

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**L.H, et al.,**

**Plaintiffs,**

**vs.**

**NO. CIV. S-06-2042 LKK/GGH**

**ARNOLD SCHWARZENEGGER, et al.,**

**Defendants.**

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**FOURTH REPORT OF THE SPECIAL MASTER  
ON THE STATUS OF  
CONDITIONS OF THE STIPULATED ORDER**

**Background**

The Plaintiffs in this case filed their Complaint with the Court on September 13, 2006. The Court certified this case as a class action by Order dated February 28, 2007.

On September 19, 2007, the Court granted partial summary judgment in favor of Plaintiffs, holding that California's juvenile parole revocation system, by failing to provide a timely probable cause hearing, violated the due process rights of the Plaintiff class as those rights were described in *Morrissey v. Brewer*. On January 29, 2008, the Court held that Defendants' failure to appoint counsel for all juvenile parolees violated the due process rights of the Plaintiff class, according to precedent set in *Gagnon v. Scarpelli*. In the same order, the Court also found that Defendants' policies and practices

violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The Court ordered the Defendants to:

- (1) begin appointing counsel to represent juvenile parolees at parole revocation hearings no later than February 15, 2008, and to provide that counsel with access to confidential contact space and the necessary files sufficiently in advance of the hearing to allow adequate preparation,
- (2) allow parolees to obtain counsel of their own choosing, who shall be able to represent clients under the same terms as appointed counsel, and Defendants are to notify the parolee's counsel of record or public defender when a hold is placed,
- (3) ensure effective communication and provide necessary accommodations, and
- (4) develop sufficiently specific policies and procedures to ensure continuous compliance with all of the requirements of the American with Disabilities Act during revocation proceedings.

Chase Riveland and Virginia Morrison were appointed as Special Master and Deputy Special Master, respectively, on May 22, 2008. The parties, on June 13, 2008, submitted a Stipulated Motion for Preliminary Approval of Class Settlement. The Court granted the motion on June 17, 2008 and approved a Stipulation and Order for Permanent Injunctive Relief on October 7, 2008 (hereafter "Stipulated Injunction") which, among other requirements, incorporated the terms of the September 2007 and January 2008 orders.

On April 2, 2009, the parties filed a Stipulation and Order Re: Plaintiffs' Motion to Monitor Defendants' Compliance with the Stipulated Order for Permanent Injunctive

Relief.

The Court entered a Stipulation and Order Requiring Defendants to Take Immediate Steps to Identify and Track Juvenile Parolees with Disabilities and Effective Communication Needs, dated July 7, 2009. The parties also negotiated stipulations modifying several aspects of policies and procedures, and the revocation extension penalty matrix, which this Court signed on September 10, 2009 and February 12, 2010, respectively.

### **Special Master Activities**

The Special Master observed the Defendant s' task force and trainings for CalPAP attorneys, hearing officers, hearings staff, and institutions staff. He participated in a simulation using videoconferencing equipment, worked with Defendants' staff to improve information systems, and assisted the parties' negotiations concerning a variety of topics. The Mastership conducted interviews and 39 file reviews at the Bakersfield, Covina, Inland, San Fernando Valley, and San Jose parole units and the Ventura Youth Correctional Facility.

The team observed hearings at Herman G. Stark and Preston youth correctional facilities; Southern Youth Correctional Reception Center and Clinic; and Los Angeles, Sacramento, Lerdo, and Sonoma county jails. Those proceedings were conducted by five hearing officers and consisted of 12 probable cause hearings, two revocation hearings, and one not in custody hearing. The team did not attempt to observe the service of notice on any parolees or return to custody assessments.

In addition to the proceedings seen in person, the Mastership analyzed recorded and

written materials for another 21 revocation hearings, three not in custody hearings, and one revocation extension hearing, equally distributed among the five hearing officers who conduct them.

### **Scope and Approach**

This report discusses observations and activities spanning October 2009 through March 2010, collectively referred to as “the Round.” References to the Special Master’s activities frequently include the actions of a member of his team.

A number of mandates consist both of procedural due process requirements and due process in how they are conducted; all aspects are included in the Special Master’s assessment. The term “mainstream cases” refers to those revocation actions that follow the normal course; it excludes cases with special circumstances, such as not in custody hearings, extradition, parolee time waivers, optional waivers, and postponements.

For many of the requirements, the Special Master’s team conducted a study based on revocation packets, hearing documents, and recordings provided in Defendants’ monthly document productions, in combination with those same documents produced for the hearings observed during the team’s site visits. For other requirements, the team studied records selected from the relevant population as identified by electronic reports. Since these samples were not randomly chosen, there are limitations on their representativeness. In other instances, the team relied on reports generated by Defendants’ revocation database, Plaintiffs’ monitoring reports and analyses, reports or studies conducted by the California IPAP attorney panel administration, and sometimes documents underlying these sources.

### Overview of Actions

During the Round, approximately 507 revocation actions were handled.<sup>1</sup> These actions were concluded in the following way:

		% of total
Open	74	15%
Decisions to handle the alleged violation through a corrective action plan, dismiss the violation charge, or otherwise conclude it at or in proximity to the Parole Agent-Supervisor conference	122	24%
Decisions to conclude the action during investigation	24	5%
Decisions to conclude the action during Supervising Parole Agent review	2	<1%
Decisions to conclude the action during Return to Custody Assessment	15	3%
Actions concluded at Probable Cause Hearing, either through an accepted return to custody, dismissal, or decision to continue on parole	112	22%
Actions concluded by parolee invoking optional waiver and provisionally accepting return to custody time (right to hearing not reactivated during the Round)	43 <sup>2</sup>	8%
Actions concluded at Optional Waiver Review	15	3%
Actions concluded at Revocation Hearing	100	20%

Between probable cause hearings, optional waiver reviews, postponed hearings, revocation extensions, and revocation hearings, Defendants held at least 449 revocation-related hearings during the Round.<sup>3</sup>

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### **Substantial Compliance and Other Indicators of Success**

In this action, the central objective of all parties and the Court is for the Defendants to operate a sustainable system that provides fair, timely, just procedures to juveniles accused of parole violations. It is beyond doubt that Defendants have established important components of the remedy, much of the infrastructure critical to institutionalizing and sustaining the needed revocation system. It is extraordinary that they have accomplished this in an exceptionally short time – only 18 months since the entry of the Stipulated Injunction.

The Special Master agrees with the parties that those accomplishments deserve recognition. To the extent that an Injunction requirement has been conducted well for a sustained period, he will consider that requirement to be in substantial compliance. In some institutional litigation, “substantial compliance” has been used as an umbrella term for ultimate success. The *LH* Defendants argue that it should be the standard for relief from judgment in this case; Plaintiffs strongly contest that substantial compliance should serve as that standard.

As used in this report, substantial compliance indicates a sustained period of meeting a high standard. Substantially compliant items will remain within the Stipulated Injunction, but the Special Master and Plaintiffs will discontinue review of such items unless and until a significant decline in performance surfaces. Defendants are expected, and have made plans, to continue to review these items at regular intervals to prevent such a decline.

#### ***Substantial compliance***

The Special Master considers the following requirements to be in substantial

compliance, as described *supra*. The bases for reaching these conclusions are detailed in the Stipulated Injunction Requirements section, *infra*.

- Provision of counsel during revocation proceedings (§ 15)<sup>4</sup>
- At the time of attorney appointment, provision of date, time, and location of the hearing (§ 16)
- Defendants shall take all reasonable steps to allow counsel to meet with client at least 24 hours prior to the probable cause hearing (§ 16)
- State-appointed counsel for juvenile parolees shall be appropriately compensated for hearings and appeals (§ 24)
- Defendants shall develop standards, guidelines, and training for effective assistance of state-appointed counsel (§ 21)
- Parole revocation hearings to be held within a 50-mile radius of the alleged violation (§ 36)

#### ***Well-established infrastructure***

Defendants concentrated initially on designing and institutionalizing systems to ensure information flow and timely execution of the steps in the revocation procedure. Many of these have been successful. The parties have agreed provisionally that Defendants will also assume responsibility for self-monitoring the timeliness of the items listed below, with Plaintiffs' input into review methods, and Plaintiffs will refrain from that monitoring.<sup>5</sup> With the data system problems that will be described *infra*, it will be important for Defendants to supplement data reports with case sampling and other review mechanisms, which they plan to do. The Defendants will assume responsibility for monitoring timeliness concerning:

- Parole agent and Supervising Parole Agent conference within two business days
- Notice of charges and rights within three business days
- Violation report by the sixth business day after the parole hold<sup>6</sup>
- Supervisor review of revocation packet within seven business days after the parole hold
- Timely appointment of counsel
- Return to custody assessment within nine business days
- Attorney will be informed of Return to Custody Assessment by the 10<sup>th</sup> business day after the hold
- Probable cause hearing within 13 business days of the parole hold

- Revocation hearing within 35 days of the parole hold
- Not in custody hearing within 60 days after notice service
- Appeals decided within 10 days of receipt by the Juvenile Parole Board, and decisions provided to the parolee within five business days after their issuance

Timeliness is an important aspect of meeting any given Stipulated Injunction requirement. The parties and the Special Master will continue to monitor and develop the more qualitative aspects of these requirements.

### ***Keys to success***

Several components have made Defendants' successes possible. These will be important to maintain as they continue to work toward satisfying the Court's orders.

