

**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**

**EDMUND G. BROWN, JR., et al.,**

**Defendants.**

\_\_\_\_\_ /

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

**Background**

In orders dated September 19, 2007 and January 29, 2008, this Court found that California's juvenile parole revocation system violated juvenile parolees' due process rights, the Americans with Disabilities Act (ADA), and the Rehabilitation Act.

The Court approved a Stipulation and Order for Permanent Injunctive Relief on October 7, 2008 (hereafter "Stipulated Injunction"), which sets forth detailed requirements for attorney representation, revocation system procedures, effective communication and reasonable accommodations, and consideration of alternatives to incarceration.

During implementation, stipulated orders have been entered concerning Plaintiffs'

monitoring, the tracking of parolees with disabilities and effective communication needs, policies and procedures, and the revocation extension penalty matrix.

Chase Riveland was appointed as Special Master on May 22, 2008. Virginia Morrison assumed the role of Special Master, and Patricia Gray was appointed Deputy Special Master, effective June 1, 2010. The Mastership has submitted five reports during that time, and offers this sixth report assessing progress toward providing due process and complying with this Court's orders.

### **Special Master Activities**

During this Round, the Special Master's team assisted in the parties' negotiations regarding monitoring and standards and criteria for compliance, and mediated issues concerning alternatives to incarceration.

The Mastership interviewed headquarters staff, parole agents, attorneys, and parolees. The team observed hearings at Preston Youth Correctional Facility; NA Chaderjian Youth Correctional Facility; Southern Youth Correctional Reception Center and Clinic; Watts Parole Unit; West County Detention Center; and in the jails of Marin, San Francisco and Los Angeles counties. The team monitored a total of 41 hearings conducted by 6 hearing officers. This included 9 probable cause hearings observed in person statewide. The team observed the service of notice on two parolees in county jails,<sup>1</sup> routine meetings of Defendants' task force, and training for the Board's staff and parole agents.

In addition, the Mastership team analyzed 24 revocation hearings, 3 revocation extension hearings, and 5 not-in-custody revocation matters by recorded and written

materials. The team also examined the 2 Decision Review matters and the orders for an additional 43 probable cause hearings.

### **Scope and Approach**

This report discusses observations and activities spanning November 2010 through April 2011, collectively referred to as “the Round.” Data includes that which became available during the Round, typically from October 2010 through April 2011.

References to the Special Master’s activities frequently include the actions of a member of her team. For some requirements, the Special Master’s team conducted studies 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. In other instances, the team relied on reports generated by Defendants’ revocation database; Plaintiffs’ monitoring summaries; and analyses, reports, or studies conducted by the CalPAP attorney panel administration, and sometimes documents underlying these sources.

This report is structured according to the following format:

- Brief comment on the current legislative environment within which this lawsuit is operating
- Summary of the requirements on which the parties concentrated their efforts during the Round
- Brief summary of the most problematic practices identified during the Round by the Special Master
- Areas of substantial compliance

- Analysis of compliance with each of the Stipulated Injunction requirements not previously found to be in substantial compliance
- Summary and Recommendations for further orders

### **The Environment**

Assembly Bill 1628 went into effect during the Round; it reduces and ultimately will eliminate supervision of juvenile parolees by the State.<sup>2</sup> By its terms, juveniles on parole before January 19, 2011 will continue to be supervised by the State and subject to revocation by the Juvenile Parole Board.<sup>3</sup> Those released from Division of Juvenile Justice facilities for the first time from January 19, 2011 forward are being discharged to the counties for supervision. Because the existing parolees' supervision terms will expire and no new parolees will be coming into the system, the parties anticipate that parole supervision by the State will end significantly before July 2014, the maximum date set by this law. On the theory that procedures will remain unchanged for the current *LH* class, and that the legislation changes terms only for those who have not been on parole and are therefore not in the class, limited implementation plans have been shared with the Mastership and Plaintiffs; Plaintiffs would very much like more information to enable determining that the rights of class members are, in fact, being protected.

In 2011, two additional legislative and policy changes will greatly affect parole supervision, parole revocation, and juvenile incarceration. The passage of Assembly Bill 109 substantially realigns major functions in adult and juvenile corrections and parole, including transferring large populations to be handled by county probation and courts. It appears that this law affects the context in which *LH* operates, but does not affect juvenile parole supervision or revocation directly. Although passed, implementation of this law is

also contingent upon funding being provided.

As of this writing, the Mastership is informed that a decision has also been made – separate from Assembly Bill 109 -- to transfer the remaining juvenile parole supervision operations to be subsumed by the adult parole division. The impact could range from transferring the *LH* system and staffing intact to merging operations into *Valdivia* and eliminating any separate juvenile procedures altogether. The Division of Juvenile Justice is strongly committed to maintaining the existing *L.H.* processes and is negotiating toward that end. Negotiation of the terms and implementation dates is underway within the State and the transfer reportedly must occur within fiscal year 2011-2012. Therefore, details of implementation, and any response by Plaintiffs' counsel, are not yet available.

#### **Areas of Party Emphasis**

During this Round, the parties concentrated their efforts on these activities:

- Defining appropriate information-sharing concerning alternatives to incarceration
- Monitoring the *LH* systems, particularly site visits and document reviews by Plaintiffs
- Defining the standards and criteria by which Defendants will internally assess the revocation steps
- Employing the annual policy revision process to incorporate the *LH* policy changes that occurred during the year
- Moving regulation revisions through the comment and approval process
- Annual training for Board and Parole division staff, including emphasis on some *LH* topics that need improvement
- Information system improvements
- Revising the Parolee Handbook so that parolees are better informed about the revocation process

### **Issues Requiring the Greatest Attention in the Next Round**

The Special Master encourages Defendants to treat the following practices as the highest priorities for improvement in the coming Round:

- Assessing ADA and effective communication needs in notice service and hearings; adjusting communication with parolees who have cognitive limitations; and demonstrating that specific accommodations are provided when needed
- Completeness and accuracy of disability forms (“3.260s”)
- Providing evidence with the revocation packet, or as soon after discovery as possible, and no later than two days before the hearing in which it will be introduced
- Determination of probable cause to continue to detain during probable cause hearings
- Increased clarity in following the law when determining whether hearsay can be used as evidence
- Practices that can impact impressions of fairness and neutrality
- Accuracy and completeness of hearing orders

These issues will be discussed in detail, *infra*. In most instances, there is a high percentage of deficiency for these items. Additionally, there are single, or small scale, occurrences of a variety of very problematic practices, such as:

- A revocation packet was transmitted 10 days late
- Three postponed probable cause hearings took more than a week to be rescheduled
- One case came to the Special Master’s attention in which there was no probable cause on two of the charges;<sup>4</sup> this was not identified at any of Defendants’ revocation or review steps
- A revocation hearing was two weeks late after a postponement because the State had not subpoenaed key witnesses
- A successful appeal took three weeks to be reheard

- Two revocation extensions were not initiated for four to six months after discovery of the conduct at issue
- Most of these cases apparently were not identified and discussed in the State's oversight processes

While it is positive that these issues did not appear to occur on a larger scale, when a system contains this variety of practices that injure due process, occurring across a range of offices and revocation steps, it suggests that the system has not yet stabilized and is not controlling for due process at the level needed for functioning without Court oversight. As Defendants continue to make improvements to both staff practices and oversight, the Mastership is hopeful that they will overcome these issues as well.

Finally, among the policy and practice issues the parties have identified as disputed, there remain important due process issues. These must be resolved for due process to be protected and this Court's orders satisfied.

### **Substantial Compliance**

Defendants continue to sustain the systems they have implemented; there is additional improvement and almost no backsliding on prior accomplishments is apparent.

Many of the requirements of the Stipulated Injunction involve timeframes as well as other practices to effect due process. While timeliness is not a stand-alone requirement, and thus cannot be found in substantial compliance, its extraordinary level bears comment. Continued improvement in Defendants' ability to capture and report reliable data on point gives, for the first time, an ability to present a complete picture of the timeliness of the revocation steps.

By this Round, Defendants have accomplished the following in terms of timeliness:

Parole agent/supervisor conference about probable cause	99%	5 cases late
Service of notice of rights and charges	99%	2 cases late
Violation report	92%	
Unit Supervisor review	99%	
Attorney appointment	99%	2 cases late
Return to Custody Assessment	99.7-100% <sup>5</sup>	1 case late
Probable cause hearing	98%	4 cases late
Revocation hearing	96%	2 cases late

Further detail about timeliness, as well as an assessment of the other criteria for those requirements to reach substantial compliance, are discussed *infra*.

To the extent that a Stipulated Injunction requirement has been conducted well for a sustained period, the Mastership 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 to continue to review these items at regular intervals to prevent such a decline.

The Special Master considers the following requirements to be in substantial compliance on the following bases.

Current Round:

Notice of terms (§ 11): As required, soon after entry of the Stipulated Injunction, Defendants posted notice of the material terms of the settlement on their website and in Division of Juvenile Justice institutional living units and libraries.<sup>6</sup> Monitors have observed posters onsite long-term.

Most parolees interviewed by the Special Master are familiar with *LH* and the rights it affords. Although not specifically required, in a similar vein, Defendants recently updated the Parolee Handbook to increase parolee information about the revocation process.<sup>7</sup> This requirement can be considered in substantial compliance.

Waivers and continuances (§31): The Stipulated Injunction provides that parolees who wish to “waive the right to, or seek a continuance of, a timely Probable Cause Hearing and/or a Parole Revocation Hearing may elect to do so.” Printouts demonstrate that parolees do exercise this right.<sup>8</sup> To the Special Master’s knowledge, policies do not operate to inhibit this right. No objections on this basis, nor any other complaint of denial of this right, have ever come to the Special Master’s attention. CalPAP confirms that waivers are routinely granted without obstacle. This requirement can be considered in substantial compliance.

