons in response to the COVID-19 pandemic, Defendants ask this Court to coordinate its
5 efforts to determine of the adequacy of CDCR's actions to address the COVID-19 pandemic in
6 conjunction with the District Court in *Plata v. Newsom, et. al.*, case no. 4:01-cv-01351-JST (N.D.
7 Cal.). This coordination and collaboration will best focus the parties' and Court's efforts to
8 ensure inmate and staff safety in CDCR's institutions during these unprecedented and challenging
9 times.

10 **DEFENDANTS' RESPONSE TO ITEM NO. 1**

11 The Court's April 6, 2020, order directed Defendants to address the following questions: In
12 light of the coronavirus pandemic, what are the constitutional minima required for physical safety
13 for *Coleman* class members? Is six feet of physical distancing required by the Constitution? If
14 not, why not and what is required? (ECF No. 6580 at 2.)

15 Six feet of physical distancing is not required under the Constitution. Moreover, physical
16 distancing is only one factor to consider in the broader context of the totality of measures CDCR
17 has taken and continues to take daily to address the COVID-19 pandemic.

18 The constitutional minima required to ensure the physical safety for *Coleman* class
19 members in these unprecedented times must be evaluated in the context of the Eighth
20 Amendment's prohibition of cruel and unusual punishment and the resulting claim for deliberate
21 indifference to serious medical needs. The Eighth Amendment analysis requires both 1) objective
22 proof that inmates face a substantial risk of serious harm, and 2) evidence of the defendant's state
23 of mind about that substantial deprivation. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). When
24 officials respond reasonably to a risk of harm, there is no Eighth Amendment violation even if the
25 harm is not completely averted. *Id.* at 844.

26 Further, in terms of what constitutional minima are required to ensure the physical safety
27 for *Coleman* class members (and all other inmates at CDCR's prisons), there is no one-approach-
28 fits-all answer. Instead, the Constitution requires that Defendants take all reasonable steps under

1 the circumstances, recognizing that each situation is different. This Court stated long ago that
2 the constitutional minima can only be understood contextually, which includes balancing
3 “common sense, and the clinical nature of the problem,” with deference to prison administrators.
4 *See Coleman v. Wilson*, 912 F.Supp. 1282, 1301 (1995). Expert-based standards are “helpful and
5 relevant” to the Eighth Amendment analysis, but they do not set fixed constitutional benchmarks.
6 *See Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981). *Hoptowit v. Ray*, 682 F.2d 1237, 1253-
7 54 (9th Cir. 1982) (reversing injunction adopting American Medical Association standard
8 because the district judge “failed to take into account the approach taken by the State”).

9 Defendants acknowledge that the risk of harm by COVID-19 is objectively serious. But
10 according to guidelines published by various governmental health officials and organizations,
11 there are *numerous* measures that Defendants can take (and have already taken) to slow, and
12 hopefully minimize, the spread of COVID-19 within CDCR’s 35 institutions. Physical distancing
13 is only one of many measures recommended to slow the spread of COVID-19. *See, e.g.*, CDC’s
14 Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities,
15 available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-](https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf)
16 [detention.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf).

17 In responding to the COVID-19 pandemic, CDCR is facing a number of constraints outside
18 of CDCR’s control. Those constraints include, but are not limited to, the time pressure to react
19 quickly to ever-changing developments on a daily, if not hourly, basis; public safety; the safety of
20 inmates and staff; space; staff availability; and the obligation to ensure that the inmates’ other
21 constitutional rights (such as the right to food, out-of-cell time, etc.) remain intact while
22 implementing measures to address the COVID-19 pandemic. These constraints also impact
23 Defendants’ ability to facilitate physical distancing in CDCR’s 35 institutions.

24 This Court, as a member of the Three Judge Court, is aware of the timely and aggressive
25 measures that CDCR has taken under pressing and uncertain time constraints to address the
26 COVID-19 pandemic—CDCR presented extensive evidence to the Three Judge Court at last
27 week’s hearing on Plaintiffs’ motion seeking a further inmate release order. (ECF No. 6552.)
28 The fact that physical distancing still varies in areas of CDCR’s prisons does not render

1 Defendants' conduct wanton or deliberately indifferent. Even the guidelines of the CDC and
2 the California Department of Public Health (CDPH) acknowledge that physical distancing will
3 vary in prisons. *See* CDC's Interim Guidance on Management of COVID-19 in Correctional and
4 Detention Facilities¹, (“[physical distancing] strategies will need to be tailored to the individual
5 space in the facility and the needs of the population and staff. Not all strategies will be feasible in
6 all facilities”); *see also* CDPH's COVID-19 Guidance for Prisons, dated March 24, 2020²
7 (“*Wherever possible*, movement, housing, and group activities of inmates should allow social
8 distancing of 6 feet between each person”) (emphasis added).