Procedurally, these include:

- setting up systems so that good practice is sustainable and not as vulnerable as when it is individual-dependent
- whenever Defendants identify problem practices, or when these are brought to their attention, there is quick, detailed follow-up to distribute better information and guidance and to address obstacles to good practice
- flexible, can-do attitudes among a broad variety of staff
- multidivision communication mechanisms, problem-solving, and joint training

Substantively, the lynchpins of effective practice to date are:

- scanning of documents to make them quickly accessible to all parties needing them in changing circumstances
- attorney representation
- effective attention to ongoing information system problems
- remedies given for revocation hearings held late without good cause, providing for justice in the usual course and for the rare failures.

**Policies and Regulations  
(Stipulated Injunction)**

The parties agreed that within 90 days of the parties signing the Stipulated Injunction, and no later than September 15, 2008, the Defendants were to develop sufficiently specific draft policies, procedures, and plans to:

- ensure that revocation proceedings are in continuous compliance with all of the requirements of the Constitution and applicable statutes,
- address a method for accurately tracking the timeliness of hearings and other steps in the parole revocation process,
- include the timely provision of accommodations for juvenile parolees' disabilities and effective communication needs,
- provide for not in custody hearings, dual commitments, and parole exit meetings; and
- address such disputed issues as telephonic probable cause hearings, circumstances constituting good cause for delayed hearings, and remedies for untimely hearings.

After intensive negotiation among many DJJ divisions affected and Plaintiffs, Defendants have distributed extensive policies and procedures with the purpose of satisfying the requirements above. These serve as one of key features of an infrastructure necessary for a sustainable, well-functioning system.

Policies and procedures have been signed and disseminated concerning revocation extension, attorney standards, revocation proceedings for the Board, the revocation process for the Division of Juvenile Parole Operations, ADA and effective communication, and exit interviews.

The parties negotiated during the Round concerning compliance standards, decision review, mentally ill parolees, revocation penalties and charge definitions, dual

supervision parolees, *McPherson* parolees, videoconferencing, and alternatives to incarceration. The parties are currently reviewing the policies and procedures to identify disputed items and further policies or clarifications needed. The parties have committed to prioritizing and addressing these issues in 2010.

Notice of terms: During 2008, Defendants reported detailed methods used to provide posters and notices to Division of Juvenile Justice, CDCR, and county jail facilities. They have demonstrated continued follow-up, periodically sending reminders to staff about posting, and responding when Plaintiffs occasionally note missing posters during site visits.<sup>7</sup>

Regulations: The parties continue to work through the lengthy, complex revision and approval process on many regulations affected by the *LH* remedy, with Plaintiffs among those contributing comments.<sup>8</sup> Plaintiffs object to the protracted process required to adopt or revise regulations.

### **Stipulated Injunction Requirements**

In analyzing compliance data, the parties and the Mastership face several challenges. The principal method available for demonstrating compliance is Defendants' revocation database, which tracks individual cases through the course of a revocation proceeding, and produces reports meant to show the volume and timeliness of different steps. While the information system serves many purposes well, there are limits on the utility and accuracy of several key reports. The net result is that no firm conclusions can be reached concerning many of the needed aggregate numbers, including overall compliance percentages of any given step.

The information system under-counts or over-counts some populations. Some are unfairly measured by shorter timeframes than apply, while reports apply too generous a standard for some others.<sup>9</sup> Significant subsets do not yet appear in reports.<sup>10</sup> A small number of cases may move into, or disappear from, a report on different days.<sup>11</sup>

The great majority of cases are reflected accurately and consistently in reports, and compliance percentages for them are high. But, when taken together, the small groups that are unknown, inaccurate, or variable amount to too large of a group to be unexamined. To demonstrate compliance, Defendants must work to reduce these uncertainties in the reports. In the meantime, the analysis that follows must defer assigning overall compliance numbers.

**Parole Agent and Supervising Parole Agent conference within two business days (§ 27):**

Defendants' revocation database reports show a large portion of the conferences, but the cases not shown make it impossible to reach overarching conclusions about timeliness compliance. The cases that can be seen in Defendants' tracking system indicate that the vast majority of cases are timely at this step and improvement was evident over the prior Rounds..

Among the very few known late cases, the majority were completed the following day and the longest time to completion was six days.

Defendants are very conscientious in their oversight, reportedly checking open case reports daily for the timeliness of cases at this and other steps; following up to remedy any appearing late; and preparing and jointly discussing, on a monthly basis, analyses of

the reasons for late cases and corrective actions taken. It is, thus, very likely that timeliness at this step is very high.

Review of whether this conference fulfills its purposes remains for the future. Plaintiffs express concern that they do not know the extent of the information and conversation on which this decision is based, and whether the standards are being applied correctly. Relatedly, Defendants record this decision in brief electronic form, but Plaintiffs are concerned that this does not fulfill the Stipulated Injunction's requirements for a form for this step. The parties have begun negotiation on point.

**Notice of charges and rights within three business days** (§ 28):

To satisfy due process, the notice must contain a summary of the conduct underlying the charges sufficient for the parolee to prepare a defense. In the notices the Special Master reviewed, about 78% of summaries ranged from reasonable to very good, a substantial improvement over the prior Round.<sup>12</sup> The Covina parole unit was particularly skilled in this area. Neither the Special Master nor Plaintiffs have observed service as it took place and therefore do not have a sense of the due process during that communication.

Because of the way the database reports are written, timeliness is particularly difficult to discern at this step. With the numbers available, however, the great majority of known mainstream cases were timely and improvement was evident over the prior Round. All extradition cases were timely according to their standard, as were all but one not in custody case.

Among the known late cases, it appeared that nearly every case was completed the following day; one case was completed two days late and one not in custody case took an additional 15 days beyond the policy deadline for serving such cases.<sup>13</sup>

Defendants encountered barriers in their initial attempts to serve seven parolees during the Round,<sup>14</sup> but nearly all were nevertheless served timely on a later attempt. One parolee was served one business day late; the final case took place during a lockdown; the parole agent attempted service daily and was successful on the third business day past the deadline. These numbers reflect a conscientious, effective effort to serve parolees quickly despite the obstacles encountered.

As described *supra*, Defendants take very careful measures to oversee this step and to identify and remedy potentially late cases. It is very likely that timeliness compliance is very high and that there is good practice as to this requirement.

**Non-acceptance of written admissions to a violation of parole, or waivers of hearing rights or the right to counsel, made prior to the juvenile parolee meeting with counsel** (§ 17, 31):

Defendants assert that they have ceased the routine practice of asking parolees to complete waivers and written admission forms. The Special Master has not encountered these forms in more than 100 revocation packets reviewed in 2009 and 2010.

Plaintiffs object to parole agents taking oral statements at the service of notice of rights and charges and during the investigation, before CalPAP counsel is appointed;<sup>15</sup> the parties disagree as to whether this practice is permissible under the Stipulated Injunction.

**Violation report within six business days** (Exh. A):

The Special Master reviewed 55 violation reports for the sufficiency of evidence to support the elements of the charges; in the Mastership's opinion, 78% were sufficient in this regard.<sup>16</sup>

In terms of timeliness, Defendants do not currently measure the date the violation report is submitted. Rather, they go the extra mile, using the six-day period for continuing conversation about whether to refer the case for revocation or to handle the behavior in the community. It is this latter decision that is memorialized in the database.

A small study by the Special Master gives an indication of good timeliness for the violation report requirement.<sup>17</sup> While 85% of the sample met the timeframe, late reports appeared to have almost no negative effect, as all but two supervisor's reviews -- the next step -- were timely. With the later cases in the sample, the mainstream case was delayed three business days, and one not in custody case report was completed seven business days after its policy deadline.<sup>18</sup> As discussed above, Defendants' oversight practices make it likely that overall timeliness compliance percentages are quite high.

**Supervising Parole Agent review of packet within seven business days** (Exh. A):

The Mastership has not developed information about Supervising Parole Agents' practices when reviewing the revocation packet for probable cause and for completeness. As with other steps, printouts and Defendants' oversight practices suggest that timely completion of this step is high but a definitive rate cannot be established. All extradition

and not in custody cases were timely according to their standards. Among the few known late mainstream cases, the longest time to completion was an additional two business days.<sup>19</sup>

**Requirements concerning attorney representation**

Provision of counsel during revocation proceedings (§ 15):

Defendants have had a system operational since February 2008 to appoint attorneys for all parolees in revocation proceedings. The Division of Juvenile Justice routinely informs CalPAP, the administrator of the attorney panel, of cases set for probable cause hearings or not in custody revocation hearings, and CalPAP attorneys represent parolees in these proceedings. There is also a mechanism to notify criminal counsel of record, which will be discussed *infra*. No instances have come to the attention of the parties or the Special Master in which a parolee was unrepresented. Given that representation is now the norm, it is difficult to imagine that any such lapse would go unnoticed.

The attorney appointment system is a key feature of the infrastructure necessary for a sustainable, well-functioning revocation system. Appointments have functioned well for a sustained period and the Special Master considers this requirement to be in substantial compliance.