Hearing recordings (§42): Defendants must provide an audible copy of the recording of the parole revocation hearing within 10 business days of receiving a written request. If the parolee is appealing the hearing result and the recording is inaudible, he shall be entitled to a new hearing scheduled as soon as practically possible. Defendants provide documents monthly that list the recording requests received and the dates provided; nearly all appear to have been in compliance with these provisions for two

years. Most recently, Defendants document six requests in the Round; all reportedly were filled well ahead of the two weeks allowed.<sup>9</sup> Over time, two requested recordings failed and reportedly rehearings were provided.<sup>10</sup> No failures to fulfill these requirements have ever come to the Special Master's attention. This can be considered in substantial compliance.

Revocation extension representation (¶35): The Stipulated Injunction provides that youth shall be represented by counsel in revocation extension proceedings. CalPAP data indicate that this has routinely taken place for at least two years.<sup>11</sup> The Special Master has never learned of any failure to appoint counsel in this situation. This requirement can be considered in substantial compliance.

In previous Rounds, this Court has found the following requirements to be in substantial compliance. Defendants and CalPAP maintained these requirements at or above prior levels with one exception.<sup>12</sup>

- Timely appointment of counsel (¶ 16)
- 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 will be informed of Return to Custody Assessment by the 10<sup>th</sup> business day after the hold (¶ 30)
- 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)
- Not accepting waivers of hearing rights or the right to counsel made prior to the juvenile parolee meeting with counsel; waivers of hearings and requests for continuance must be made in writing in the presence of counsel (¶ 17, 31)

- Not in custody hearings within 60 days after service and with all due process and ADA protections (§ 45)
- Revocation may be extended only after a revocation extension hearing (no time-adds or DDMS time extensions) (§ 35)
- Provision of counsel during revocation proceedings (§ 15)<sup>13</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 clients 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)

During the Round, there was a surprising increase, to 6, of objections on the basis that the State was attempting to introduce evidence that had not been provided to defense counsel. Hearing officers appropriately ruled according to policy, so late-produced evidence did not affect the proceedings; nevertheless, for fundamental fairness, it will be important for the Parole division to resume its earlier level of conscientiousness in providing evidence more timely.<sup>14</sup>

### **Stipulated Injunction Requirements**

The Stipulated Injunction requires a variety of practice changes and a system of revocation steps in which due process must be delivered according to specified timelines. The status of implementing these requirements will be discussed in this section.

Defendants initiated only 430 revocation actions during the seven-month Round,

continuing the pattern of reductions of recent years. When Defendants began full implementation in early 2009, there were nearly 100 actions per month; during this Round, there were an average of 61 actions per month. It is unclear, however, whether this reflects the reducing class occasioned by Assembly Bill 1628. It initially appeared so, since initiated actions diminished each month of the Round, but then they spiked substantially in February and March before falling again in the most recent month.<sup>15</sup>

Defendants continue to resolve one-third of these actions before proceeding to any hearing. It appears that those parolees are continued on parole within two weeks of the cases being initiated, and reportedly are given programming and/or additional structure when returned to their communities.<sup>16</sup>

Previous reports of the Special Master have detailed the difficulty Defendants have had in demonstrating the timeliness aspects of the Stipulated Injunction requirements because of information system issues. Defendants effectively improved their ability to demonstrate timeliness numbers during this Round. As a result, the Mastership feels confident in reporting compliance rates for most requirements, as detailed below.

### **Policies and Regulations**

The Stipulated Injunction requires sufficiently specific draft policies, procedures, and plans to (a) ensure that revocation proceedings are in continuous compliance with all of the requirements of the Constitution and applicable statutes, (b) address a method for accurately tracking the timeliness of hearings and other steps in the parole revocation process, (c) include the timely provision of accommodations for juvenile parolees' disabilities and effective communication needs, (d) provide for not in custody hearings, dual commitments, and parole exit meetings; and, (e) address such disputed issues as

telephonic probable cause hearings, circumstances constituting good cause for delayed hearings, and remedies for untimely hearings.

The parties negotiated, and Defendants have had in place, policies covering most of the required elements long-term. The agreed policies went forward while a substantial number of disputed items remain, including those named in the Stipulated Injunction. The parties did not maintain the rigorous approach to resolving these that had been initiated in the Fourth Round.

During the Round, the major policy effort concentrated on incorporating the policy developments of the year into an annual revision of all *LH* policies. Further policy work was limited. A decision review policy was distributed early in the Round, and negotiations were finalized on a policy governing mentally ill parolees too decompensated to participate in revocation proceedings, although that policy has not yet been distributed.

Regulations: The parties worked on revisions to relevant regulations and they were published by the Office of Administrative Law in September 2010. Plaintiffs provided comments during the initial public comment period and most recently in March 2011; Defendants currently are reviewing the latter.<sup>17</sup> Reportedly, after Defendants' review period, there is a final Office of Administrative Law review period of 30 days and then the regulations will be filed with the Secretary of State.<sup>18</sup>

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

*Nature of the practice*: 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. The parties reached agreement during the Round about a means by which this decision will be documented. These practices are to be implemented in the future and have not yet been monitored by either party or the Special Master.

*Timeliness:* Defendants' database shows 99% of cases continue to be timely at this step, an extraordinary level. At most, only five cases were late and most were completed the following day.<sup>19</sup>

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

*Nature of the practice*

To satisfy due process standards, the notice must contain a summary of the conduct underlying the charges sufficient for the parolee to prepare a defense. Defendants provided training on point during the Round and supervisors reportedly have been encouraged to emphasize the substance of charge reports during their reviews.<sup>20</sup> The Special Master analyzed more than one-third of the notices of charges prepared during the Round. The summaries improved, so that 88% met expectations, and most of those were very well done.<sup>21</sup> The Oakland parole unit was particularly skilled in this area; it continues to be the case that the Bakersfield and Watts parole units have the most work to do to improve. The Special Master appreciates the Defendants' work to date to improve these documents, and encourages them to continue this effort in order to communicate fairly with parolees and to reach compliance with *LH* requirements.

Due process, of course, can also be carried out or frustrated by the methods used when serving notice and explaining rights and charges. The Mastership and Plaintiffs were only able to observe a limited number of these interactions during the Round.<sup>22</sup>

Observed service generally was conducted in appropriate spaces, though occasionally jail staff remained nearby gratuitously. Plaintiffs continue to be concerned that service occurs in a private setting – a condition Defendants dispute is required – where accommodations can be provided if necessary, and by occasional parolee reports that service was perfunctory.<sup>23</sup> Additionally, one jail required an agent to serve a parolee by “video conference” – which may have been phone contact without video -- within the jail, and intended to require that procedure ongoing. This included having to entrust the service documents to jail staff for later delivery; the parolee alleges he did not receive them. Staff report taking steps to ameliorate this during the service, but it is highly unusual and contains many drawbacks.<sup>24</sup>

All observed parole agents had reviewed files before the notice to identify disabilities and covered the essential disability-related questions with the parolees. Several parolees had limited ability to understand and/or language issues. Most agents managed this well, simplifying terms, taking extra time, and stopping periodically to check understanding. Several used practices that, though apparently well-intentioned, appeared to be steering parolees away from, or could serve as a disincentive to, asking for help. One agent was creative about arranging for an interpreter and brought translated forms; one took care to rule out the need for an interpreter, while another, who did not know the parolee, merely accepted a “no” answer and made no adjustments to assess

understanding, speaking rapidly throughout. While ultimately it appeared that all of these parolees did understand, these are unnecessary risks to take.

All but one agent went over the rights in detail. All covered the charges and these charge reports were informative. Agents commonly take extra care in the sections of the disability form where the parolee has choices, and in the acknowledgement form – going through each choice one by one – to ensure understanding. All observed agents distributed ADA grievance forms.

On balance, these agents served parolees well, with an appreciation of the need to ensure understanding and support knowing choices. Each agent was respectful and worked in partnership with the parolee and none aggressively investigated the cases. The area that needs work is a greater recognition of practices that, despite the intention of creating understanding, actually undermine it.

#### *Timeliness*

According to CalPAP's and Defendants' records, 99% of service was completed timely. There were only 2 late cases in six months; these were initiated timely but encountered a barrier, and were completed in one to two additional days.<sup>25</sup> It was rare for service to be initially unsuccessful. These occurred because of lockdown, parolee court date, parolee transfer, and quarantine. Some were completed by the deadline nevertheless.<sup>26</sup> The timeliness of open cases was consistent with the foregoing rate.<sup>27</sup> These numbers show continued improvement and are exceptional.

**Not accepting written admissions to a violation of parole made prior to the juvenile parolee meeting with counsel** (§ 17):

Defendants assert that they have ceased the routine practice of asking parolees to sign written admission forms. The Special Master has not encountered these forms in more than 200 revocation packets reviewed since 2009, and none has been identified by monitors.

Plaintiffs' monitoring discusses three cases in which charges were added based on information learned during service of notice of rights and charges or the parole agent's investigation.<sup>28</sup> The Special Master observed a notice where the conversation both elicited potentially incriminating information and, when the parolee mentioned exculpatory information, the parole agent followed up and developed that. The parties disagree as to whether these practices violate this provision of the Stipulated Injunction.

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

*Nature of the practice:* Whether the content of violation reports satisfies due process has not yet been monitored by either party or the Special Master. The parties dispute whether this step is a requirement of the Stipulated Injunction.<sup>29</sup>

*Timeliness:* The Mastership studied the timeliness of 37% of the violation reports generated; 92% met the timeframe requirement, and all but one were completed by the following day.<sup>30</sup> Since the next revocation step showed a near-perfect timeliness rate, it does not appear that late violation reports caused delays in information provided to attorneys or late hearings. This is very good performance on timeliness.

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

A):

*Nature of the practice:* Neither party nor the Mastership has assessed Supervising Parole Agents' practices when reviewing the revocation packet for probable cause and for completeness. On the same basis as with the violation report, the parties dispute whether this step is a requirement of the Stipulated Injunction.

*Timeliness:* It appears that this function was also completed timely at the exceptional rate of 99%.<sup>31</sup> Only three cases were late and they were completed within one to two additional days. Open cases appeared consistent with this analysis.