9 Also, the CDC does not define physical distancing as keeping space between yourself and
10 *everyone* else. Instead, the CDC defines physical distancing as keeping space between yourself
11 and people “outside your household.” *See* [https://www.cdc.gov/coronavirus/2019-ncov/prevent-](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html)
12 [getting-sick/social-distancing.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html). While it is not possible to create separations in prisons to
13 mirror the same kind of separate households that exist in the free world, CDCR has taken various
14 steps to separate inmates in housing units from inmates in other housing units. Those steps
15 include, but are not limited to, rearranging scheduled movements to minimize mixing of people
16 from different housing areas and adjusting dining schedules where possible to allow for physical
17 distancing. Also, no rehabilitative programs, group events, or in-person educational classes will
18 take place until further notice. For inmates who live in dorms, CDCR is currently evaluating
19 whether it is feasible to assign groups of approximately eight inmates to family-unit-type pods
20 that are separated from other pods and mirror separate “households” of people who live together
21 and have less or no exposure to inmates in other pods. This approach mirrors physical distancing
22 guidelines for families and co-habiting groups in the community.

23
24 ¹ Available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-](https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf)
[detention.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf).

25 ² Available at [https://www.cdcr.ca.gov/covid19/wp-content/uploads/sites/197/2020/03/R_CDPH-](https://www.cdcr.ca.gov/covid19/wp-content/uploads/sites/197/2020/03/R_CDPH-COVID-19-Guidance-for-Prisons-3.30.20.pdf?label=California%20Department%20of%20Public%20Health%20Guidance%20About%20Novel%20Coronavirus%20(COVID-19)%20for%20California%20Prisons&from=https://www.cdcr.ca.gov/covid19/memos-guidelines-messaging/)
26 [COVID-](https://www.cdcr.ca.gov/covid19/wp-content/uploads/sites/197/2020/03/R_CDPH-COVID-19-Guidance-for-Prisons-3.30.20.pdf?label=California%20Department%20of%20Public%20Health%20Guidance%20About%20Novel%20Coronavirus%20(COVID-19)%20for%20California%20Prisons&from=https://www.cdcr.ca.gov/covid19/memos-guidelines-messaging/)
27 [19\)%20for%20California%20Prisons&from=https://www.cdcr.ca.gov/covid19/memos-guidelines-](https://www.cdcr.ca.gov/covid19/wp-content/uploads/sites/197/2020/03/R_CDPH-COVID-19-Guidance-for-Prisons-3.30.20.pdf?label=California%20Department%20of%20Public%20Health%20Guidance%20About%20Novel%20Coronavirus%20(COVID-19)%20for%20California%20Prisons&from=https://www.cdcr.ca.gov/covid19/memos-guidelines-messaging/)
28 [messaging/](https://www.cdcr.ca.gov/covid19/wp-content/uploads/sites/197/2020/03/R_CDPH-COVID-19-Guidance-for-Prisons-3.30.20.pdf?label=California%20Department%20of%20Public%20Health%20Guidance%20About%20Novel%20Coronavirus%20(COVID-19)%20for%20California%20Prisons&from=https://www.cdcr.ca.gov/covid19/memos-guidelines-messaging/).

1 CDCR has also taken far more steps to address the COVID-19 pandemic than any other
2 state prisons system to date. For example, as of this filing, other large state prison systems in
3 Florida, Michigan, New Jersey, and Texas have not released any inmates in response to the
4 COVID-19 pandemic.³ In addition, state prisons in Texas and Florida continue or have resumed
5 the intake of new inmates. California has suspended admissions. *See*
6 [https://www.gov.ca.gov/2020/03/24/governor-newsom-issues-executive-order-on-state-prisons-](https://www.gov.ca.gov/2020/03/24/governor-newsom-issues-executive-order-on-state-prisons-and-juvenile-facilities-in-response-to-the-covid-19-outbreak/)
7 [and-juvenile-facilities-in-response-to-the-covid-19-outbreak/](https://www.gov.ca.gov/2020/03/24/governor-newsom-issues-executive-order-on-state-prisons-and-juvenile-facilities-in-response-to-the-covid-19-outbreak/). And also in contrast to other states,
8 California is in the process of accelerating the release of several thousand inmates. *See*
9 [https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-plan-to-further-protect-staff-and-](https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-plan-to-further-protect-staff-and-inmates-from-the-spread-of-covid-19-in-state-prisons/)
10 [inmates-from-the-spread-of-covid-19-in-state-prisons/](https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-plan-to-further-protect-staff-and-inmates-from-the-spread-of-covid-19-in-state-prisons/).

