



MEMO

DATE: September 14, 2021

TO: All Board Members
Kathleen T. Howard, Executive Director
Allison Ganter, Deputy Director

FROM: Aaron R. Maguire, General Counsel

SUBJECT: QUESTIONS REGARDING SEPTEMBER 16, 2021 SUITABILITY DETERMINATION

Preface

On September 16, 2021, the Board will consider whether the juvenile halls (Barry J. Nidorf & Central Juvenile Hall) in the County of Los Angeles are “suitable” for the confinement of minors within the meaning of Welfare and Institutions Code section 209, subdivision (d). The Board has not conducted one of these proceedings since the Board was reconstituted as the Board of State and Community Corrections (BSCC) in 2012. As such, this memo is intended to provide additional guidance to board members prior to the board meeting. Because multiple questions have been raised, this document is presented mostly in the format of an FAQ rather than a detailed legal analysis.

Factual and Legal Background¹

The BSCC establishes the minimum standards for juvenile halls and camps and conducts biennial inspections of those facilities. (Welf. & Inst. Code, §§ 209, 210, & 885.) Regulations setting forth these minimum standards can be found in Sections 1300-1511 of Title 15 of the California Code of Regulations.

Welfare and Institutions Code section 209, subdivision (d), provides:

Except as provided in subdivision (e), a juvenile hall, special purpose juvenile hall, law enforcement facility, or jail shall be unsuitable for the confinement of minors if it is not in compliance with one or more of the minimum standards for

¹ This information is duplicative of the Determination of Suitability Board report posted for the September 16, 2021 agenda that can be found [here](#).

juvenile facilities adopted by the Board of State and Community Corrections under Section 210 or 210.2, and if, within 60 days of having received notice of noncompliance from the board or the judge of the juvenile court, the juvenile hall, special purpose juvenile hall, law enforcement facility, or jail has failed to file an approved corrective action plan with the Board of State and Community Corrections to correct the condition or conditions of noncompliance of which it has been notified. The corrective action plan shall outline how the juvenile hall, special purpose juvenile hall, law enforcement facility, or jail plans to correct the issue of noncompliance and give a reasonable timeframe, not to exceed 90 days, for resolution, that the board shall either approve or deny. In the event the juvenile hall, special purpose juvenile hall, law enforcement facility, or jail fails to meet its commitment to resolve noncompliance issues outlined in its corrective action plan, the board shall make a determination of suitability at its next scheduled meeting.

Summary of 2018-2020 Biennial Inspection

On February 11, 2021, following the inspection of Los Angeles County's juvenile facilities, the BSCC notified Los Angeles County's probation department (referred to as "the agency" throughout this memo) of several items of noncompliance with the Board's regulations. A copy of the inspection report can be found here:

https://drive.google.com/drive/folders/1Vqe3goCNKm461_osebBmHFnsb055Do4M

Pursuant to Welfare and Institutions Code section 209, the agency was required to submit a corrective action plan (CAP) to the BSCC within 60 days or by April 12, 2021.

On April 12, 2021, the BSCC received the agency's corrective action plan. This corrective action plan required the agency to outline how they intended to correct the issues of noncompliance and to come into compliance within a reasonable timeframe, not to exceed 90 days or by July 11, 2021. (Welf. & Inst. Code, § 209, subd. (d).) As of July 12, 2021, and following a series of site visits to the facilities to review progress on the corrective action plan, the agency remained out of compliance with the regulations indicated below. On August 19, 2021, the BSCC notified the County of Los Angeles that the Board would make a determination of suitability at its next scheduled board meeting as required by Welfare and Institutions Code section 209, subdivision (d). (Notice.) As of the date of the notification, the county's juvenile halls remained out of compliance with the following Title 15 regulations:

Barry J. Nidorf Juvenile Hall

- § 1313, County Inspection and Evaluation of Building and Grounds
- § 1352, Classification
- § 1353, Orientation
- § 1354.5, Room Confinement
- § 1355, Institutional Assessment and Plan
- § 1358.5, Use of Restraint Devices for Movement and Transportation within the Facility
- § 1371, Programs, Recreation, and Exercise

Central Juvenile Hall

- § 1313, County Inspection and Evaluation of Building and Grounds
- § 1321, Staffing
- § 1352, Classification
- § 1354.5, Room Confinement
- § 1355, Institutional Assessment and Plan
- § 1358.5, Use of Restraint Devices for Movement and Transportation within the Facility
- § 1371, Programs, Recreation, and Exercise

In addition, staff was unable to make a final determination of compliance for section 1358, Use of Restraints, at the Barry J. Nidorf facility at the time of the notification. The agency has since updated its policy and trained staff to comply with this regulation.

On September 2, 2021, the BSCC received a letter from Los Angeles County Chief Probation Officer Adolfo Gonzales, responding to the Board’s notice of suitability determination. ([Response Letter.](#))

On September 13, 2021, BSCC staff conducted a further inspection of Barry J. Nidorf and Central Juvenile Hall to determine the status of the above-referenced regulations. A supplemental report will be posted online prior to the September 16, 2021 Board meeting.

Questions Regarding the Suitability Determination

1. What is a “suitability determination” and why is the Board making one at the September 16, 2021 board meeting?

Welfare and Institutions Code section 209 requires the Board to make a determination of suitability whenever a county juvenile hall is determined not to be in compliance with one or more of the Board’s regulations and fails to remedy items on noncompliance after a specified period of time and after being notified. When this happens, the Board is required to make a determination of suitability at its “next scheduled meeting,” which is September 16, 2021. (Welf. & Inst. Code, § 209, subd. (d).)