**Requirements concerning attorney representation**

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

Defendants use a summary form, negotiated by the parties, to provide educational, mental health, and disability information to attorneys and those making use of the field files. 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 the counsel of record of the imposition of a parole hold (§ 18):

Defendants have in place a system to notify counsel of record. Previously, this system operated consistently but with significant deficiencies in timeliness. Neither the parties nor the Special Master's team conducted a review during this Round. Reportedly,

no attorneys outside of CalPAP represented youth in the revocation proceedings during the Round.<sup>32</sup>

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

*Nature of practice:* The Special Master was unable to observe hearing officer practice in assessing at this stage probable cause and the need for continued detention.

*Timeliness:* Timeliness was extraordinary. Only one case was late, and it appears that it was completed on the day the revocation packet arrived.<sup>33</sup>

**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>34</sup>

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

***Nature of Hearings***

The Mastership had the opportunity to review nine probable cause hearings conducted by four hearing officers statewide during the Round.<sup>35</sup> In several respects, the Defendants have improved their skills. Most notably, there was important improvement in detailing the factual basis for findings. The areas of greatest concern were:

- ADA interactive interviews, although somewhat improved due to focused training, are still falling short of effectively assessing mental health, communication, and ability to answer to charges
- Assessing probable cause to detain pending the revocation hearing
- Quality and completeness of Board Orders

As there are similar routines, strengths, and weaknesses in the practice of probable cause and revocation hearings,<sup>36</sup> most aspects will be discussed in the revocation hearings section. A few issues unique to probable cause hearings follow.

Most hearing officers have become adept at reciting ADA questions, rights, and the appellate process from memory. Perhaps because of that comfort, delivery can become rapid, damaging actual communication. In some cases, nevertheless, no mention of appellate rights was made during the entire proceeding. Additionally, by this Round, some hearing officers had also gotten away from clearly indicating that parolees have a right to a revocation hearing. Plaintiffs and the Mastership raised this after monitoring tours, and Defendants were responsive in revising the hearing template to ensure that this right is express. Hearings subsequently observed have resumed this good practice.

As to findings, the Mastership observed hearing officers appropriately dismissing all or some of the charges when the evidence at the hearing did not support probable cause.<sup>37</sup> There was tremendous improvement in citing the evidence that supports a probable cause finding, with only a handful of *charges*, among hundreds, that could use more detail.<sup>38</sup> Defendants should continue to address rare occasions in which hearing officers continue to simply point to the source document, such as a police report or violation report. Citing a general document continues to weaken the process. The parolee is entitled to, and any appellate reviewer requires, the facts the hearing officer is relying upon to make his or her decision. This belongs in the written orders, a lesson Defendants have widely adopted.

Defendants are far less successful in assessing whether there is probable cause to continue to hold parolees in custody pending revocation hearing. In the Mastership's very

large sample, only 28% of relevant hearing records reflected this assessment and provided a reason. It was not uncommon to assert the finding without giving support, and half of the cases did not discuss probable cause to detain at all.<sup>39</sup> This percentage is far too low and should be improved.<sup>40</sup>

In general, Defendants work to provide written hearing records immediately to parolees and counsel, principally running into barriers only at some county jails. Although much improved in terms of connectivity, in three out of nine hearings the Special Master's team observed, staff did not have access to a printer or online service in the hearings, which prevented them from providing copies of the hearing orders to the parolee and attorney at the close of the hearings. In those instances, staff and the attorney described the follow-up methods that would be employed to provide the record to the parolee; in some cases, this reportedly occurred immediately following the hearing.

CalPAP reports show only 14 occasions on which orders were not immediately provided, or 4% of hearings in the Round.<sup>41</sup> Many of these orders were provided the same or the next day, while one-third of them took two to four days to provide.<sup>42</sup> As there is no timing requirement associated with providing a written record, either in this lawsuit or in *Morrissey*, this is reasonable practice. Maintaining a similar level of timeliness will be important, both as a matter of the parolee's rights and so that any contemplated appeals are not delayed.

### ***Timeliness***

Based on more complete and reliable reports, the timeliness of probable cause hearings continued to improve to an impressive 98% when the entire population is taken

into account.<sup>43</sup> Mainstream cases were *all* timely. Open cases and CalPAP data show slight variations, but are consistent with these numbers.<sup>44</sup> Only one extradition case was late, although it was quite extended, apparently by a previous process step, and the probable cause hearing was eight days late. All time waivers were brought back to calendar within the time waived.

Postponements affected 5% of the probable cause hearings. About one-third of these were because the parolee could not attend a not-in-custody hearing; refused attendance; or, in one case, his attorney was unavailable. In this Round, the State's nine postponements occurred only when the parolee was out to court or not transported;<sup>45</sup> one additional case was rescheduled by the State's decision review process.

There was significant improvement in the timely rescheduling of probable cause hearing postponements. About half were back on calendar in a few days. Three cases exceeded one week to re-calendar, with 9 days being the longest time. While Defendants should continue to strive to reschedule probable cause hearings as soon as possible, Defendants are to be commended for these improvements. Both the number of parolees waiting long periods for a hearing, and the length of time they waited, were greatly reduced.

Optional waivers: An additional set of cases is concluded at "optional waiver review," a proceeding equivalent to probable cause hearings. Some parolees choose to defer revocation proceedings until the handling of concurrent criminal charges is complete; should they resume revocation proceedings, the first step is the optional waiver review. In the Special Master's observations, optional waiver reviews are conducted

consistent with probable cause hearings, with a determination of probable cause for the charges and negotiating about a possible outcome.

Data indicates that about 15% of all cases reaching the probable cause step have an optional waiver review.<sup>46</sup> Where there was an optional waiver review that was not continued, all were completed in a reasonable time.<sup>47</sup> Those with an additional time waiver were completed within the time waived. Two cases were subject to postponement; one was rescheduled quickly and it appears the attorney's schedule impacted the rescheduling of the second.<sup>48</sup> There is excellent timeliness at this step.

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. This remained unchanged during the Round.

**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, due process standards, 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 did distribute a policy and has held related training.

The Special Master's team observed restraints practices onsite and in hearing records, and interviewed staff concerning them. Among 41 cases reviewed, 13 parolees were restrained. Additional training on this issue seems to have impacted the consideration of using mechanical restraints, and helped to highlight the reasoning

invoked when considering the appropriateness of restraints during a hearing. There was also marked improvement in recording restraints and the basis for it.

Defendants' staff exercised discretion to restrain 5 parolees in the cases reviewed by the Mastership. In each, Defendants made an individualized judgment about the likelihood of violence based on recent behavior, as required. Plaintiffs object to determinations made on the basis of the violations charged. The agreed standard is that the parolee "present[s] a reasonable likelihood that he/she may become violent or attempt to escape. Such conditions may include behavior while on parole or violent behavior during the period of incarceration for this alleged parole violation." Since the alleged violations are "behavior while on parole," it appears likely that this is a legitimate basis. Plaintiffs also advocate for a "totality of the circumstances" assessment rather than any single factor being determinative.

Eight parolees in the Special Master's study were restrained in deference to county jail policy. Plaintiffs strenuously object to this deference where the policies require universal use of restraints,<sup>49</sup> contrary to the terms of the Stipulated Injunction. Defendants assert that they have no control over these agencies. Los Angeles County Jail's routine practice of restraining prisoners to furniture and the floor is particularly 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 it appears this has not been undertaken. In the Mastership's study, the majority of parolees who were restrained at hearings were in county jail facilities and hearing officers typically overruled restraints objections.

There is a particular requirement in the Stipulated Injunction concerning pregnant parolees; the Special Master does not have current information on point as no such cases came to her attention.

**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. In this Round, the Mastership analyzed 29 revocation hearings – 60% of those conducted – including five that were conducted “not in custody.”

***Nature of Hearings***

It is longstanding standard practice for hearing officers to begin all types of hearings with queries about accommodation needs, mental health, education level, and cognitive status; advisement of parolee rights; and orientation to the hearing process. Several of these practices have been strengthened by practice and advanced training during this Round.

The ADA interviews during this Round were much improved in their execution as observed in many of the hearings audited by the Mastership. Where they fail, however, they continue to be one of the least effective aspects of the hearings because of rapid speech obscuring meaning, closed questions conveying that they to wish to rule out conditions, neglecting to follow up indicia of need, and what appear to be assumptions that what hearing officers are saying is being understood when there is an affirmative response. For more detail, see discussion of ADA identification and accommodation, *infra*.

Due process is at risk when there is failure to properly assess physical and mental health issues, to establish effective communication before the hearing proceeds, and to maintain that process throughout the proceeding. If any of these is in question, or if a necessary accommodation is overlooked, the important nature of the proceeding may be lost on the persons whose liberty is at stake. It is akin to not having them there at all if they do not understand or cannot access the information being presented.

Similarly, the Mastership and Plaintiffs continue to observe procedural rights still being read too quickly, or hearing officers using compound questions, decreasing the likelihood that parolees will understand, or worse, be intimidated by the rapid delivery and complicated terminology sometimes used.

In one hearing, for example, the hearing officer conducted a seriously truncated ADA assessment, did not advise the parolee of his rights, took a plea, and sentenced the parolee in *four minutes*. Although this parolee was accepting a previous offer and a full hearing was unnecessary, it was incumbent on the hearing officer to assure that the parolee understood and was knowingly waiving his rights, which cannot be done in this

cursory fashion. The possibility for informed understanding of the process, let alone protecting the liberty of a juvenile, is put in jeopardy when so much is quartered into such a small package. The order recounted much more than what occurred on the record and that leaves the Board open for other criticism, as well.

Hearing officers should guard against giving the impression that they are assigning the duty of ensuring due process to the defense during the proceeding, which continues to happen in some hearings. It is the duty of the hearing officer to maintain fair and ethical practice in the hearing room, and that duty is not transferable to the attorneys, although it can be shared; it would be better practice to make this intention more express.