Timely appointment of counsel (§ 16):

The Juvenile Parole Board greatly improved the timeliness with which it provided the information necessary to appoint attorneys. Attorneys were appointed timely for the vast majority of known mainstream cases and all extradition cases. In each of several months, only one to three cases were late. Late cases were completed within an additional

four days.<sup>20</sup>

Defendants' policies call for attorneys to be appointed for not in custody cases by the 21<sup>st</sup> day after notice of charges has been served. In the cases that proceeded to hearing, 10 had timely attorney appointments and one was conveyed to CalPAP five days late.<sup>21</sup>

State-appointed counsel for Juvenile Parolees shall be appropriately compensated for hearings and appeals (§ 24):

The payment structure to CalPAP includes payment for hearings and appeals. No issues have been reported to the Special Master. The Mastership considers this requirement to be in substantial compliance.

At the time of attorney appointment, provision of date, time, and location of the hearing (§ 16):

Defendants are compliant with this provision, as CalPAP reports that it is provided these pieces of information at the same time it receives the packets. This system has been in place since implementation, and the Special Master considers it in substantial compliance.

At the time of attorney appointment, provision of a copy of all the evidence on which the State intends to rely or which may be exculpatory; evidence not provided with at least two days' notice shall be excluded unless the state shows good cause (§ 16, 19):

Attorney interviews have indicated that they generally receive the state's evidence timely. Seven objections came to the Special Master's attention, and they were handled reasonably. Hearing officers determined, after questioning, that the evidence had been provided in sufficient time according to the standard in two cases; they appropriately excluded the evidence in other cases.<sup>22</sup> An additional objection is shown as denied in CalPAP's tracking but it is not recorded in the hearing order.

In addition to the questions of timely provision, there has been a concern that the quality of some photocopies of photographic evidence is so poor that it gives counsel an inadequate ability to judge the quality of the evidence and prepare a defense. The parties remain in dispute; in the meantime, Defendants have issued instruction to address the problem.

At the time of attorney appointment, provision of relevant educational, mental health and disability identification and source documents (§ 16):

Defendants completed, ahead of the parties' stipulated deadline, a large-scale review of files and electronic databases to incorporate disability information for lawyers and others into a summary form. These summaries will serve to provide educational, mental health and disability information to attorneys ongoing.<sup>23</sup> The forms the Special Master reviewed generally contained detailed disability information including citations for the source material within the file; accommodations were included rarely.

A dispute remains about what is sufficient to satisfy the requirement to provide source documents.

Right to be represented by counsel of choice; process for timely notifying of the counsel of record of the imposition of a parole hold (§ 18):

In the Special Master's review of 79 files, a form was routinely used to notify public defenders and private attorneys of a parole revocation proceeding for their clients. Only 62% were provided in the time mandated by policy, though this represents improvement, and another handful were present but undated. The Oakland parole unit had perfect performance on this requirement in this study.

A substantial minority of forms were sent one to five business days late, and notices were missing altogether in 11% of reviewed files. This, of course, can significantly impact parolees' ability to employ non-CalPAP attorneys. The San Jose parole office had the furthest to go to satisfy this requirement.<sup>24</sup>

Documents indicate that only three attorneys outside of CalPAP represented youth in the revocation proceedings.<sup>25</sup>

Defendants shall develop standards, guidelines, and training for effective assistance of state-appointed counsel (§ 21):

The Stipulated Injunction requires Defendants to develop standards, guidelines, and training for effective assistance of state-appointed counsel in the revocation process, including standards for panel administration, training and continuing education, quality assurance, independence, statewide oversight and individual representation. The parties negotiated such standards, which were finalized on March 25, 2009, although Plaintiffs maintain some objections. The policy appears to contain all of the required components. The Special Master considers this requirement to be in substantial compliance.

Attorney will be informed of Return to Custody Assessment by the 10<sup>th</sup> business day after the hold (§ 30):

As discussed *infra*, there were few return to custody assessments known to be late during the Round. Since CalPAP has simultaneous access to this information when it is entered, it appears there was good practice in notifying CalPAP timely during this Round.

Defendants shall take all reasonable steps to allow counsel to meet with clients at least 24 hours prior to probable cause hearings (§ 16):

As described above, Defendants have consistently provided parolee information, representation materials, and hearing scheduling information well ahead of the day before the probable cause hearing. They provide access to Division of Juvenile Justice facilities and information about parolee locations. The Office of Audits and Compliance audit reviewed 10% of CalPAP data and found compliance to be 85% or greater for providing gate clearance at CDCR institutions and attorneys meeting with clients by the 12<sup>th</sup> business day; indeed, the auditor reportedly found full compliance on these issues.<sup>26</sup>

In interviews and observations during prior Rounds, attorneys informed the Special Master that they commonly meet with their clients one to three days ahead of hearings. In the past, at least one hearing officer would ask about this point specifically, though hearing records for this Round did not reflect this specific inquiry. However, no information to the contrary has come to the attention of the Special Master.

Defendants have met their obligation to take reasonable steps and are in substantial compliance with this requirement.

Adequate time for representation ; reasonable access to clients and files; confidential phone calls and space in which to meet; observing staff cannot participate in proceedings. (§ 20, 23):

All counsel observed since implementation have been well-prepared, suggesting that they have had adequate time; similarly, none have expressed a concern about insufficient time or information available. To the Special Master's knowledge, none of the parties has undertaken a systematic review of these questions, which would be beneficial to supporting a finding of substantial compliance in the future.

**Return to custody assessment within nine business days** (§ 29):

The Special Master was unable to observe hearing officer practice in assessing at this stage probable cause and the need for continued detention. At least 15 cases were continued on parole at this step, and another was dismissed for insufficient evidence, supporting an inference that hearing officers are applying these criteria.<sup>27</sup>

Timeliness among known cases was excellent, with only five cases determined to be late. All of those were completed the following day except one that was delayed by three days.<sup>28</sup>

The not in custody policies do not assign a timeframe for return to custody assessments; the attorney appointment, which ordinarily occurs the day before this assessment, is required by the 21<sup>st</sup> day after notice of charges. All return to custody assessments for these cases occurred well within that time during this Round.<sup>29</sup>

With a substantial number of the cases unknown, overall timeliness compliance cannot be determined.<sup>30</sup> The consistency of practice in known cases, the centralized

procedure for handling this step within hours after packets arrive in the office, and the close oversight exercised by Defendants, suggest that the overall timeliness rate is very high.

**Probable cause hearing requirements**

Expedited probable cause hearings (§ 26): There have been no requests for expedited probable cause hearings in any Round to date.<sup>31</sup>

Probable cause hearings within 13 business days after the hold is placed, including written bases for findings (§ 32, 40):

***Nature of Hearings***

The Special Master had an opportunity to observe 12 probable cause hearings conducted by five hearing officers during the Round.

Defendants concentrated on improving ADA reviews and the results are evident. Where previously hearing officers asked questions that suggested that a parolee should disclaim any need for accommodations, several hearing officers have been successful in no longer using that approach and creating an open, communicative atmosphere to explore known disabilities and to increase understanding. A significant minority of hearing officers still need improvement in this regard, but in general, practice is much more likely to elicit disability disclosure and help with understanding. In the relatively rare cases of parolees with apparent, serious cognitive limitations, it is not clear that hearing officers and attorneys are aware of how to adjust their approach, as needed for an accommodation, and they could use more support in this regard.

Several hearing officers review the parolee's rights, give instruction about how to exercise them, and orient the parolee to what to expect. More consistency is needed in these practices. For the most part, they read the charges and the basis, and take pleas.

It is problematic that, on some occasions, some found probable cause without inviting or appearing to consider counsel's arguments. Some carefully consider whether there is evidence for the elements of the violations, while others do not do this effectively.

When articulating the basis for finding probable cause, hearing officers can improve by citing the facts as well as the source document. Hearing officers appropriately require independent evidence in conjunction with an admission. Several dismissed charges or entire cases for insufficient evidence, occasionally expressly for the failure to prove an element. Several appropriately handled jurisdiction questions and worked to ensure that the parolee was making knowing and intelligent waivers and other choices.

There is insufficient consideration of probable cause to detain articulated during hearings. On the other hand, alternatives to incarceration were discussed in about half of the hearings and granted in most cases disposed of at this step.<sup>32</sup> Thus, hearing officers may be combining these two analyses; if this is true, all agree that this is problematic.

In general, there is some difficulty with written records accurately capturing aspects of the proceedings. This may take the form of not recording objections or the presence of participants or observers, incomplete descriptions of reasoning, or computer glitches leading to inaccuracies.<sup>33</sup> This can be exacerbated when staff do not have access to the internet-based program during the hearing. One hearing officer has excellent practice in contemporaneously recording objections and other key facts, keeping it in

balance with attention to the parolee and attorney, and in creating the possibility for accuracy.

There are different systems for providing the record to the parolee depending on the facility. Staff have ease with these systems and they could well be sufficient. CalPAP reports receiving only one complaint that a parolee did not receive his document. It would be beneficial to audit these practices to ensure they are effective.

### ***Timeliness***

There are a number of different scenarios to factor in to an assessment of timely probable cause hearings. Most of Defendant's practices show good results; compliance percentages are lowered by the time it takes to reschedule some postponed cases and by the cases in the data system whose outcomes are unknown.