11 Finally, the separation of powers doctrine mandates that courts give deference to prison
12 authorities to determine how best to ensure the physical safety of all inmates, including *Coleman*
13 class members, particularly during times of crisis. *See, e.g., Sandin v. Conner*, 515 U.S. 472,
14 482-83 (1995) (observing that “federal courts ought to afford appropriate deference and flexibility
15 to state officials trying to manage a volatile environment [in a prison]”). Therefore, the State
16 should be given the opportunity to address these important issues without judicial interference.

17 DEFENDANTS’ RESPONSE TO ITEM NO. 2

18 The Court’s April 6, 2020 order also directed Defendants to address the following question:
19 Assuming some level of physical distancing is required by the Constitution, what additional steps,
20 if any, must be taken to ensure that Defendants continue to deliver to *Coleman* class members at a
21 minimum the level of mental health care that has thus far been achieved in the ongoing remedial
22 process in this case, focused on achieving the delivery of constitutionally adequate mental health
23 care to the plaintiff class? (ECF No. 6580 at 2.)

24 ///

25 _____
26 ³ The information can be found here: For Florida: <http://www.dc.state.fl.us/comm/covid-19.html> and
27 <http://www.dc.state.fl.us/comm/press/main/04-03-Intake.html>; for Michigan:
28 <https://www.wzzm13.com/article/news/health/coronavirus/how-michigans-prison-system-is-addressing-a-rising-covid-19-case-count/69-3da0144d-7571-49e5-81b6-af89815cefa7>; for New Jersey:
<https://www.njspotlight.com/2020/04/covid-19-behind-bars-will-releasing-at-risk-inmates-select-others-keep-lid-on-potential-crisis/>; and for Texas: <https://www.tdcj.texas.gov/covid-19/index2.html>.

1 **I. ALTHOUGH THE CONSTITUTION DOES NOT REQUIRE SOME SPECIFIC LEVEL OF**
2 **PHYSICAL DISTANCING, DEFENDANTS HAVE PROACTIVELY TAKEN STEPS TO**
3 **ENSURE CONTINUED DELIVERY OF MENTAL HEALTH CARE TO CDCR’S PATIENTS**
4 **DURING THE COVID-19 PANDEMIC WHILE ALSO REDUCING POPULATION**
5 **DENSITY AND LIMITING MOVEMENT.**

6 The Constitution does not mandate six feet of physical distancing to keep *Coleman* class
7 members safe. Nonetheless, recognizing the COVID-19 pandemic’s potential impacts upon all
8 aspects of prison operations, Defendants have taken various actions to ensure that *Coleman* class
9 members continue receiving mental health care services. Working independently on some
10 measures, and with the Special Master and Plaintiffs on other measures in the COVID-19 Task
11 Force, Defendants are striving to provide *Coleman* class members with appropriate mental health
12 care services, while setting conditions to dramatically reduce COVID-19 transmission risks to the
13 inmate and staff populations. Three central goals guide CDCR’s statewide mental health program
14 operations during this pandemic: 1) preserving life; 2) stabilizing acute mental health
15 deterioration; and 3) providing coping skills to the mental health populations. (ECF No. 6535 at
16 5.) Steadfast in these objectives, Defendants have proactively taken the following steps to
17 facilitate, among other things, the continued delivery of mental health services to *Coleman*
18 patients under the present extraordinary and unprecedented circumstances.

19 **A. Specialized COVID-19 Mental Health Delivery Guidelines & Tiered**
20 **Response Plan.**

21 On March 25, 2020, CDCR’s mental health program leadership issued a memorandum
22 titled “COVID-19 – Mental Health Delivery of Care Guidance,” which provides institutional
23 guidance and a four-tiered response plan to ensure continued mental health care to all Mental
24 Health Services Delivery System (MHSDS) inmate-patients. (ECF 6535 at 10.) First proposed
25 by Defendants to the COVID-19 Task Force, a body established by this Court and led by the
26 Special Master, this plan was reviewed and discussed with all stakeholders. As a dynamic
27 approach to the provision of mental health services during this evolving pandemic, each tier
28 corresponds to an institution’s staffing and operational circumstances, providing real-time
flexibility so that institutions can adjust their mental health programming based on existing
conditions. For example, tier one provides guidelines to institutions operating close to MHSDS