The majority of hearing officers manage other procedural protections well, such as ensuring that charges are named and the foundation laid, taking pleas, inviting narrative testimony and cross-examination, and preserving distinct phases for fact-finding and disposition. It appears there has been an increase in recent months of the State attempting to put on evidence that it had not provided to defense counsel. The Parole division will want to address this practice; hearing officers appropriately did not admit such evidence.<sup>50</sup> There are also occasions when hearing officers dismiss charges when the State's evidence is incomplete or the charges are otherwise vague and cumulative. During this Round, for example, the Mastership monitored nine matters where cases or individual charges were dismissed at the hearing for insufficient evidence, lack of witness testimony, redundancy in charging, and lack of jurisdiction. Data indicates this occurred in 20 cases during the Round.<sup>51</sup>

There remain issues of due process that require attention. Some hearing officers appropriately require corroborating evidence in conjunction with an admission, but this is

not done universally. Due process calls for authorities to assess whether individuals who waive important rights do so knowingly and voluntarily; hearing officers commonly do so with optional waivers and need to add this practice when parolees make admissions.

As to other issues, in one case, when the state did not present any admissible evidence to support revocation, it was inappropriate for the hearing officer to appear to shift the burden to the defense. In another, there was a pending objection concerning whether physical evidence was admissible; the hearing officer examined the evidence before that question had been resolved.

Overall, hearing officers appropriately limit their inquiry and decisionmaking to the record and testimony. In this Round, as in others, however, on occasion they reach outside to the on-duty hearing officer, legal counsel, or other staff for advice and direction during a hearing, a practice to which Plaintiffs strenuously object.

Although it has been recommended that the hearing process remain transparent, there remains an inclination to clear the room and telephone the officer on-duty to sort out a legal or policy question and make a decision. Procedural due process risks are inherent when a hearing officer seeks advice from a person who is not present, recites the facts to him or her, and then relies on the third party's feedback in formulating decisions that impact a parolee's personal liberty, all outside the presence of the accused and his or her counsel. Consistent with fair hearing practice, the Mastership would prefer to see complete transparency when hearing officers seek outside opinions during a hearing.

An additional, continuing and problematic practice is that, unfortunately, it appears that decisions are sometimes made based upon information that has not been proffered in the hearing as part of the hearing record. This has an unfair impact on the

process and poses a risk to due process and the integrity of the hearing. This is an area that would benefit greatly from interactive training.

The majority of hearing officers continue to approach disposition issues openly and with considerable deliberation. Undermining this good practice, however, was a minority of cases observed or audited in which hearing officers took matters into account that were uncharged, unproven, hypothetical, or otherwise unrelated to the charges before them. Sometimes it seemed that mitigating factors were not taken into account. The Mastership would encourage additional training and direction for hearing officers in these areas.

The treatment of proffered hearsay is a due process problem of substantial concern. Although Defendants offered further training during the Round, hearing officers continued to have difficulty applying the legal test required before admitting or excluding this potential evidence.

The Special Master reviewed the Board Orders and recordings in all confrontation rights objections occurring after the most recent refresher training. Only one of the oral and written orders applied the confrontation rights balancing test correctly, explicitly or implicitly.<sup>52</sup> Admitting evidence that is unverifiable and therefore unreliable is unfairly prejudicial to a parolee, risking significant harm.

Benefit from the confrontation rights training was evident in that several of the factors, and the idea of balancing, were more commonly in use. However, there continued to be analyses that omitted a key factor. Frequently, no balancing was conducted, and occasionally, the test was not used at all. In a small number of cases,

hearing officers may not have recorded the confrontation rights objection.<sup>53</sup> The rate of problematic handling is actually worse than before the recent training.

There is no indication that decision review corrected these errors of law. The appellate process gives mixed indications. While it does not appear that any of the cases the Special Master reviewed were appealed, two appeals predating the training came to the Special Master's attention and involved confrontation rights objections. One reversed the decision on this basis, which is laudable. The other did not reflect an understanding of the test when it concluded that this ground for appeal was without merit because the hearing officer deferred ruling. Defendants note that there have been no appeals concerning confrontation rights since the December 2010 training.

Additionally, Defendants' practice allowing the seriousness of charges and potential dangerousness of the parolee as reason enough to continue a matter when key State witnesses are absent – even when the witnesses were not subpoenaed and there is no known reason for nonappearance – is objectionable.<sup>54</sup> Under ordinary practice, a hearing officer would apply the confrontation rights balancing test to that witness' information, and the State would be required to make its case, with the information if it satisfied the balancing test, without it if it did not. Not honoring this principle compromises the appearance of neutrality for the hearing officer and revocation system alike.

Confrontation rights is a complex issue and it does not arise frequently enough for hearing officers to become proficient with it in the ordinary course of hearings. While this may be understandable, the risk of incarceration based on untrustworthy evidence – or of compromised public safety because excluded evidence after insufficient reasoning

leads to parolee release – is unreasonable and the costs are too high. Defendants must devote more to ensuring that hearing officers can handle this critical evidentiary matter consistent with due process.

Concerning consideration of alternatives to incarceration, Defendants offered training during the Round and improvement was evident. A minority of hearing officers, however, gave the impression they were operating by rote, or according to predetermined ideas, and not assessing the facts of the case before them. Where there is much more detail about consideration in the Board Order than the hearing itself, it can raise a question about whether that thinking occurred before or after the disposition decision.

More broadly, there continues to be difficulty with written records accurately and completely capturing aspects of the proceedings. In a review of records, the Mastership and Plaintiffs observed that objections and rulings were not always recorded; significant evidence or developments during the hearing were not included; evidence or positions were summarized incorrectly; orders could have internal inconsistencies; and the presence of participants, witnesses, and observers was not always included. Difficulties in the computer programming can cause additional inaccuracies concerning witness appearance, hearing officer identification, and postponements. In the very large sample of revocation hearing orders the Mastership analyzed, one-third were incomplete. On the other hand, reviewers noted improvement, particularly on the inclusion of objections and restraint orders. To the extent that an order does not accurately record the events in a hearing, it may substantially affect appellate due process rights, future parole conditions, and permanent records. It also hampers credible statistical data, effective training, and oversight.

A more universal understanding of due process itself, including the ways in which it applies to every aspect of the revocation process, may prove helpful to hearing officers, especially when the situation calls upon them to independently think through a fairness issue. The Defendants held specialized training midway through this Round and the Mastership is beginning to see improvement, especially in consideration of alternatives to incarceration and more detailed findings in support of decisions. Focused training on fundamental fairness in process and evidentiary interpretation is still a weak link and additional training would prove invaluable for hearing officers.

### ***Timeliness***

To understand timeliness at this step, one must be able to assess:

- Mainstream cases<sup>55</sup> completed within 35 days
- Mainstream cases pending and still 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
- 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

Defendants' data reporting capability continues to improve at this revocation step, as well, and they are now able to identify the above-described populations and indicate their times to hearing.<sup>56</sup> There are impressive timeliness numbers across the board.

The frequency of revocation hearings dropped dramatically, from 11 per month in the previous Round to 7 per month in the instant Round, for a total of 47. **Only two cases were clearly late**<sup>57</sup> and another is controversial. Periodic reviews of open cases showed a similar rate of timeliness.<sup>58</sup> This is an extraordinary accomplishment.

During this Round, Defendants brought additional attention to ensuring that the hearings of special populations remained on time despite the need for special handling. Not in custody cases and activated optional waivers were all timely according to their adjusted timeframes.<sup>59</sup> No extradition cases proceeded to revocation hearing.<sup>60</sup>

Time waiver cases were completed before the expiration of the time waived. Most postponements were at the parolee's request and all were rescheduled within the two weeks required for subpoenas.<sup>61</sup> The two exceptions involved one case where the State postponed to subpoena key witnesses who had not been subpoenaed and had no known reason for non-appearance – a step taken for reasons of public safety and one that all acknowledge does not qualify as good cause for postponement – and one rehearing ordered through decision review. These postponements, as well, were heard within an additional two weeks.<sup>62</sup> This is a significant improvement from rescheduling times of the past.

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

In observations and on hearing recordings, parolees generally put on evidence without obstacle. There are occasions when the parolee's defense or mitigation relies in

part on questioning his parole agent, and this can be frustrated when a substitute agent appears. In the one postponement by the State this Round, some of the parolee's witnesses did not return for the rescheduled hearing, a disadvantage partially, though unintentionally, engendered by the State's actions. In general, however, the system to satisfy this requirement appears to be functioning well.

Supplemental charges (§ 34): During this Round, it appears that no parolee faced supplemental charges.<sup>63</sup>

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

The parties have agreed on a definition of good cause for delay and remedies associated with timeframe violations for probable cause hearings held after 35 days, revocation hearings, and revocation extension hearings. The Special Master verified that no probable cause hearing exceeded 35 days without a parolee request.<sup>64</sup> In the late revocation hearings discussed above, the case that took place three days late was dismissed for insufficient evidence – thus, the remedy could not be applied – and the postponement over parolee objection was given time credit as agreed.

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.<sup>65</sup> To the Special Master's knowledge, all cases were resolved well before the 90<sup>th</sup> day.<sup>66</sup>

**Requirements related to disposition**

Alternatives to incarceration (§27)

The Stipulated Injunction requires Defendants to “consider whether alternatives to incarceration are warranted [at the initial case conference]. The advisability of alternatives to incarceration shall be considered again at the Probable Cause Hearing and at the Revocation Hearing.”

Revocation proceedings do appear to have consideration for alternatives to incarceration built in at every step and, according to the State, everyone is eligible for consideration. Youth are continued on parole by their parole agents in about one-third of the actions; this disposition can include placement in programs and other structured activity. The Board also continues some youth on parole, albeit less frequently, at the Return to Custody Assessment step and as a disposition when probable cause has been found on the charges. It is very rare for hearing officers to release a parolee to await revocation hearing after a probable cause finding on the charges. The Board also continues some youth on parole at revocation hearings. To their credit, some hearing officers have taken a more active role in initiating the discussion about alternatives to incarceration at the dispositional stage as opposed to waiting for defense counsel to raise it.