Both extradition cases and the completed cases that followed the usual course continued to show a very high rate of success and rates continue to improve each Round. The open cases that could be discerned showed a similar, high rate. Additionally, at least 9% of the total cases were open cases that could not be viewed and, thus, their timeliness was unknown.<sup>34</sup>

It is also necessary to examine cases where time waivers or postponements were taken, as they were at least 6% of the total probable cause hearings during this Round, and could be greater.<sup>35</sup> At present, there is no systematic way to identify cases that were postponed and have subsequently closed. Additionally, the database measures timeliness for these cases as of the original hearing that was postponed, not the ultimate hearing in which the probable cause assessment took place. Because postponements can substantially extend the time to probable cause hearing, adversely to the parolee if not

requested by him, these issues are of particular concern to the Special Master and to Plaintiffs.

Reasons for postponements included, the parolee being out to court, quarantine, a private attorney's schedule, medical and psychiatric crises, parolee request, failure of transportation, lack of jail access, evidence availability, and Defendants' decision review.<sup>36</sup> While the parties have agreed to a general definition of good cause for delay, they have not decided about its specific application to all of these topics, and Plaintiffs have asserted their objections to postponements based on the latter four. Defendants have offered to prepare a summary of any restrictions on access to county jails, which will be useful in examining one of the causes of delays and postponements.

In any event, there is an obligation to return postponed cases to the calendar in a reasonable time. There was excellent practice in all seven identified cases in which the parolee made a time-specific waiver, as Defendants set the rescheduled hearing within the time requested. With other postponements, while a reasonable length of time has not been established, about 78% met the conservative standard of a week, and a significant minority exceeded it. Very rarely, serial postponements led to probable cause hearings in the 30- to 60-day range.

Thus, while mainstream operations achieve a high level of timeliness, there are an increasing variety of populations unknown at this step, which may affect timeliness numbers as more information develops.

Definition of presumed prejudice (§ 32): Defendants assert that the parties negotiated one definition to be used for both types of hearings, while Plaintiffs indicate that a definition applying to probable cause hearings remains to be developed.

**Mechanical restraints at hearings** (§ 46):

The Stipulated Injunction requires Defendants to develop policies, procedures, and training concerning restraints that are consistent with the ADA, the Rehabilitation Act, the due process clause, and Title 15 California Code of Regulations section 4034.4. The Stipulated Injunction prohibits any policy requiring universal use of restraints in revocation proceedings.

Defendants issued policies in compliance with this requirement during the Round. The Special Master observed restraints practices onsite and in hearing records, and interviewed staff concerning them. Among 57 cases reviewed, 25 parolees were not restrained. Defendants' staff exercised discretion to restrain nine parolees; about half were restrained according to the agreed criteria, while it was not clear that the reasons met policy in four instances. Another 18 were restrained in deference to county jail or CDCR policy. Staff did not record restraints use in about 10% of this sample.

Plaintiffs strenuously object to Defendants deferring to the policies of county jails and CDCR adult institutions, some of which require universal use of restraints, contrary to the terms of the Stipulated Injunction. Reviews have not been comprehensive, but have identified 14 county jails and all CDCR adult institutions as requiring universal restraints, while another five permit DJJ staff discretion or the parolees are physically separated from others and therefore not restrained. Plaintiffs are also concerned that DJJ facilities

may not be following this Stipulated Injunction requirement; examples to date surfaced solely at one institution that has since closed. However, the parties have agreed to mediate concerning these difficult topics.

Additionally, Los Angeles County Jail's routine practice of restraining prisoners to furniture and the floor is objectionable and is counter to the parties' stipulation and order entered in September 2009. The parties agreed in 2009 to approach the jail to address this but, to the Special Master's knowledge, this has not been undertaken.

**Requirements related to revocation hearings:**

Final revocation hearing on or before 35 calendar days after the parole hold is placed (§ 33):

In assessing this requirement, there are a number of considerations. The system must consistently provide timely hearings in the usual course of revocation proceedings. It must also function to provide hearings timely to special populations, sometimes small groups whose circumstances dictate counting timelines differently or suspending and resuming proceedings once conditions have been met. In operation, the hearings must provide due process, satisfying questions such as fairness, opportunity to be heard, elements of the violation proved sufficient for the applicable standard, and consideration of appropriate sanctions.

***Nature of Hearings***

The Special Master had the opportunity to review 25 hearings, recorded or in person, held by all five of the hearing officers who conduct them. Many of the

impressions described concerning probable cause hearings apply to revocation hearings, as well.

ADA practices are clearly improved after training and practice, with about half meeting standards well.<sup>37</sup> Orientation was carefully done. Hearing officers noted jurisdiction questions in a few cases. A small minority routinely did not cover parolees' rights at all.

The Special Master, the parties, and CalPAP attorneys have observed the need to strengthen the handling of the legal issues that arise. Commonly, parolees exercise their rights to be heard and present evidence, with a few exceptions discussed *infra*. The practice of providing evidence timely to parolee's counsel is generally handled well, as noted *supra*.

The handling of the right to confront accusers is not as skillful. It does appear that hearing officers assess the reasonableness of a witness' claim of fearfulness before excusing that witness' presence, and DJJ makes available a procedure to balance those needs with the parolees' when such witnesses appear. CalPAP records reflect *Comito* objections raised in 10 cases;<sup>38</sup> the Special Master reviewed those as well as five cases from Plaintiffs' or the Special Master's monitoring and four cases in which the objection arose in the monthly production of recordings. Hearing officers are beginning to make use of the balancing test factors, and progress is evident after enhanced training in December 2009. As with any complex test, much more practice will be needed before there is mastery. Written orders, in particular, do not reflect a complete understanding. In a significant minority, the objection was not noted in the Board Order at all. Objections were granted and denied in approximately equal numbers.

Defendants are mindful of determining whether the parolee is accused of a genuine violation of law or parole conditions. They have distributed definitions of certain charges, negotiated with Plaintiffs, to increase predictability of expectations and responses to alleged violations. Defendants have also sought to increase staff's knowledge concerning constitutionally valid parole conditions. Hearing officers exhibit an increasing sensibility about what's fair and right to introduce as evidence and have steered participants away from irrelevant or prejudicial offerings.

As with probable cause hearing records, Plaintiffs have noted a number of instances in which the written record omits or, in their opinion, inaccurately captures the proceedings. It has been a problem when records don't capture key content or reflect mistakes; additionally, because of some routine administrative functions, one cannot consistently determine some basic information such as which hearing officer presided and which witnesses appeared. The revocation system will benefit when these practices can be improved.

As to outcomes, two-thirds of the cases reviewed were dismissed or the parolee continued on parole. Returns to custody were evenly distributed across a range of six months to one year. Alternatives to incarceration were often discussed, but this was absent in about one-quarter of the cases. Written records were sometimes inconsistent with the oral proceedings on this point.

Defendants employ a system termed Decision Review. Plaintiffs strenuously object to this system in concept and in operation. For a detailed description of the process and some issues previously observed, please see the Special Master's third report.

Decision review’s benefits include a quick review and the likelihood of generating more rigorous and well-supported decisions. It can also disadvantage parolees in that State actors commonly invoke this process, which can undo the final hearing on which the parolee relied. Where a decision is adverse to the parolee, however, he is always provided a rehearing. The parties are working to solidify the standards and procedures for this process, and transparency in its application.

***Timeliness***

Although the standard data report shows 70 revocation hearings, all told, there were actually 100. To understand this population and its timeliness, one must be able to assess:

- mainstream cases<sup>39</sup> completed within 35 days
- mainstream cases pending to be completed within 35 days
- extradition cases completed according to the *LH* standards calculated from arrival in California, rather than hold date
- activated optional waiver cases, completed within 35 days after receipt of activation request<sup>40</sup>
- activated optional waiver cases, pending within 35 days after receipt of activation request
- hearings held while the parolee is not in custody and within 60 days after notice service
- postponed revocation hearings reheard within the requested time or a reasonable time
- postponed probable cause hearings and optional waivers that subsequently go on to revocation hearing<sup>41</sup>

Taken together, the Special Master’s study found timeliness of revocation hearings at 90%. This is a rate similar to the prior Round. This consists of:

	Total	Timely/ within a reasonable time <sup>42</sup>
mainstream closed	32 <sup>43</sup>	31
mainstream open	5 <sup>44</sup>	5

extradition	0	0
optional waiver activated and completed	25	22
optional waiver activated and open	5	4
not in custody	15	15
postponed revocation hearings reheard <sup>45</sup>	13	8
revocation hearings after a probable cause or optional waiver review had been postponed	5	5

The lengths of delay for late revocation hearings ranged from four days to nearly one month.

Parole revocation hearings to be held within a 50-mile radius of the alleged violation (§ 36):

CalPAP asks its attorneys to report any instance of revocation hearings being held more than 50 miles from the incidents underlying the violation allegation. There were no such hearings during this Round and only one held in the prior Round over the parolee's objection. With this sustained performance, the Special Master considers this requirement to be in substantial compliance.<sup>46</sup>

Evidence on the same terms as the state (§ 33):

In observations and on hearing recordings, parolees generally put on evidence without obstacle. There were single examples that reflected mistakes rather than intentionally prejudicing the parolee.<sup>47</sup> There were occasions when the parolee's defense or mitigation relied in part on questioning his parole agent, and this was frustrated when a substitute agent appeared. In general, however, the system to satisfy this requirement

appears to be functioning well.

Supplemental charges (§ 34):

During this Round, it appears there were nine cases with supplemental charges.<sup>48</sup> The parties agreed that supplemental charges may not be made based on evidence contained in the field file at the time the notice of rights is completed; no party reviewed these cases for consistency with this agreement or for other aspects of their handling.