1 Program Guide requirements, while tier four provides guidelines to institutions with substantially
2 decreased resources. (*Id.*)

3 To the extent possible, the tiered plan directs that institutions follow current Program Guide
4 policies and procedures including clinical contacts, group and treatment requirements, emergent
5 and urgent referral processes, crisis intervention, suicide prevention, and inpatient referrals,
6 among others. (ECF No. 6535 at 10-14.) These guidelines, developed with the input of the
7 Special Master and Plaintiffs during initial Task Force meetings, strike a delicate balance between
8 providing mental health treatment and minimizing the risk of COVID-19 exposure to both
9 patients and staff during the worldwide pandemic, consistent with various strategies
10 recommended by public health professionals. (ECF No. 6535 at 4-9.) For example, these
11 guidelines direct that individual clinical contacts and Interdisciplinary Treatment Teams shall
12 continue while maintaining physical distancing; groups shall continue but may be reduced in size
13 in order to adhere to physical distancing standards, and larger classrooms or vocational space may
14 be used as alternative locations; patients in COVID-19 isolation and/or quarantine will not attend
15 groups but shall be provided with therapeutic treatment packets, workbooks, and other in-cell
16 activities and shall receive daily rounds by mental health staff; and psychiatry encounters may be
17 via telepsychiatry, utilizing WebEx or Citrix. (*Id.*)

18 Further demonstrating their commitment to providing services to the patient population if
19 institutions are unable to continue group programming due to physical distancing considerations,
20 mental health staff will conduct increased rounds to check on inmates in their cells and to
21 increase cell-side therapeutic activities. (*Id.* at 5-6.) Recognizing the importance of patient
22 education, particularly during a time of potential increased mental stress, providers are also
23 directed to keep patients informed regarding changes in mental health services that may result
24 from the pandemic's operational impacts. (*Id.* at 7.) Additionally, Defendants are actively
25 exploring the expanded use of telepsychiatry by CDCR providers, thus expanding the pool of
26 resources for patient services while also reducing patient and staff COVID-19 transmission risks.
27 (*Id.* at 8-9.)

28 ///

1 **B. COVID-19 Temporary Transfer Guidelines & Workflow.**

2 Operating within the framework of the COVID-19 Task Force established by the Court,
3 Defendants are actively working with the Special Master and his experts to develop guidelines for
4 temporary transfers of inmate-patients should they need a higher level of mental health care.
5 During numerous meetings over the past week, including just yesterday, CDCR clinicians
6 evaluated and revised CDCR’s proposed guidelines with the Special Master, then discussed the
7 with Plaintiffs. According to clinicians, the guidelines are meant to supplement the March 25,
8 2020 “COVID-19 – Mental Health Delivery of Care Guidance” document, and provide
9 institutions with further guidance should a patient need a higher level of care. Further, if a patient
10 requires emergency inpatient care to prevent serious harm to self or others or to address serious
11 mental health decompensation, referrals to Mental Health Inpatient care shall continue. The
12 clinicians’ guidelines identify four transfer options, which balance the patient’s need for a higher
13 level of care with the consideration of decreasing movements and transfers throughout CDCR to
14 prevent the risk COVID-19 transmission. CDCR clinicians report that, when approved, they will
15 distribute these standardized transfer guidelines to ensure that *Coleman* class members receive
16 necessary and adequate mental health care throughout CDCR’s institutions.

17 **C. COVID-19 Emergency Mental Health Treatment Guidance.**

18 To ensure continued delivery of mental health services to *Coleman* class members, CDCR
19 clinicians also report that they are developing an emergency mental health treatment guidance for
20 CDCR institutions. Building from transfer options delineated in the Mental Health Delivery of
21 Care Guidance, discussed above, the document will provide guidance to institutions regarding the
22 operation of mental health units and other treatment modalities to inmates at their current
23 institution during the COVID-19 pandemic. Clinicians will present this document to the Special
24 Master’s experts shortly for constructive discussion and eventual presentation to Plaintiffs in the
25 COVID-19 Task Force.