The parties are currently involved in sorting out what alternatives are considered and when, and the scope of information necessary to determine this. Plaintiffs have sought, for several years, to be given detailed information based on the contention that they and CalPAP should know the universe of alternative programs available to be able

assess compliance and so that CalPAP can better advocate for community placements. Defendants see reasonable monitoring of this topic to be much more limited.

Previously, Defendants arranged for staff to provide descriptions of their practices in order to provide context and to illustrate the methods of consideration. Much of this Round was devoted to mediating to determine the types of documents and other information on point to be shared. Resolution of this dispute is ongoing. On May 5, 2011, the parties engaged in good faith discussions about sharing information that genuinely demonstrates compliance with central due process issues. They were able to resolve many of the long-term issues and it is expected that ongoing mediated discussions will resolve the balance of disputed items in the coming months.

Limiting return to custody time to one year; use of a matrix of ranges of revocation terms (§ 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 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 has exceeded one year in the hearings observed by the Special Master throughout implementation.

There remains a strongly disputed issue, however, concerning policies that permit revocations for an additional year for misconduct during the period in which the parolee is pending revocation.

Release within three days if time has been served (¶ 38): Discussions are ongoing to determine an effective means to demonstrate that this requirement is being met. The Special Master looks forward to a method being identified and to reviewing the information developed.

**Requirements related to ADA and effective communication**

ADA and effective communications accommodation (¶ 23, 48, 50, 51, 52, 53):

Attention to effective communication carries both ADA and due process implications, and the Stipulated Injunction reflects expectations that ADA and effective communication needs be identified and accommodated. Identification tends to take two forms: assessment during the notice of rights and charges and during hearings, as well as recording known issues in a database and paper files for review during current and future proceedings.

The Mastership is aware that staff are working to expand their ability to conduct interactive interviews with parolees. Defendants have provided multiple trainings on point for Parole and Board staff, including several sessions during this Round; the Board particularly concentrated on ADA interactive interviewing skills. Improvement is seen both in the documentation and the oral assessment during hearings. Nearly all observed staff demonstrate an appreciation for the issue, but they are skilled in only some aspects of identification. For this reason, continued, specific training is needed.

The strengths and weaknesses in the practice of Parole staff were discussed *supra*. As to hearings, more often than in the past, it was clear that hearing officers had reviewed the file ahead for disabilities and effective communication needs, a welcome

improvement. The persistent weakness in hearings comes in talking too fast, cursory explanations, and what appear to be assumptions that what hearing officers are saying is being understood. These practices can lead to inadequate assessment – thus not identifying a needed accommodation – or an inadvertent failure to effectively communicate or accommodate.

Among the hearing officers assigned to probable cause hearings and revocation hearings, three are consistently observed conducting very good assessments.<sup>67</sup> A minority continues to speed through the ADA assessment, some imply or expressly refer to the process pejoratively as silly, or suggest to the parolee that the attorney will see to their due process and accommodation needs. Too often with some, the ADA interview consists of “Can you hear me, see me, and understand what I am saying to you?” When the parolee answers “yes,” that concludes the ADA/effective communication interview. Despite training to the contrary, this practice continues.

In addition, the Mastership routinely observed hearing officers move on as soon as they received a “yes” or “no” answer, even when there were indications that the response may not have been truthful or complete and that this may affect the hearing. There are vestiges of the habit of asking questions that suggest that an affirmative answer is desired – that is, that the parolee is able to manage without accommodation -- that may chill an informative response. This is particularly troubling where a parolee has serious or multiple conditions likely to impact on his participation, as was observed in this Round.<sup>68</sup> For the ADA interview to be meaningful, the interviewer must ask open-ended questions, use common language and non-technical terms, follow up clues that there may be a need

not being disclosed, and invite an interactive conversation that makes evident the parolee's ability or disability rather than relying on him to describe his needs.<sup>69</sup>

Potential failures of this process might be illustrated by two parolees Plaintiffs noted with a documented primary language other than English and cognitive impairment or low education; in these cases, Plaintiffs could not determine from hearing documents whether the need for an interpreter had been assessed.<sup>70</sup>

The other aspect of identification is recording known conditions, needs, and accommodations, and consulting those resources during the revocation process. For a year and a half, Defendants have employed a summary sheet on point, which remains in parolee files and is included in revocation packets. This appears to be an effective mechanism. When an agent plans to serve a parolee notice of his rights and charges, she initiates another form carrying forward that known information; she includes her own assessment of the parolee's understanding of that meeting, and the parolee indicates whether he requests assistance. Here, Plaintiffs' monitoring revealed a high percentage of lapses: forms that were internally inconsistent, inconsistent between sources, did not carry forward known information, or were otherwise incomplete.<sup>71</sup> Reading level has presented consistent problems, including recording incorrect information and apparently accepting parolees' self-reports without records verification. All of this information is maintained in a database, so addressing these issues will improve future revocation proceedings for these parolees as well as the immediate one to which the form applies.

In terms of accommodation, the Board designates a staff member to review all cases for needed accommodation, to arrange accommodations, and to record and track this information. Magnifiers are available and readily offered at notice service and at

hearing to parolees whose vision impairment affects reading; similarly, hearing amplifiers are available. For those who have difficulty understanding and communicating in English, Parole staff and attorneys are expected to use phone translation services at most steps; Board staff is tasked with arranging language interpreters for revocation hearings, as well as any needed sign language interpreters.<sup>72</sup> Although it was recently determined that hearing staff did not know to check the database for the coordinator's indication of accommodations to be provided,<sup>73</sup> it does appear that this information is generally discerned from the file.

Neither party nor the Special Master has conducted a systematic review in quite some time.<sup>74</sup> Five possible failures to provide an identified or requested accommodation have come to the Special Master's attention during the Round. These involved the possible need for translation, possible need for accommodation for hearing impairment, and the adequacy of accommodation provided for a mobility impairment and learning disability.<sup>75</sup> Defendants indicate that no grievances have reported a failure of accommodation, and those forms have been made available routinely for nearly one year, a promising sign.

These indications suggest that, on the whole, accommodations are commonly provided. The Special Master has less confidence in three remaining aspects, all involving parolees with cognitive limitations, such as learning disabilities, processing disorders, communication disorders, and those whose thinking is hindered substantially by medication or mental health condition. The first is a question of whether the need for increased help to understand is being identified for these young men and women, as described above. Secondly, where it is recognized, the Special Master has seen little

difference in how the hearing is conducted, which suggests a failure of accommodation. Third, parolee files reflect that certain deficits require specific types of accommodations beyond speaking slowly and using simple language; the Special Master has never seen alternate methods in use and Defendants' tracking does not reflect whether the specific type of accommodation was provided, so it remains an open question whether these needs are being met. In each of these areas, Defendants must take further measures to provide what is needed and demonstrate they have done so.

The Mastership recommends that continued practical training of hearing officers and parole agents regarding ADA and effective communication assessments, accommodations, and documentation remain a priority in the coming Round.

Forms in alternative formats (§ 55): Previously, Defendants made available in Spanish and large print those forms given to parolees during service of the notice of rights and charges, and the parties agreed that, rather than providing forms in audio format, Defendants will read the forms aloud when needed. Defendants previously ensured that there was equipment available at each of their facilities for parolees needing to listen to materials on recordings; the status of providing this support to parolees housed in jails is unknown, and Plaintiffs assert that it is necessary.<sup>76</sup> No new information came to the Special Master's attention during the Round.

Prohibition of discrimination in parole placements and referrals to services (§ 27):

The parties have long disagreed concerning documentation that may be necessary to demonstrate compliance with this provision. As part of the mediation related to alternatives to incarceration, described *supra*, the parties recently made decisions about

many, but not all, of the items proposed to demonstrate compliance. The Mastership is following up with support in resolving the outstanding issues. The Defendants report that there have never been complaints of discrimination and none came to the Special Master's attention during the Round. They also agree that they will produce any and all discrimination complaints filed.

Develop an ADA grievance procedure (§ 54): Defendants have put in place an ADA grievance procedure and routinely distribute the form when parole agents serve the notice of rights and charges.<sup>77</sup> The Special Master has also observed Defendants' staff making parolees aware of the ADA grievance procedure during some hearings. Defendants report receiving no grievances raising a failure of accommodation throughout *LH* implementation.<sup>78</sup>

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

Defendants have developed an appeal process with the components required in the Stipulated Injunction, much of which is operating well. Hearing officers generally inform parolees of their right to appeal, including the assistance of counsel and timeframes; however, comprehensive advisement of rights with respect to appeal, hearing process, and fairness is missed in enough hearings that this practice needs more attention.<sup>79</sup>

The system employs one level of appeal that requires parolees, or their attorneys, to file with the Juvenile Parole Board Executive Officer within 20 business days of receiving the Board Order. By policy, the Executive Officer does have the ability to grant release, discharge or continuation on parole, consistent with the Stipulated Injunction.

Defendants document nine appeals handled during the Round.<sup>80</sup> From that, one appeal was granted, ultimately resulting in dismissal of the charges and the case against the parolee. In all other matters, rehearing was denied.

The Mastership shares Plaintiffs' concern that the record on appeal does not always provide sufficient information regarding the basis for review and the decisions made. This is important for Defendants and outsiders monitoring due process practice and analyzing legal reasoning as applied to the facts. Even with this shrinking population, the importance of legally sound decisionmaking cannot be minimized when a serious charge is being considered against a juvenile.

In terms of timeliness, Defendants' and CalPAP data show that, in all cases, the Board issued a decision within 10 business days of receipt, as required, and CalPAP received notice of decisions within the required five business days, with one exception that was one day late. It is unknown whether decisions also reached parolees in this time.

There is an additional mechanism termed decision review, in which Defendants review each Board Order for mistakes of fact, law, or policy. Parolees and the Parole division can also request that a decision be reviewed using these criteria. Plaintiffs continue to object to this system. The parties negotiated some of the standards and timeframes and memorialized those in policy during the last Round, and have agreed to defer work on the dispute while these new practices are put into place.