During reviews, the Special Master encountered three cases with supplemental charges. In two, the charge was matched to the original packet quickly and was heard during the original probable cause hearing. The third case proceeded separately and, because it occurred in custody but before revocation, DJJ asserts it is not subject to the one-year limit and is seeking an additional term for the penalty. This is a matter of policy to which Plaintiffs object.

Definition of good cause for delay, remedy for timeframe violation (§ 33):

The parties have agreed to define good cause as “justifiable, legitimate and unforeseeable reason for the delay, asserted in good faith and caused by factors that are beyond the control of the State.” They have also agreed that, for any revocation or revocation extension hearing timeframe violation, and for any probable cause hearing held after 35 days, any return to custody will be reduced by the number of days the hearing is late. There were few late revocation hearings during the Round, and this remedy was provided in the two that came to the Special Master’s attention.

Prejudice is presumed, and the case will be dismissed, if, absent good cause, a revocation hearing has not been held by the 90<sup>th</sup> day after the hold. The parties negotiated

the reduction of the previous threshold for presumed prejudice down to 90 days, but Plaintiffs maintain that the Injunction is violated whenever the 35-day timeframe is not met without a showing of good cause, and that a case should be dismissed if the hearing has not been held within 60 days after the hold.<sup>49</sup> To the Special Master's knowledge, all cases were resolved well before the 90<sup>th</sup> day.

Not in custody hearings within 60 days after service and with all due process and ADA protections (§ 45)

During this Round, 21 parolees' revocation actions were handled as "not in custody." Nearly all were initiated at the parole unit, without taking the parolee into custody; three were converted at the return to custody assessment or at an in-custody probable cause hearing.<sup>50</sup> This is about 8% of those violation cases that proceeded to some type of hearing.

In the hearings the Special Master observed and listened to, due process and ADA protections were comparable to those in Defendants' revocation hearings. Nearly half of the population was continued on parole before reaching a hearing. For those hearings conducted, all were completed well within the timeframe.<sup>51</sup>

**Requirements related to disposition**

Limiting return to custody time to one year except for willful program failure or serious in-custody misconduct (§ 35):

There appears to be very good compliance with this requirement. The revocation matrix reflects the highest penalty to be one year. Hearing officers routinely inform parolees during proceedings that this is the maximum term. No penalty exceeded one

year in the hearings observed by the Special Master in 2009 and 2010; while not systematically chosen, these total well over 100 in person, in Board Orders, and on recordings. Likewise, no such problem has been discussed in Defendants' task force meetings, to the Special Master's knowledge, or in Plaintiffs' monitoring reports.

Defendants are using the revocation extension system to consider cases of serious in-custody misconduct; it is discussed *infra*.

There is an issue, however, with the policy as to handling in-custody misconduct during the period the parolee is pending revocation. It indicates that, when such cases involve violence, they will be charged separately from the original violation allegations and a separate penalty can attach, which could extend the revocation term beyond one year. Hearing officers are to use the revocation extension matrix for the in-custody conduct. The parties are in dispute concerning this policy. While it undoubtedly arises from the need to address serious misconduct and concerns about a lack of jurisdiction for revocation extension, it is difficult to imagine, with the information currently available, that it is consistent with the Stipulated Injunction.

Development of a matrix of ranges of revocation terms for specific violations

(¶ 35):

A matrix routinely guides decisions concerning violation terms, although Plaintiffs and some system actors assert that it carries more harsh penalties than in the adult system and in the previous juvenile system. The parties strengthened the document by negotiating and distributing definitions for some of the charge codes.

Release within three days if time has been served (¶ 38): No information came to the Special Master's attention during the Round

**Requirements related to ADA and effective communication**

ADA and effective communications accommodation (¶ 23, 48, 50, 51, 53):

After extensive negotiation, Defendants distributed in February 2010 revised policies and procedures for identifying and addressing disabilities and effective communication needs. During the Round, Defendants executed the agreement, memorialized in a stipulation and order, to summarize and make more accessible key disability and effective communication information. Training concentrated on methods for assessing these needs, and hearing officers showed significant improvement in this regard. An electronic database is in routine use, however, forms do not always accurately record known disabilities. Centralized tracking of disabilities and accommodations provided is partially implemented.

During hearings, hearing officers routinely seek to identify accommodations needs and offer to fulfill them, including volunteering magnifiers and assistive hearing devices. The Special Master has not seen the latter in use, and has not learned any information about spoken or sign language interpreters or delays, if any, when accommodations are needed.

Identification and tracking (¶ 52):

Identification: Defendants completed a major effort in November 2009 that is very helpful in identifying disabilities to be accommodated during the revocation process. Parolees' files and databases contain disability information in a number of places and

formats; Defendants conducted an extensive review of all of those sources and summarized key indicators of disability and effective communication needs into a single, easily-accessible form that was jointly designed with Plaintiffs.

Defendants completed these summaries for all parolees in the community, and those pending revocation, in compliance with the timeframes specified in this Court's order signed July 7, 2009. Parole agents in various offices affirmed that completing this form is one of their responsibilities on initial contact for parolees released from custody.

The Defendants have not conducted a review to verify that the summaries are present as intended. The Special Master completed a small study toward this end. In 56 field files or revocation packets, 95% contained the summaries and the handful that did not had only recently been released from facilities. Summaries appeared well-done and were often thoroughly documented. About 10% could use correction, however, in that they documented a serious limitation, such as a learning disability, but indicated that the parolee would not need accommodation or effective communication assistance.

Additionally, *LH* procedures require staff to review parolees' files and databases for disability and effective communication information, and to record and transmit it at various steps in the revocation process. In the Special Master's review of 60 cases, the majority of forms were completed well. The Stockton and Oakland parole units showed the best practice in this regard.

There were also several trends that need attention.<sup>52</sup> In a significant minority in the Special Master's study (15%), agents missed putting available disability information on the form, particularly, but not exclusively, reading level; Plaintiffs have also commented on this issue after their reviews.<sup>53</sup> In nearly 10%, agents used handwritten and electronic

versions of the form in the same case and there continued to be some inconsistencies and some handwritten information was not carried forward. In both of these examples, there is a risk of not accommodating parolees during notice service, and of missed accommodations later in the process. An additional trend to address is that, fairly often, agents did not indicate whether parolees needed accommodations, particularly a problem in those cases where the agents had recorded disabilities. Similarly, in a few cases, agents marked that disabled parolees did not need accommodation.

Along with the forms discussed above, Defendants are to provide “source documents” concerning the disabilities identified. The extent of that obligation remains in dispute, although the parties have agreed to four documents for Defendants to provide.

Tracking: Defendants make use of disabilities-related electronic databases in two ways: they record disabilities and effective communication needs during revocation process steps, as described *supra*, and they generate reports concerning accommodations needed and provided. The latter function provides a window into practice but needs significantly more development.

The reports reflect dozens of accommodations provided at parole units and in institutions during revocation proceedings, including some needs that staff were able to accommodate despite there either being no request or the need surfacing unexpectedly. Records suggest there were no instances when a requested accommodation was denied. The reports are not clear, however, as to the actual frequency, the types of needs, the accommodations provided, and whether they were sufficient to accomplish effective communication and participation.<sup>54</sup>

Forms in alternative formats (§ 55): During the Round, the parties worked on making forms available in Spanish, large print, and audio formats. To the Special Master's knowledge, this remains in process. Defendants also ensured that there was equipment available at each of their facilities for parolees needing to listen to materials on recordings.<sup>55</sup>

Prohibition of discrimination in parole placements and referrals to services (§ 27): Information concerning this requirement did not come to the Special Master's attention during the Round. The parties disagree concerning documentation that may be necessary to demonstrate compliance with this provision.

Develop an ADA grievance procedure (§ 54): Defendants have put in place an ADA grievance procedure. The parties contemplated providing a grievance form when parolees are served their notice of charges; this has not occurred to date, but the parties agreed to remedy this and Defendants report they have completed the first steps to accomplish this. The Special Master has observed Defendants' staff making parolees aware of the ADA grievance procedure during some hearings.

Defendants report receiving no ADA grievances during the Round or in 2009.<sup>56</sup>

**Development of an appeal process** (§ 43):

Decision review, described *supra*, can serve as one means of appeal for CalPAP or the Division of Juvenile Parole Operations.

Defendants have also developed an appeal process with the components required in the Stipulated Injunction, much of which is operating well. In about two-thirds of the hearings reviewed, hearing officers informed parolees of their right to appeal, including the assistance of counsel; several offered instructions on how to exercise it. The system would benefit from more consistency on this point by a small minority.

The system employs one level of appeal that requires parolees, or their attorneys, to file with the Juvenile Parole Board Executive Officer within 20 days of receiving the Board Order. Taken together, CalPAP's and Defendants' documents refer to 16 appeals handled during the Round.<sup>57</sup> The Special Master has found the appeal decisions to be of good quality, but Plaintiffs are concerned that these did not provide sufficient information regarding their basis. In terms of timeliness, the Juvenile Parole Board issued a decision within 10 business days of receipt, as required, with one exception, which was answered two weeks late. CalPAP tracking shows that it received notice of most decisions within the required five business days, also with one exception that was three business days late. It is unknown whether decisions also reached parolees in this time.