26 **D. Population Measures Impacting the *Coleman* Class.**

27 Defendants have also taken unprecedented measures to address overall population density
28 concerns within CDCR’s institutions that also directly impact the *Coleman* class. On March 24,

1 2020, Governor Newsom temporarily suspended all CDCR intake from California county jails for
2 30 days, which, absent any other measures, will result in a net population reduction of
3 approximately 3,000 inmates. See [https://www.gov.ca.gov/2020/03/24/governor-newsom-issues-
4 executive-order-on-state-prisons-and-juvenile-facilities-in-response-to-the-covid-19-outbreak/](https://www.gov.ca.gov/2020/03/24/governor-newsom-issues-executive-order-on-state-prisons-and-juvenile-facilities-in-response-to-the-covid-19-outbreak/).
5 Furthermore, on March 31, 2020, CDCR Secretary Diaz ordered the Department to expedite the
6 transition to parole of approximately 3,500 non-violent male and female inmates who are within
7 60 days of their release date. See [https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-
8 plan-to-further-protect-staff-and-inmates-from-the-spread-of-covid-19-in-state-prisons/](https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-plan-to-further-protect-staff-and-inmates-from-the-spread-of-covid-19-in-state-prisons/).
9 According to CDCR's Division of Adult Institutions, while not specifically intended to address
10 mental health treatment needs of *Coleman* class members, these measures will reduce the number
11 of MHSDS patients in CDCR and help improve the Department's ability to provide appropriate
12 treatment for its other patients during the pandemic.

13 **E. Mandatory 14-Day Modified Program for All CDCR Institutions.**

14 Most recently, CDCR initiated a statewide institutional modified program intended to
15 benefit all inmates and staff, including *Coleman* class members. Effective April 8, 2020, all
16 CDCR institutions will implement a mandatory 14-day modified program to reduce the risk of
17 staff and inmate exposure to and spread of COVID-19. See [https://www.cdcr.ca.gov/covid19/wp-
18 content/uploads/sites/197/2020/04/COVID19-Modified-Program.pdf](https://www.cdcr.ca.gov/covid19/wp-content/uploads/sites/197/2020/04/COVID19-Modified-Program.pdf). During this modified
19 program, inmates will have access to certain activities and services, including phone calls, access
20 to mental health groups and individual clinical appointments, recreational yard time, law library,
21 educational materials, health care services, and medications, subject to appropriate physical
22 distancing guidelines. Staff are also directed to conduct additional rounds and spot check of
23 inmates to reduce self-harm attempts. While this modified program does not specifically address
24 *Coleman* class members' mental health treatment needs—CDCR must take into account the needs
25 of all inmates in its custody—it minimizes disruption of inmates' daily routines, thereby
26 providing them with greater stability and curtailing escalation of depression or anxiety that could
27 arise during the pandemic. Combined with increased custodial and clinical staff rounding, this
28 modified program promotes the physical and mental well-being of all inmates, and further

1 demonstrates Defendants' sustained proactive efforts to efficiently manage prison operations in
2 this crisis. (*Id.*; ECF No 6535 at 5-6.)

3 **CONCLUSION**

4 The Constitution requires that "reasonable" steps be taken to mitigate the risk of an
5 objectively serious harm. No single measure taken in response can be considered constitutional
6 or unconstitutional alone and in a vacuum; instead, prison officials' actions must be viewed in the
7 context of the harm and the totality of their response. This is why the Court should coordinate its
8 consideration of CDCR's COVID-19 response with *Plata*, as the *Plata* Receiver controls the
9 provision of medical care to CDCR's inmates.⁴ The Constitution does not require six feet of
10 physical distancing, and Defendants have taken, and are presently taking, a host of proactive
11 measures to mitigate against the risk of harm posed by the COVID-19 pandemic. These efforts
12 will ensure that CDCR continues to provide mental health care services to *Coleman* class
13 members under these extraordinary and unprecedented conditions.

14 Dated: April 8, 2020

Respectfully submitted,

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23 ⁴ The Court ordered Defendants to respond to its questions with less than 48-hours' notice.
24 If the Court intends to rule on the adequacy of Defendants' response to the COVID-19 pandemic
25 to date, or the constitutionality of a six-foot physical distancing requirement, Defendants request
26 that the Court issue a formal briefing schedule providing a fair and adequate opportunity for
27 Defendants to fully address these important issues of first impression. *See Barona Group of*
28 *Captain Grande Band of Mission Indians v. Am. Mgmt. & Amusement, Inc.*, 824 F.2d 710, 721-22
(9th Cir. 1987), amended by 840 F.2d 1394, 1405-06 (9th Cir. 1988) ("While District Courts have
inherent power to control their dockets, such authority must not deprive a litigant of due process
of law within the meaning of the Fifth and Fourteenth Amendments of the U.S. Constitution.");
see also Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due
process is the opportunity to be heard at a meaningful time and in a meaningful manner").