During this Round, only two rehearings were ordered pursuant to decision review.<sup>81</sup> The reasons were of concern to the Mastership. On the other hand, several issues from prior Rounds have been improved. The reasons for reversal were consistently stated in Board Orders and CalPAP was notified quickly. Defendants worked within the

deadlines set by policy, so rehearings were timely.<sup>82</sup> Defendants addressed the appearance of conflict of interest with hearing officers conducting decision review and rehearings.<sup>83</sup> As to outcomes, in one case, the parolee likely benefited; in the other, the outcome remained the same and the legal basis expressed was more accurate. Neither decision review extended a parolee's time in custody. Fairness to the parolee was apparent throughout. The frequency of rehearings was substantially reduced from previous Rounds.<sup>84</sup>

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

Defendants have offered training, periodically through implementation, to all types of staff at the Board, parole agents and supervisors, and facilities staff. During this Round, both Parole division and the Board provided annual training on a variety of *LH*-related topics.

Parole agent training covered many aspects of *LH* requirements in just over a day's time.<sup>85</sup> The greatest amount of time was allocated for ADA and effective communication, and the training appropriately emphasized the content for adequate notice in charge reports, clarity and accuracy of violation reports to satisfy due process, effective bases for recommendations about incarceration or alternatives, revocation extension, and continuously assessing whether alternatives to incarceration would be more effective than a return to custody.<sup>86</sup> Absent from this training were discussions of the parole agent's role at revocation hearings and the impact of supplemental charges on due process; these would be beneficial for agents, as well.

The Board also held its annual training during this Round, spanning a day and a half of *LH* content. One session was especially well designed to cover many due process

aspects in a creative, effective learning format. Substantial sections were devoted to ADA and effective communication review and documentation, rationale of applicable constitutional law, and the confrontation rights balancing test.<sup>87</sup> In a February Board meeting, Defendants also integrated training for Board staff concerning confrontation rights, disability documentation, and other aspects of hearing practice.<sup>88</sup>

**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. Despite the system being built on inflexible programming initiated more than 10 years ago, Defendants have made great strides, particularly in this Round, in improving the data reporting capability, removing obstacles that made some information appear inaccurate, and employing alternate methods to demonstrate certain information not reflected in reports.

Defendants, and the information systems professionals they contract with, have worked diligently to create and improve data reports so that they capture the specialized populations who are extradited, postpone hearings, invoke optional waivers, or participate in proceedings while remaining in the community. Those reports now indicate the time to hearings for those populations. After examining, testing, and cross-referencing, it appears to the Special Master that most steps' timeliness data is reflected consistently across reports, and missing cases, calculation errors, and duplication are reduced in "closed case" reports.<sup>89</sup> Glitches do continue to surface occasionally, and thus require continued attention, but they do not rise to the level of compromising aggregate data and conclusions drawn therefrom. Defendants also continued to conduct periodic

studies of the timeliness of revocation steps for open cases and results were consistent with closed cases.

This is an important improvement in Defendants' ability to demonstrate compliance. Defendants and their contractors have been highly responsive as data report errors and needs have been identified, and their swiftness and effectiveness has been impressive.

### **Monitoring process**

In previous Rounds, the parties reached agreement concerning a detailed monthly production of documents and recordings by which Plaintiffs may review critical aspects of the policy implementation. Defendants have provided those materials monthly. Plaintiffs have raised concerns about the accuracy and utility of some documents. Defendants have asked to reduce production in certain areas based on population decline and substantial compliance. The Mastership recently convened the parties to mediate document production disputed issues. Each side acted in good faith in structuring document production for the current year.

The parties have agreed to a number of onsite visits by Plaintiffs' counsel. Continuing from the last Round, Plaintiffs were able to observe notices of rights and charges and hearing practice, as well as interviewing staff, attorneys, and parolees. The parties have successfully renegotiated the monitoring agreements for 2011.

The Stipulated Injunction requires Defendants to develop self-monitoring to ensure compliance with its terms and with relevant policies and procedures (§ 57). The Office of Audits and Compliance, an office external to the Division of Juvenile Justice but within CDCR, has been designated to conduct monitoring.<sup>90</sup> It carried out two reviews in early

2010, but has suspended that activity for nearly a year owing to waves of State budget restrictions and the need to restructure its audit tools to conform to the standards and criteria negotiated by the parties in the last half of 2010.

To date, the parties have worked cooperatively on designing the audit tools. In previous rounds of review, both the Special Master and Plaintiffs held significant reservations about some of the methodology; a revised set of tools is presently pending review. Plaintiffs express their ongoing reservations about the methodologies in the audit tools, and call for further development of methods to evaluate the aspects of the revocation process not easily subject to quantification.

In addition to formal audits, Defendants have a number of oversight mechanisms integrated into operations. From the outset, Defendants have maintained a multidisciplinary team that meets at regular intervals. It can share information and troubleshoot. Its principal operation, at this point, is to examine late cases at every revocation process step; investigate the reasons; and implement and check on corrective action.

Some opportunities are apparent for improving this process. Presumably because the source material does not capture case initiation, two egregiously late revocation extension cases apparently were not examined. Additionally, each division reviews, investigates, and reports on the revocation steps for which it is responsible. That is sensible in terms of maintaining a sense of ownership. The risk is that it is possible to overlook the problems that occur with handoffs between the divisions, or when one division observes a deficient practice that occurred in another division. The process, which is well-designed to analyze and remedy problems, may not be used in these

instances, depending on whether and how this information is communicated. Some examples where this system fell short came to the Special Master's attention. It will be important for Defendants to apply this excellent review process in the situations described, in order for it to be fully effective.

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 makes it more likely that oversight will become and remain institutionalized.

**Revocation Extensions shall only be issued for serious in-custody misconduct or willful program failure and after a hearing timely conducted by a hearing officer with attorney representation and a copy of the decision and tape and appeal rights (§ 35, 40):**

DJJ is operating a revocation extension system, which handled 21 cases during the Round, consistent with the previous Round. Two cases came to the Special Master's attention that were greatly delayed in initiation – from four to six months after discovery of the conduct at issue. While this did not extend the parolees' time in custody, it is problematic both that it occurred and that Defendants' oversight systems do not seem to have addressed them independently. Once identified, Defendants have taken good measures to prevent recurrence.<sup>91</sup> Once initiated, there is a near-perfect record on timeliness for all functions; with only one case late 10 days at the notice of rights and being conveyed to the Board.<sup>92</sup>

Several cases occurred within the month before the parolee was set for release.

Defendants expedited these hearings so that all occurred by the deadline; indeed, all but one were concluded before the original release date.

The Special Master's team analyzed three revocation extension hearings via recording and document review. All three involved aggressive behavior while incarcerated. The conduct of the hearings and their due process protections were consistent with Defendants' other hearings. Attorneys confirmed that all parolees subject to revocation extension during this Round received copies of their written hearing records at the conclusion of the hearings.<sup>93</sup>

**Policies and procedures governing dual commitments** (§ 45): No new information came to the attention of the Special Master concerning the implementation of this policy, which has been in place since 2009.

**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 and that they have reinforced repeatedly with staff that this practice is no longer permitted, including in the most recent annual training for parole agents.<sup>94</sup> Plaintiffs have raised concerns that some cases give the appearance of circumventing the prohibition, including one observed during this Round.

### Summary

As discussed, significant challenges require attention in order to satisfy due process and this Court's orders. Among the highest priorities to address are:

- Assessing ADA and effective communication needs in notice service and hearings; adjusting communication with parolees who have cognitive limitations; and demonstrating that specific accommodations are provided when needed
- Completeness and accuracy of disability forms ("3.260s")
- Providing evidence with the revocation packet, or as soon after discovery as possible, and no later than two days before the hearing in which it will be introduced
- Determination during probable cause hearings of probable cause to continue to detain
- Increased clarity in following the law when determining whether hearsay can be used as evidence
- Practices that can impact impressions of fairness and neutrality
- Accuracy and completeness of hearing orders

It will also be necessary to strengthen internal oversight to be able to demonstrate the ability to assume full responsibility for the revocation system. Defendants should follow through on their plans for self-monitoring, increase the recognition of errors of law, and improve existing systems of review. At least some of the remaining disputed items are core due process issues, and should also be negotiated and implemented once resolved.

Defendants have maintained extraordinary timeliness rates at all revocation steps, and it is impressive that they continue to make improvements. Staff at all levels are respectful of parolees and of the need to protect their ability to understand and participate in revocation proceedings. Importantly, a majority of hearing officers have substantially improved the quality and clarity of probable cause findings. Should the Court adopt the

recommendations for findings of substantial compliance contained herein, Defendants will have achieved substantial compliance on 17 issues.

In the face of uncertainty and constant change, Defendants' work has been conscientious and effective. The Mastership encourages them to stay the course during these turbulent times as, together, the parties are making a significant difference in the lives of young parolees.

### **Recommendations**

The Defendants have demonstrated compliance with several requirements of the Stipulated Injunction. I therefore 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:

- Post notice of the material terms of the settlement (§ 11)
- Parolees may elect to take waivers and continuances (§31)
- Providing hearing recordings within 10 business days of written request and a new hearing if the recording is inaudible (§42)
- Representation in revocation extension proceedings (§35)

Pursuant to the Order of Reference to the Special Master, the Special Master's reports shall be final unless, no later than twenty (20) days after service of the final report, a party files written objections with the Court. If any party files objections, the opposing party shall have twenty (20) days to file a reply to the objections with the Court. If objections are filed, the Court will consider the matter and issue an order adopting the

report in full or as modified, or rejecting the report.

Respectfully submitted,

/s/Virginia L. Morrison  
Virginia L. Morrison  
Special Master

June 21, 2011

---

<sup>1</sup> Attempts to observe notice service on eight other occasions were unsuccessful.

<sup>2</sup> Assembly Bill No. 1628, enrolled Oct. 11, 2010

<sup>3</sup> If revoked, there are currently differing interpretations of whether, upon the subsequent release, they would be under the jurisdiction of the state or counties.