The Special Master does not have direct information concerning the relief the Executive Officer can grant and whether it includes immediate relief, such as release from custody. Rehearing was granted in three cases, but the parolees opted not to pursue them.<sup>58</sup>

Defendants document five requests for tapes in the Round. All but one of these requests reportedly were filled in two weeks or less, as required; there had been an equipment malfunction as to the exceptional hearing and Defendants ordered a rehearing in accord with Stipulated Injunction requirements.<sup>59</sup> During the Round, Defendants

ensured that there was equipment available at each of their facilities for parolees to listen to these recordings.<sup>60</sup>

**Comprehensive annual training on ADA and effective communication, the Stipulated Injunction's requirements, policies and procedures, due process (§ 56):**

Defendants have done an excellent job providing training for staff. During most months, Defendants distribute instructional memoranda clarifying Stipulated Injunction mandates and setting out procedures where previous interpretation had been unclear or not well-executed. Defendants set aside a portion of the routine Juvenile Parole Board meeting, which occurs monthly or every few months, for *LH*-related training. They have distributed several very beneficial guidelines and checklists for conducting hearings and specific, complicated tasks within them, such as handling hearsay, crime elements, and assessing disabilities and ensuring effective communication.

In the prior Round, the Division of Juvenile Parole Operations provided *LH* training to its staff. CalPAP provided further training for its panel attorneys in October 2009. In December 2009, the Juvenile Parole Board collaborated with CalPAP on a three-day training for its staff; parole agents and attorneys participated in portions the divisions have in common, an excellent mechanism for creating greater coordination, understanding, and just and effective revocation proceedings. In March 2010, the Division of Juvenile Facilities trained its staff for a full day on *LH* requirements and practices.

Plaintiffs attend trainings and provide feedback on content and on practice problems evident in trainees' discussion. Plaintiffs object that they receive materials with

little or no time for comment ahead of trainings, and sometimes receive little notice of the trainings.

Together, the trainings have covered restraints practices, assessing parolees' disability and effective communication needs, handling hearsay, elements of crimes and violations, constitutional validity of parole conditions, severely mentally ill parolees, documenting Board Orders and ADA reviews, the revocation penalty matrix and other dispositions, revocation extensions, and exit interviews.<sup>61</sup> As Plaintiffs note implementation issues in the field, they call for more training to reduce confusion. In particular, they would like to see hearing officers and parole staff become more skilled in disability and effective communication issues and legal analysis.

**Tracking mechanism for timeframes and reasons for delay** (¶ 13, 32, 33):

Defendants employ a complex information system that facilitates many aspects of compliance and tracking performance. During the Round, they continued to address operating inconsistencies, improvements needed for DJJ business practices, data requests from the Special Master, and data entry errors.<sup>62</sup>

As Defendants and the Special Master gain greater experience with the system, however, an increasing number of structural concerns are surfacing. The information system is built on the programming initiated more than 10 years ago, based on the *Valdivia* Defendants' projection of how the revocation system would operate and the functions and data that would be needed; experience has borne out quite differently.

The *LH* Defendants have inherited both its strengths and the weaknesses of a very old system written in outdated language. It has been modified many times over the years

in an attempt to meet compliance reporting requirements that were not contemplated in its original design. The dated technology's inherent lack of flexibility renders changes unreasonably difficult, and some of the modifications were not complete or could cause unintended consequences for other aspects of the database.

It is difficult to ask this system to address the varied needs that are sometimes in tension: workflow, management reports, and compliance reports. As a result, compliance reports do not capture existing data on certain activities, and data moves in and out of reports according to an arcane set of variables, reducing the completeness and predictability of the compliance picture.

The system serves several purposes well. What is unclear is whether the gaps in what it can do are too large to overcome in the current system technology. Unfortunately, these gaps are likely to be central to Defendants' ultimate ability to demonstrate substantial compliance.

### **Monitoring process**

In previous Rounds, the parties reached agreement concerning a detailed monthly production of documents and recordings by which Plaintiffs may review some aspects of the remedy's implementation. Defendants have provided those materials monthly. Plaintiffs have raised concerns about the completeness of productions and the accuracy and utility of some documents.

The parties have also agreed to a number of onsite visits by Plaintiffs' counsel independently and in conjunction with the Master ship. There are occasional difficulties in access at local jails, but the parties are working to resolve them. It is of great concern to

Plaintiffs that they have not been able to observe notices of rights and charges; the parties are working on means to accomplish that, as well.

The Stipulated Injunction requires Defendants to develop self-monitoring to ensure compliance with its terms and with relevant policies and procedures (§ 57). Defendants continue to demonstrate very good practices in this regard.

From the outset, Defendants have maintained a multidisciplinary team that meets weekly to design, oversee and troubleshoot implementation; to share information; and to jointly create policy and regulation. Members of this body examine the great majority of late cases<sup>63</sup> at every revocation process step; investigate the reasons; implement and check on corrective action; and report to the full task force on the substance and outcome of these efforts monthly.

Headquarters staff reportedly check open case reports daily for timeliness at each step and follow up to remedy any appearing late. Defendants indicate that field supervisors also frequently check database reports concerning timeliness. These are all excellent measures to ensure that the system becomes established and that systemic and individualized obstacles are identified and addressed early. The widespread and consistent nature of these practices make it more likely that oversight will become and remain institutionalized.

In addition, CDCR's Office of Audits and Compliance will be conducting a number of routine audits based on audit tools designed in conjunction with division subject matter experts and comment from Plaintiffs. The first audits are complete for CalPAP operations and ADA requirements. An audit tool for the Juvenile Parole Board's portions of the revocation process has been designed and is pending comment. Audit methods are

designed thoughtfully, employing a number of techniques and drawing on subject matter experts in the field visits and to assist with business process understanding and interpretation. Expectations for corrective action and follow-up are built into this review mechanism.<sup>64</sup>

The parties have also undertaken an important effort to design detailed standards and criteria for the Stipulated Injunction's requirements. They are collaboratively negotiating these components, which can be used by all parties examining Defendants' efforts to determine progress and ultimate success of implementation. This will provide valuable guidance for Defendants' planning and execution of the mandates, and help all parties recognize when goals have been met.

**Revocation may be extended only after a revocation extension hearing, and parolee must receive copy of decision** (§ 35, 40):

DJJ is operating a revocation extension system, which handled 18 cases during the Round.<sup>65</sup> All but one reached a final outcome well within the timeframe prescribed; the exceptional case was extended by parolee time waiver and was held within the requested time. These include the two cases where the violation events occurred within the month before the parolee was set for release date. In one such case, hearing was held quickly and the process itself did not extend the parolee's time in custody; the second case was the above-described case with the parolee taking a waiver.

The terms generally ranged from one to four months. One parolee's term was extended by eight months, and the cases against two others were dismissed. The Special Master does not have information concerning whether parolees are receiving copies of

their written hearing records.

This system replaced Defendants' previous system of increasing parolees' in-custody time through "time-adds" and the disciplinary system called "DDMS."<sup>66</sup> Defendants' staff carefully and frequently monitored the disciplinary system in 2009 to ensure it was no longer being used to extend parole violators' time in custody.

**Policies and procedures governing dual commitments** (§ 45):

The Mastership has reported in previous Rounds that Defendants distributed a policy governing dual commitments. The parties worked to address their dispute concerning good time credits for dual commitments who opt to be housed in adult institutions, but this remains to be resolved.

**Elimination of "temporary detentions"; immediate rescission of relevant regulation** (§ 39):

The Stipulated Injunction requires Defendants to "immediately rescind Title 15, California Code of Regulations § 4985," which concerns this practice. Defendants report that this regulation and Title 15, California Code of Regulations § 4826 were repealed in prior Rounds. Plaintiffs raise concerns that temporary detentions may be continuing, based on a small number of cases in which that language was used. Defendants indicate they have followed up with instruction and that staff incorrectly used language but not the prohibited practice itself, and will continue to follow up.<sup>67</sup>

**Summary**

Just over a year into full implementation, Defendants have established impressive

pieces of the compliance picture. Much of the necessary infrastructure is in place and significant results are apparent, particularly in the timeliness of many requirements. There can be no clearer measure of this progress than the first attainment of a Special Master finding of substantial compliance in several requirements for attorney representation.

As noted at the beginning of this report, several components are critical to Defendants' success: setting up systems, quick training and guidance in response to problems, a can-do attitude, multidivision communication and problem-solving, scanning of documents, attorney representation, effective attention to ongoing information system problems, and remedies to ensure that justice is provided to all parolees.

Additionally, the effectiveness of Defendants' training has increased significantly and will contribute to the necessary foundation for fulfilling their constitutional obligations. Creating summarized, readily accessible disability information for supervision, attorney representation, and system actors in the revocation process was an important advance. Accelerating the work of the Office of Audits and Compliance and shifting primary responsibility for overseeing timeliness requirements to Defendants are important milestones.

Much more work lies ahead and the parties have committed to undertaking it together.

While timeliness numbers are strong, almost no firm conclusions can be reached when all information is taken into account. Ironically, the data system that provides structure for managing the revocation actions, and demonstrates a good portion of that practice, also poses one of the few substantial obstacles to demonstrating full compliance

and ending this case.