<sup>4</sup> This case surfaced in the course of the Special Master's reviews of other subjects. It is unknown whether this is the only such case, or whether there are others. Such a study would be highly advisable.

<sup>5</sup> For the Return to Custody Assessment and probable cause hearing steps, there was one case that was late because of a delay at an earlier step; this case was timely handled once it arrived at these steps. One might view such cases as late (hold to step completion) or timely (time to complete this step), so this range reflects the range of timeliness depending on one's conclusion. Whether the case is included or excluded from timely cases at the probable cause hearing step, the timeliness percentage does not change.

<sup>6</sup> The Stipulated Injunction also requires posting in the Office of the Ombudsman, but the parties ultimately agreed that this was unnecessary as parolees cannot access that office.

Plaintiffs raise the question of whether there are posters in living units at county jails where, of course, parolees are housed. It is unclear whether this is required under the Stipulated Injunction, and whether the terms are, in fact, posted.

<sup>7</sup> Parolee Rights Handbook section re: parole violation process.pdf; memorandum regarding Parolee Rights Handbook Distribution dated Feb. 25, 2011

<sup>8</sup> Closed Case Summary – Postponement Oct. 1, 2010 through Apr. 29, 2011

<sup>9</sup> Document Production Itemizations, Oct. 2010 through Mar. 2011

<sup>10</sup> See third through fifth reports of the Special Master, citing monthly document production itemizations; LH Document Production for each of Oct. 2010 through Mar. 2011. For the inaudible recording discussions, see fourth and fifth reports of the Special Master.

<sup>11</sup> DJJ Rev. Extension Cases Closed for each month spanning May 2009 through Mar. 2010

<sup>12</sup> CalPAP DJJ Statistics 50 Mile Report for each of October 2010 through March 2011; DJJ Date Case Assigned Compliance Report for each of October 2010 through March 2011; DJJ NIC Cases Closed for each of October 2010 through March 2011; informal communications with CalPAP; Special Master observations

<sup>13</sup> This is distinguished from the separate requirement for counsel of choice, which remains subject to full Court oversight

<sup>14</sup> Other Objections for each of Oct. 2010 through Mar. 2011. All such objections were granted except for one, which was denied once it was determined that the evidence was provided to CalPAP two days before the hearing.

In their comments to the draft Special Master's report, Plaintiffs raise an additional case that came to light after the writing of the Special Master's draft report, and they allege that the ruling and appeal decision were prejudicial to the parolee. The Special Master disagrees with their analysis.

<sup>15</sup> Closed Case Summary, run monthly for each of Oct. 2010 through Apr. 2011

<sup>16</sup> It may be that, in a subset of these cases, the hold is dropped in deference to prosecution by another entity; in those cases, the status may be "continue on parole" but the parolee remains in custody under the jurisdiction of another agency. It is not practical to discern the number of such cases.

Defendants explain that their data showing fewer cases at each revocation step is the illustration that holds have been dropped. There are no printouts directly showing which parolees were continued on parole and any applicable alternative placements. Plaintiffs strongly advocate that such data should be made

available to Plaintiffs, and the parties are engaged in mediation efforts on-point with the Deputy Special Master.

<sup>17</sup> LH Compliance Report, Apr. 29, 2011

<sup>18</sup> Correspondence from C. Chen to S. Huey, Sept. 3, 2010

<sup>19</sup> Closed Case Summary and Closed Case Detail Step PCD, Oct. 1, 2010 through Apr. 29, 2011. This report captures special populations subject to longer timelines, so it is possible that fewer than five cases were overdue.

<sup>20</sup> LH Compliance Report, Apr. 29, 2011; Special Master's observations

<sup>21</sup> Source for this analysis is a sample of 106 Charge Reports, drawn in equal measure from each of the seven parole units active during the Round, and dating after the division's training on point. This constitutes 37% of the notices in the Round. See electronic file titled Notice of Charges Sample of 7 Units.pdf, Closed Case Detail by Unit NOR for each of those units, Closed Case Detail by JPB Step NOR Dec. 1, 2010 through Apr. 30, 2011

<sup>22</sup> The following section is based on the Special Master's observations and informal communications with the parties

<sup>23</sup> See, e.g., Plaintiffs' report of monitoring Ventura Youth Correctional Facility in Mar. 2011

<sup>24</sup> Individual record and informal communications with Defendants indicate the Robert Presley Detention Center required this when the agent arrived for the second attempt at the jail. The agent reports that she took extra steps to check the parolee's understanding at regular intervals. Plaintiffs join the Special Master in objecting to this requirement. Defendants have arranged to discuss the issue with the Jail Commander.

<sup>25</sup> DJJ Notice of Rights Compliance Report for each of Oct. 2010 through Mar. 2011.

Defendants' records are consistent with this. Closed Case Summary, LH Timeliness shows two late cases; Closed Case Summary captures six late cases, but the additional four appear to have involved data entry errors and not in custody cases. See these two reports run for Oct. 1, 2010 through Apr. 29, 2011, Closed Case Detail Step NOR for these dates, and individual records in electronic file titled NORs.

Defendants' records incorrectly suggest that some notices were never served. On examination, the hold on each of these cases was dropped before service was due. NOR Timeliness Oct. 1, 2010 through Apr. 29, 2011 and related individual records

<sup>26</sup> NOR Unsuccessful, Will Retry, Oct. 1, 2010 through Apr. 29, 2011; individual records in electronic file titled NORs

<sup>27</sup> See, e.g., spreadsheets titled open case summary 2-11-2011.xls and open case summary 5 2 2011.xls

<sup>28</sup> See contents of electronic folder titled Plaintiffs' monitoring

<sup>29</sup> Defendants contend that the Stipulated Injunction expressly excluded this step as a requirement by the language "The flowchart does not create any rights beyond those expressly set forth in ¶¶ 1 to 57." It is Plaintiffs' position that the steps in the flowchart are part of the Stipulated Injunction because it "incorporate[d] by reference" the flowchart and the flowchart is attached as an exhibit.

<sup>30</sup> Closed Case Detail by Unit, Step NOR, run for each of seven parole units; sample pulled 15 cases from each parole unit. See also, select individual cases from the sample stored in the electronic folder titled Violation Report.

<sup>31</sup> JSTS – Closed Case Monthly Report Oct. 2010 – Mar. 2011.xls; Closed Case Summary, Closed Case – LH Timeliness, and Closed Case Detail Step Violation Report from each of them, each dated Oct. 1, 2010 through Apr. 29, 2011. These documents, taken together, indicate that three cases were genuinely late. All others that appear late were timely not in custody cases.

<sup>32</sup> Document Production Itemization for each of Oct. 2010 through Mar. 2011

<sup>33</sup> Oct. 2010 – Mar. 2011 Drill Down (20110511).xls; Closed Case Summary, Closed Case – LH Timeliness, and Closed Case Detail Step RTCA, each dated Oct. 1, 2010 through Apr. 29, 2011. With one exception, the cases that appear late were timely not in custody cases, the same list as appears at the Unit Supervisor review stage.

<sup>34</sup> CalPAP Requested Expedited Hearings, Oct. 1, 2010 through Apr. 29, 2011; see prior reports of the Special Master

<sup>35</sup> See contents of electronic folder titled PCHs

<sup>36</sup> In addition, data reports concerning objections, dismissals and the like sometimes do not distinguish between the types of hearings involved.

<sup>3737</sup> One exception to this came to the Special Master's attention, and the lack of probable cause was not identified at any revocation step. Once noted, Defendants dismissed those charges.

<sup>38</sup> The Mastership reviewed an accidental sample of 43 orders, in addition to 8 associated with site visits, representing 19% of all cases proceeding to probable cause hearing. All cases met the Mastership's expectations overall, and only three charges were not sufficiently supported in the text of the order. See individual records in the electronic folder titled PCHs

<sup>39</sup> The Mastership reviewed an accidental sample of 18 probable cause hearings, 50% of those in custody at the time they opted to proceed to revocation hearing.

<sup>40</sup> Defendants have argued that such an assessment is good practice but not required. Plaintiffs assert that it is a critical component of due process.

<sup>41</sup> There were approximately 327 proceedings for which a written record would have been generated between Oct. 2010 through Mar. 2011. Closed Case Summary Oct. 1, 2010 through Mar. 31, 2011; Optional Waiver Timeliness and Closed Case Summary – Postponement, each run for Oct. 1, 2010 through Apr. 29, 2011, but April cases are not included in this total

<sup>42</sup> Missing Board Orders, run for each of Oct. 2010 through Mar. 2011

<sup>43</sup> Closed Case – *LH* Timeliness Rules, Oct. 1, 2010 through Apr 29, 2011 shows 261 cases. Although all appear timely, this includes 24 postponed cases that are automatically counted as timely regardless of when the rehearing occurs, so these are subtracted from the total (to 237). Closed Case Summary - Postponement and Open Case Summary – Time Waiver for those dates, and Open Case Summary - Postponement for Apr. 29, 2011, reveals 10 time waivers, all of which were rescheduled or pending within the time waived, and 14 postponements, all but 3 of which were rescheduled within one week, which the Mastership has been using as a rough measure of reasonableness. Closed Case Extradition shows 5 cases, 4 of which were timely. Thus, of 266 cases, 262 were timely or rescheduled in a reasonable time, which constitutes 98%.

This does not include any open extradition cases, because no report currently captures them. With fewer than one extradition per month, this should not affect the conclusion.

<sup>44</sup> DJJ Probable Cause Hearing Compliance Report for each of Oct. 2010 through Mar. 2011; spreadsheets titled open case summary 2-11-2011.xls and open case summary 5 2 2011.xls

<sup>45</sup> The parties maintain a dispute about whether and when this is good cause for a hearing exceeding the Stipulated Injunction's timeframes.

<sup>46</sup> Optional Waiver Activated Cases for each of Oct. 2010 through Mar. 2011. Defendants' reports show far fewer cases based on different search criteria. Timeliness calculations, however, are consistent across sources.