It is built on the programming initiated more than 10 years ago in *Valdivia*, and the *LH* Defendants have inherited both its strengths and the weaknesses of a very old system written in outdated language. It was not designed for all of the necessary compliance reporting -- which is sometimes in tension with management reporting needs -- and the outdated technology renders changes unreasonably difficult. Observations and external data suggest a revocation system that is highly functioning in timeliness; Defendants' data can only substantiate a portion of that. Much of the analysis in this Special Master's report required painstaking, case by case analysis, a highly impractical method for Defendants to sustain. It is questionable whether Defendants will be able to solve this problem with the current system.

Beyond the data system, Defendants' next steps involve solidifying the system that has just come together, and bringing attention to several substantive areas. Among the highest priorities are:

- a better understanding of accommodating the more severely challenged within the disabled population
- developing and presenting sufficient evidence; and
- a better grasp of applying the law when weighing evidence and arguments

Additional policies, procedures and regulations are needed to increase consistency and enhance the survivability of the system. As with any system, better implementation of many of the specific Stipulated Injunction requirements remains for the coming Rounds, a natural second wave after broader components are first established.

### Recommendations

The Defendants have demonstrated compliance with several requirements of the Stipulated Injunction. Therefore, I recommend that the Court order that the following requirements are substantially compliant, and that the subjects will therefore no longer be a primary focus of Plaintiffs' or the Special Master's monitoring unless and until it comes to the parties' or the Special Master's attention that there has been a significant decline in compliance. These orders should apply to the following requirements:

- Provision of counsel during revocation proceedings (§ 15)<sup>68</sup>
- Parole revocation hearings to be held within a 50-mile radius of the alleged violation (§ 36)
- At the time of attorney appointment, provision of date, time, and location of the hearing (§ 16)
- Defendants shall take all reasonable steps to allow counsel to meet with client at least 24 hours prior to the probable cause hearing (§ 16)
- State-appointed counsel for juvenile parolees shall be appropriately compensated for hearings and appeals (§ 24). Defendants shall develop standards, guidelines, and training for effective assistance of state-appointed counsel (§ 21)

Respectfully submitted,

Chase Riveland /s/ Chase Riveland  
Special Master

May 25, 2010

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<sup>1</sup> This was determined in the following way: Closed Case Summary Oct. 1, 2009 through Mar. 28, 2010 (generated Apr. 10, 2010) reportedly contains all special populations (except supplemental cases and revocation extensions, each of which tends to be minimal and handled under a different analysis) and shows 433 cases. Open Case Summary run closest to the end of the Round, Mar. 26, 2010, shows 74 cases. The number of actions staff handled during the Round, then, is approximately 507.

<sup>2</sup> Cases for this and the following data point are captured in Optional Waiver Timeliness Oct. 1, 2009 through Mar. 28, 2010, in combination with the individual records underlying it.

<sup>3</sup> Closed Case Summary, Optional Waiver Timeliness, Closed Case – Revocation Extension each run for Oct. 1, 2009 through Mar. 28, 2010, and individual records reflecting postponements. As there is no report capturing completed postponements, this total may well be higher.

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<sup>4</sup> This is distinguished from the separate requirement for counsel of choice, which remains subject to full Court oversight

<sup>5</sup> Plaintiffs have agreed as to most requirements listed here. The Special Master recommends a few additions as noted here.

<sup>6</sup> Defendants are currently treating this as the deadline by which to decide whether to refer the revocation case to the Juvenile Parole Board.

<sup>7</sup> Informal communications among parties; see, e.g., electronic file titled BCPA Memo- DUE PROCESS Poster.rtf

<sup>8</sup> Informal communications among parties Oct. through Dec. 2009, Mar.2010

<sup>9</sup> Timelines for not in custody cases have been established in policy but not as between the parties. In the meantime, Defendants ask their staff to meet the timeframes in policy, but the database report seems to measure by mainstream case standards for most steps.

For postponed cases, reports measure timeliness by the first probable cause hearing, without regard to when the matter was ultimately heard. The timeframes for a rehearing have yet to be negotiated, but the completed hearing will need to be accounted for. At present, there is no systematic way to identify cases that were postponed and have subsequently closed.

<sup>10</sup> Open case reports indicate the timeliness of the step at which each case therein is found. The timeliness of each preceding step in those cases is not visible in any report (until those cases close), so presently timely cases awaiting probable cause hearing might have had late notices of rights, for example, and one would not know from the report.

Open case reports also contain cases open but not shown in any step; they are apparent only by the fact that the step columns total less than the full total column. Defendants believe these principally are cases open at another type of step (Charge or Optional Waiver Review) or closed but not archived. Since they cannot be viewed, however, one cannot verify whether these reasons cover all of the unexplained open cases.

The notice of rights step poses additional problems. On open case reports, it does not track independently; it is always linked either to the step before or after it, so it is not possible to determine on the report which cases are open at this step. Therefore, one cannot discern the timeliness of notice for *any* of the open cases without examining each one.

Of the 408 cases shown in Closed Case – *LH* Timeliness Oct. 1 through Mar. 28,2010 as proceeding forward from the agent-supervisor conference, only 278 show as having a notice of rights. Defendants assert that many cases are moved out of revocation proceedings at this time, either through dismissal or by handling the allegations with a corrective action plan. Logically, this would explain a large proportion of this difference. However, there is no report to capture that population to be able to demonstrate that this action fully explains this difference. In fact, Information Systems staff analysis reveals that *more* notices took place than the 278. Some of these are notices that are subject to a different timeframe expectation (not in custody policies, rather than requirements laid out in the Stipulated Injunction) and are reflected in the data system but not in this report; unfortunately, there are other seemingly completed notices not explained by any of the foregoing. This does not leave one with confidence that the likely explanations are definite enough to explain all of what appear to be discrepancies and to assure that all necessary notices took place and were completed timely.

<sup>11</sup> The number of cases varies when reports are generated on different dates. This may occur when cases are archived or duplicates are discovered and eliminated. It may occur when an optional waiver is taken or activated. There may be administrative or other reasons. To date, the Special Master has observed the amount of variance to be small. However, the fact of variance means statistics can never be fully precise, and the fact that some changes occur but can only be explained with likely reasons, rather than definite ones, is of concern.

<sup>12</sup> The Special Master reviewed an accidental sample of 77 individuals' records drawn from the monthly productions, site visits, and packets pulled for studies of other issues. There were a minimum of five from each parole unit. This is a large sample size, at about 24%, but the selection method was not systematic, so this may or may not be representative.

<sup>13</sup> The amount of lateness was determined by a case-by-case review of the two special populations and examining the drilldown report of late cases in Closed Case – *LH* Timeliness and the individual records for those appearing more than one day late. For all sources, see electronic folders titled NOR analysis and JSTS reports – gen'l within Materials Relied Upon for OSM4.

<sup>14</sup> NOR Unsuccessful – Will Retry totals 7 cases after removing duplicates . NOR Unsuccessful – Will Not Retry was also reviewed; it showed there were no such cases during the Round. Both reports were run for Oct. 1, 2009 through Mar. 28, 2010. .

<sup>15</sup> The investigation occurs before CalPAP attorneys are appointed. Parolees may or may not have counsel in concurrent criminal proceedings.

<sup>16</sup> The Special Master reviewed an accidental sample of 55 individuals' records drawn from the monthly productions, site visits, and packets pulled for studies of other issues. This is a 17% sample, but the selection method was not systematic, so this may or may not be representative.

<sup>17</sup> See contents of the electronic folder Rev Packet Study in Materials Relied Upon for OSM4. The Special Master reviewed the actual reports in the packets, not data printouts. The total number examined was 34 and was chosen by accidental sampling. While this does not provide a sample that can be relied upon as representative, it does give an indication of practice.

<sup>18</sup> *Id.*, as well as case contained in electronic folder titled Supervisor Review in Materials Relied Upon for OSM4

<sup>19</sup> Most populations are captured in the Closed Case – *LH* Timeliness report; the exceptions are included in Closed Case – Extradition, Closed Case – NIC Referral, and Open Case Summary. About 5% of the cases shown in Closed Case – *LH* Timeliness were late, almost all one day or less. The amount of lateness was determined by a case-by-case review of the two special populations and examining the drilldown report of late cases in Closed Case – *LH* Timeliness. For all sources, see electronic folders titled Supervisor Review, Extradition, NIC, and JSTS reports – gen'l within Materials Relied Upon for OSM4.

<sup>20</sup> DJJ Date Case Assigned Compliance Report for each of Oct. 2009 through Feb. 2010; informal communication May 25, 2010; Closed Case Summary – Extradition Oct. 1, 2009 through Mar. 28,2010; Extradition Report Apr. 11, 2010; attorney appointment dates obtained through informal communication with CalPAP. Attorney appointment figures are not practically discernible for open cases.

<sup>21</sup> Contents of electronic filed NIC within Materials Relied Upon for OSM4; attorney appointment dates obtained through informal communication with CalPAP. The not in custody cases not discussed here were continued on parole before the time that an attorney would have been appointed, generally at the RTCA step.

<sup>22</sup> In one instance, a police officer surprised the parties with a report not previously provided.

<sup>23</sup> *LH* Compliance Report, Mar. 16, 2010

<sup>24</sup> Source for this section is 79 revocation packets reviewed during site visits or downloaded from JSTS or RAD and filed in several electronic folders within Materials Relied Upon for OSM4. This accidental sample is about a 23% sample of the actions that proceeded to a step requiring counsel notification, but was not systematically chosen, so it may or may not be fully representative.

<sup>25</sup> Document Production Itemization for each of Oct. 2009 through Mar. 2010

<sup>26</sup> Compliance Review, California Parole Advocacy Program. Reportedly, the auditor's method is to describe all deficient cases identified; as there were no such descriptions in this report, Defendants say this indicates the auditor found 100% compliance.

<sup>27</sup> Contents of electronic file RTCA within Materials Relied Upon for OSM4

<sup>28</sup> Contents of electronic file RTCA within Materials Relied Upon for OSM4; Closed Case – *LH* Timeliness and Closed Case Summary – Extradition Oct. 1, 2009 through Mar. 28, 2010; Open Case Summary for each of Nov. 20 and Dec. 13,2009 and Jan. 15, Feb. 11, Mar. 16, Mar. 26 and Apr. 7, 2010. One late case was removed from both the total and the late column, as it was a case from the preceding Round that was administratively reopened.

<sup>29</sup> Closed Case Detail – RTCA Oct. 1, 2009 through Mar. 28, 2010

<sup>30</sup> In the Open Case Summary, 42 cases are unknown because some do not appear in the step columns and others progressed to the probable cause or revocation hearing steps and the timeliness of the RTCA is not currently visible.

<sup>31</sup> CalPAP Requested Expedited Hearings, Oct. 1, 2009 through Apr. 1, 2010

<sup>32</sup> Some parolees took optional waivers at the probable cause hearing. For those who did not, most were given alternatives to incarceration.

<sup>33</sup> See, , *e.g.*, correspondence from S. Cooppan to M. Brady and C. Chen, Apr.20,2010, and correspondence from E. Eng to M. Brady and C. Chen, Apr.2,2010

<sup>34</sup> This analysis draws on Closed Case – *LH* Timeliness and Closed Case Extradition for Oct. 1, 2009 through Mar. 28, 2010. With Open Case – *LH* Timeliness, each of Nov. 20 and Dec. 13,2009 and Jan. 15,

Feb. 11, Mar. 16, Mar. 26 and Apr. 7, 2010 were averaged to produce a number of open probable cause hearings at any given time, and their timeliness.

Postponed cases require a separate assessment. Currently, these are included in these two closed case reports, with timeliness determined by the timeliness of the first probable cause hearing, without regard to when the matter was ultimately heard. For this reason, in this analysis, postponed cases are removed from the totals shown on the mainstream reports.

The above-described analysis of Open Case – *LH* Timeliness also produced the average number of open revocation hearings, which indicates a number of probable cause hearings that have occurred but for whom one cannot view timeliness. Open postponements and time waivers must be added in; Open Case-Postponement and Open Case-Time Waiver for Nov. 20 and Dec. 13, 2009 and Jan. 15, Feb. 11, Mar. 16, and Apr. 7, 2010 provides this number (after subtracting duplicates and averaging), but do not indicate timeliness. Additionally, Open Case Summary for the same dates provides the number of cases open but not appearing in any step column (the difference between the total column and the totals of the step columns, less the NOR column as it duplicates those adjacent to it). It is not possible to isolate open extradition cases, but they are infrequent, so a small number of these may also be unknown. Taken together, these reflect about 9% of the total probable cause hearings and there is no known timeliness information for them at this time.

<sup>35</sup> For this review, the Special Master studied the cases captured on the Open Case-Postponement and Open Case-Time Waiver reports, and noted the probable cause hearings with postponements while auditing records for other purposes. This yielded a population of 12 parolees with postponements and 6 with time waivers at probable cause (as well as postponements at other steps). It is unknown what proportion of all postponements this represents.

<sup>36</sup> See contents of electronic file titled Postponements within Materials Relied Upon for OSM4

<sup>37</sup> A small minority have been briefly verifying the ADA review from the probable cause hearing, forgoing an interactive assessment during the revocation hearing. Defendants responded with training upon learning of this practice.

<sup>38</sup> Granted *Comito* Objections, Denied *Comito* Objections, and Other Objections reports, each covering Sept. 2009 through Feb. 2010 (data analysis makes use only of the data from this Round, Oct. 2009 through Feb. 2010)

<sup>39</sup> This term is used to describe those revocation actions that follow the normal course. The concept excludes cases with special circumstances, such as not in custody hearings, extradition, parolee time waivers, optional waivers, and postponements.

<sup>40</sup> This is a standard Defendants are applying. Plaintiffs contend that counting the days to hearing should resume at the point when the optional waiver was exercised (for a total of 35 days in the revocation process, not including the period of the optional waiver).

<sup>41</sup> These do not appear in the information system reports otherwise referenced here and must be accounted for separately.

<sup>42</sup> Timeliness for mainstream closed cases and not in custody cases is set by the Stipulated Injunction.

When referring to open cases, this column reflects cases still within the time allowed by the Stipulated Injunction and/or policy. For completed optional waiver activations and extradition cases, timeliness is measured by the time allowed by policy.

When referring to postponed cases, this column reflects cases reheard within a reasonable time for the circumstances. As discussed, the parties will need to negotiate this standard. In the meantime, for purposes of this report's analysis, the Special Master defines a reasonable time to reschedule these revocation hearings as less than three weeks after the first revocation hearing. This is significantly longer than the two weeks required for reissuing subpoenas to law enforcement witnesses.

<sup>43</sup> Although Closed Case – *LH* Timeliness shows higher numbers, these include postponed revocation hearings with the timeliness calculated as of the first hearing. While the timeliness of the first hearing is significant, it is not the final word. Thus, this analysis subtracts those cases from the mainstream numbers and treats them separately.

<sup>44</sup> Obtained through the averaging techniques described *supra*

<sup>45</sup> The Special Master's analysis was only able to take into account those postponements that came to the team's attention. As there is not currently a method to systematically identify these, it may be that this and the data point that follow are under-representative, and mainstream closed probable cause and revocation hearings are overcounted by Defendants' information system.

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<sup>46</sup> CalPAP DJJ Statistics 50 Mile Report for each of Apr. through Dec. 2009, and Jan. through Feb. 2010

<sup>47</sup> In one, a hearing officer discouraged disposition witnesses as unnecessary. In another, the resolution indicated that the difficulty was with parolee's counsel's subpoenas rather than any action of the State. In a third, a parolee was not allowed to introduce physical evidence because of a mistake concerning discovery requirements. See Other Objections Sept. 2009 through Feb. 2010 (analysis draws on material from this Round, Oct. 2009 through Feb. 2010); correspondence from E. Eng to M. Brady and C. Chen, Apr. 2, 2010; hearing recordings in monthly productions

<sup>48</sup> Closed Case Summary – Supplemental Charge Cases, Oct. 1, 2009 through Mar. 28, 2010; Open Case Summary -- Supplemental Charge Cases Apr. 7, 2010

<sup>49</sup> Joint Stipulation Regarding Modifications to Division of Juvenile Justice Parole Revocation Policies and Procedures, Sept. 10, 2009

<sup>50</sup> Contents of electronic file NIC within Materials Relied Upon for OSM4

<sup>51</sup> *Id.* The one exception was a parolee who could not participate in her first not in custody hearing for medical reasons, and was taken into custody on other charges before the postponed hearing was scheduled.

<sup>52</sup> The Special Master reviewed an accidental sample of 60 individuals' packets drawn from site visits and packets pulled for studies of other issues. This is likely about a 20% sample, but the selection method was not systematic, so this may or may not be representative.

<sup>53</sup> See, e.g., correspondence from S. Cooppa to M. Brady and C. Chen, Apr. 20, 2010

<sup>54</sup> Contents of electronic file titled ADA within Materials Relied Upon for OSM4. It is not clear whether all reports capture discrete populations or are overlapping. The meaning of the report titled No Action is unclear; it seems to have affected as many as 26 people.

<sup>55</sup> Informal communications with Defendants Mar. 2010

<sup>56</sup> Document Production Itemization for each of Oct. 2009 through Mar. 2010

<sup>57</sup> See contents of electronic file titled Appeal within Materials Relied Upon for OSM4

<sup>58</sup> Informal communications with CalPAP Apr. 2010

<sup>59</sup> Document Production Itemizations, Oct. 2009 through Mar. 2010

<sup>60</sup> Informal communications with Defendants Mar. 2010

<sup>61</sup> See, e.g., contents of electronic folder titled Training within Materials Relied Upon for OSM4

<sup>62</sup> See, e.g., electronic file titled Mar 10 Status report for JSTS Changes.doc

<sup>63</sup> Defendants examine every late case shown on reports concerning revocation extension, tracking of appeals decisions, and the report titled Closed Case Summary – *LH* Timeliness. As described, the latter report omits certain populations, so it is likely that some late cases have not been reviewed. However, it is Defendants' intention to subject every late case to scrutiny.

<sup>64</sup> *LH* Compliance Report, Mar. 16, 2010

<sup>65</sup> CalPAP DJJ Rev. Extension Cases Closed, run for each of Oct. 2009 through Feb. 2010. According to Defendants' Mar. 16, 2010 compliance report, internal data did not operate consistently during this Round, so the Special Master will not rely on it for the instant report.

<sup>66</sup> The latter is still used for wards in custody and to for corrections for parolees' behavior other than extending their time in custody.

<sup>67</sup> See, e.g., correspondence from S. Cooppa to M. Brady and C. Chen, Apr. 20, 2010

<sup>68</sup> This is distinguished from the separate requirement for counsel of choice, which remains subject to full Court oversight