<sup>47</sup> Printouts show 19 cases with a completed or pending optional waiver review. Defendants' policy does not specify a timeframe for this proceeding. Most were closed in less than 2 weeks, all within 19 days, and one was pending at 11 days. Optional Waiver Timeliness, Oct. 1, 2010 through Apr. 29, 2011, confirmed by Optional Waiver Open Cases run Apr. 29, 2011. The latter report appears to show a second case open and overdue, but the Special Master determined that this is a data entry issue.

<sup>48</sup> All time waivers were concluded within the time waived. Time waiver and postponement information found at Closed Case Summary – Postponement Oct. 1, 2010 through Apr. 29, 2011, Open Case Summary – Postponement Apr. 29, 2011, and individual cases stored in the electronic folder titled Optional Waivers

<sup>49</sup> Reviews have not been comprehensive, but have identified 14 county jails and all CDCR adult institutions as requiring universal restraints.

<sup>50</sup> This occurred in five hearings; another objection was determined to be incorrect and was denied. Other Objections for each of Oct. 2010 through Mar. 2011

<sup>51</sup> Hearing Decision Dismiss Oct. 1, 2010 through Apr. 29, 2011

<sup>52</sup> Recordings from monthly document productions; Granted *Comito* Objections, each of Jan. and Feb. 2011; Denied *Comito* Objections Jan. 2011; and related individual records in electronic folder titled *Comito*. CalPAP reports that there were no confrontation rights objections made in Dec. 2010 and Mar. 2011, and none granted in Feb. 2011, so this is the full set of reported objections from December forward.

<sup>53</sup> In two cases, hearing officers recorded objections on other grounds and did not record the confrontation rights balancing test. *If* the attorneys did, in fact, make confrontation rights objections, this is problematic. The bases for these two objections are not entirely clear, so the Special Master cannot make a determination about these two cases. However, in general, Defendants must be vigilant to ensure that

hearing officers recognize the objection being made, record all objections, and do not avoid a difficult analysis by substituting a different objection; all of these practices have been observed in the past.

<sup>54</sup> This occurred once during the Round and occasionally over time. Termed a “public safety holdover,” Defendants acknowledge that this is not good cause to delay hearings.

<sup>55</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>56</sup> Occasional glitches remain where a case is mis-identified or the date calculation is incorrect. After cross-referencing reports within Defendants’ database and with that of CalPAP, and examining dozens of records; the Mastership is confident that these glitches are few.

<sup>57</sup> CalPAP’s and Defendants’ records agree on one late case. It was completed quickly, within an additional three days. Another appears late in Defendants’ database but CalPAP indicates that the parolee asked for a time waiver, and the hearing occurred timely within it.

The second late case is a postponement that will be discussed below. DJJ Revocation Hearing Cases Over 35 Days for each of Oct. 2010 through Mar. 2011, Closed Case Detail-Hearing Events Step RevH Oct. 1 through Apr. 29, 2011, related individual hearing records, informal communications with CalPAP.

<sup>58</sup> See, e.g., spreadsheets titled open case summary 2-11-2011.xls and open case summary 5 2 2011.xls

<sup>59</sup> In fact, not in custody cases tended to be held well ahead of the deadlines. During this Round, nearly all who proceeded to a revocation hearing had been in custody and then released to await hearing. Policy essentially allows 70 days for not in custody hearings (up to 10 days from discovery to service of notice, and 60 additional days to hearing). These cases were completed between 27 and 58 days from hold or discovery, evenly distributed across that range. Closed Case Detail NIC Cases Step RevH, Oct. 1, 2010 through Mar. 31, 2011, and related individual records in electronic folder titled NIC; DJJ NIC Cases Closed for each of Oct. 2010 through Mar. 2011; NIC Timeliness Oct. 1, 2010 through Mar. 31, 2011

DJJ Optional Waiver Activated Cases for each of Oct. 2010 through Mar. 2011; Optional Waiver Timeliness, Oct. 1, 2010 through Apr. 29, 2011. Blanks in the latter report indicate optional waivers taken but not yet activated. The optional waiver timeline is one 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>60</sup> Closed Case Summary – Extradition

<sup>61</sup> After a manual check, the Special Master determined that only two cases postponed at probable cause hearing or optional waiver went on to a revocation hearing. In both cases, Defendants were successful in holding the revocation hearing within the Stipulated Injunction’s original deadline.

<sup>62</sup> Closed Case Summary – Postponement and Open Case Summary – Postponement, Oct. 1, 2010 through Apr. 29, 2011 and related individual records. The report gives the incorrect impression that the decision review case was postponed twice; the first entry is time from the overturned hearing to the decision review itself. The time from order to rehearing was 11 days.

<sup>63</sup> Closed Case Summary – Supplemental Charge Cases, Oct. 1, 2010 through Apr. 29, 2011; informal communication with Defendants confirmed this report

<sup>64</sup> Closed Case Summary, Closed Case Detail Step PCH, and Closed Case Summary – Postponement, each run for Oct. 1, 2010 through Apr. 29, 2011, and individual related files. Each entry exceeding 25 business days on Closed Case Detail was verified as having taken a timeliness waiver.

<sup>65</sup> These agreements are captured in Joint Stipulation Regarding Modifications to Division of Juvenile Justice Parole Revocation Policies and Procedures, Sept. 10, 2009. 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>66</sup> Closed Case Summary and Closed Case Detail Step RevH, each for Oct. 1, 2010 through Apr. 29, 2011

<sup>67</sup> Plaintiffs’ monitoring reports; Special Master’s observations

<sup>68</sup> See, e.g., Plaintiffs’ Mar. 23, 2011 letter analyzing February document production; related individual record

<sup>69</sup> For example, if a juvenile answers that he no longer takes medications for mental illness, asking him how he is different today from when he took them could develop needed information about whether effective communication can be accomplished. In terms of accessible language, making a small shift to asking about prescribed medicine would likely prove more interactive and productive than asking about “psychotropic medication,” a medical term.

<sup>70</sup> See Plaintiffs' monitoring report of Ventura Youth Correctional Facility and Plaintiffs' analysis of the document production provided in Mar. 2011

<sup>71</sup> See contents of electronic folder titled Plaintiffs' monitoring

<sup>72</sup> Reportedly, the need has not yet arisen for sign language interpreters.

<sup>73</sup> See Plaintiffs' Mar. 21, 2011 letter summarizing monitoring at Santa Rita County Jail and Oakland Parole Unit

<sup>74</sup> Defendants audited ADA and effective communication issues in 2009

<sup>75</sup> A parolee requested a wheelchair and Defendants reportedly ordered it the day before the hearing, but the county jail provided a cane, indicating that a wheelchair was not available. The attorney objected but said that the parolee was able to proceed with this substitute accommodation. In another proceeding, different observers held different opinions about the adequacy of accommodation for a hearing-impaired parolee. Other Objections Nov. 2010; individual hearing records

Plaintiffs' monitoring identified two cases in which it was unclear whether the need for translation had been assessed, and an additional concern that a staff assistant was needed in addition to an attorney for a learning disabled parolee. Plaintiffs' report on monitoring Ventura Youth Correctional Facility and Plaintiffs' analysis of the monthly document production provided in Mar. 2011

<sup>76</sup> Informal communications with Defendants Mar. and Nov. 2010

<sup>77</sup> Special Master's observations

<sup>78</sup> LH Compliance Report dated Apr. 29, 2011 and document productions; the one ADA grievance form submitted during this Round concerned a different topic. There was, however, an objection made on this basis during one revocation hearing. Plaintiffs' Jan. 12, 2011 letter analyzing the December 2010 document production, related individual record

<sup>79</sup> One parolee also reported to Plaintiffs his impression that staff had told him he waived his right to appeal by accepting an offer. Plaintiffs' monitoring letter concerning Ventura Youth Correctional Facility

<sup>80</sup> Appeals documents within monthly document productions Oct. 2010 through Mar. 2011

<sup>81</sup> CalPAP DJJ Decision Review Cases, for each of Oct. 2010 through Mar. 2011

<sup>82</sup> One involving a probable cause hearing was reheard in five days, within the five business days allowed by policy. An optional waiver is in place, so the timing of a final hearing is not affected.

The second case involved a revocation hearing. The rehearing occurred 11 days after the decision review order, within the 10 business days allowed by policy. The total time to a final hearing, then, was 53 days.

<sup>83</sup> In one case, the same hearing officer conducted both the decision review and the rehearing, but this preceded discussions with the Special Master identifying this concern. In the one rehearing after said discussion, a different hearing officer was assigned.

<sup>84</sup> See contents of electronic folder titled Decision Review

<sup>85</sup> DJPO Annual Review Refresher Training Agenda

<sup>86</sup> Observations of Mastership

<sup>87</sup> December 2010 JPB Annual Training Agenda; electronic files titled LH Jeopardy Pwrpt.ppt and Effective ADA Interview Techniques PPT 2007 Version (12-2-10.ppt; Special Master's observations

<sup>88</sup> February 28, 2011 Board Meeting Agenda

<sup>89</sup> Occasional flaws remain, but their frequency is reduced to a level that can be managed through manual recalculation.

<sup>90</sup> Plaintiffs have expressed doubt that an office within CDCR can be sufficiently independent to produce results that can be relied upon. The Mastership's contacts with this office to date raise no concerns about its objectivity.

<sup>91</sup> DJJ Rev Extension Cases Closed for Mar. 2011; individual cases in electronic folder titled Rev Ext; informal communications with Defendants

<sup>92</sup> Closed Case Summary - Revocation Extension, Oct. 1, 2010 through Mar. 31, 2011; DJJ Rev. Extension Cases Closed for each of Oct. 2010 through Mar. 2011. Another notice of rights appears as late on the Defendants' report, but this is a data entry issue. A revocation hearing appears late, but it involves a parolee time waiver and a parolee request for postponement.

<sup>93</sup> Informal communications with CalPAP

<sup>94</sup> Observations of Mastership