2. When is a facility considered “unsuitable” for the confinement of minors?

A facility is considered “unsuitable for the confinement of minors if it is not in compliance with **one or more** of the minimum standards for juvenile facilities adopted by the Board of State and Community Corrections....” (Welf. & Inst. Code, § 209, subd. (d) [emphasis added].)

3. What happens if the Board finds a facility unsuitable?

If the Board finds a facility is “not being operated and maintained as a suitable place for the confinement of minors,” the Board “shall give notice of its finding to all persons having authority to confine minors pursuant to this chapter and commencing 60 days thereafter the facility shall not be used for confinement of minors until the time the... board... finds, after reinspection of the facility that the conditions that rendered the facility unsuitable have been remedied, and the facility is a suitable place for confinement of minors.” (Welf. & Inst. Code, § 209, subd. (a)(4).)

4. How will the Board conduct the proceeding to make a determination of suitability?

The Board has not adopted formal guidelines or regulations on how to conduct a suitability proceeding. (The Board could adopt guidelines or regulations for future suitability determinations at a properly noticed board meeting.) The suitability determination is not a formal adjudicatory hearing; the proceeding is not required to follow the Administrative Procedure Act and no administrative law judge will be presiding. This item will proceed as a standard board agenda item. However, because there are significant county interests at stake, i.e., the potential closure of a juvenile facility and displacement of staff and youth, BSCC staff has provided procedural due process protections for the county: written notice and an opportunity to appear and respond to the notice. In addition, if the Board determines the facility is not suitable, the Board will provide a written decision setting forth the factual findings of the Board and its reasons for its decision.

5. Will the Board take public comment for this agenda item?

Yes. Because this is not an administrative adjudication within the meaning of Chapter 5 (commencing with section 11500) of the Administrative Procedure Act, public comment is required pursuant to the Bagley-Keene Open Meeting Act. (Gov. Code, § 11125.7.)

6. How should the Board consider the staff presentation and what may the county present for the Board's consideration in response to the initial staff presentation?

The Board staff has the burden of proof to demonstrate that the facility is out of compliance with the Board's regulations. Following the staff presentation, the Board members may ask questions. The county will then be given the opportunity to present any information to address items of noncompliance. The Board should review the existence or nonexistence of any fact using a "preponderance of the evidence" standard, which is the default standard for court proceedings unless otherwise specified by law. (See Evid. Code, § 115.)² In other words, based on the information presented, the Board should determine whether it is more likely than not that the county facilities are out of compliance with the Board's regulations.

7. Given the definition of "unsuitable" in Welfare and Institutions Code section 209, subdivision (d), must each instance of noncompliance (for each facility and each standard) be resolved in order for the county to avoid a determination of unsuitability?

Yes. Given the structure of Welfare and Institutions Code section 209 and the county's failure to remedy each item of noncompliance, the Board should consider each item of noncompliance individually when determining whether the county facilities are suitable.

8. If the county remains out of compliance with the Board's regulations, but commits to fixing any remaining items of noncompliance at the board meeting, can the Board find the county facilities suitable?

No. Having failed to correct items of noncompliance after 90 days, if the county facilities remain out-of-compliance with one or more of the Board's regulations, the Board should not find the county facilities suitable. The Board should either make the finding(s) of noncompliance (and unsuitability) or defer making a final determination of compliance to a future board meeting.

² Note: the California Evidence Code does not apply to this proceeding. (Evid. Code, § 300.) However, the Board should be mindful of evidentiary standards when considering what evidence to consider and how to weigh that evidence to ensure the fairness of the proceedings.

9. Can the Board defer making a final determination of suitability to a future board meeting?

Possibly. The statutory language of Welfare and Institutions Code section 209, subdivision (d), states that the Board “shall make a determination of suitability at its next scheduled meeting.” As such, it can be argued that the Board must make the determination at the board meeting and cannot defer action. However, the statute does not address how that determination is to be made. In addition, there are no considerations of time constraints, participation of parties, witness availability, evidentiary concerns, or any other procedural matters that administrative bodies or courts have the authority to address. Administrative bodies, like the BSCC, have Broad discretion to manage their affairs and in the absence of a controlling rule, administrative agencies have an implied power to continue matters, including hearings. (2 Cal. Jur. 3d Administrative Law § 549 [citing *Shoults v. Alderson* (1921) 55 Cal. App. 527]; *Powers v. Bakersfield School Dist.* (1984) 157 Cal.App.3d 560, 571.) As such, it could be argued that the Board has inherent authority to continue the proceedings and delay a final determination of compliance to a future board meeting. In addition, it should be noted that it is also possible that the Board will not be able to determine whether the county is in or out of compliance with certain regulations at the board meeting. For example, although Los Angeles County has updated its policies and procedures to comply with the Board’s Room Confinement (§ 1354.5) regulation, no incidents of room confinement have occurred at the facilities since the county was notified of the September 16, 2021 board meeting. In the absence of evidence that the county has implemented its policies and procedures correctly, the Board may want to defer making a final determination of compliance.

10. If the county claims that it has fixed all remaining issues of noncompliance at the Board meeting, but staff has not had the opportunity to verify compliance, what are the Board’s options?

The Board has several options:

- a. The Board could take the county’s assertions at face value and conclude that the county is, in fact, in compliance with the Board’s regulations.
- b. The Board could consider the county’s assertions but is not required to take them at face value. If the BSCC staff have met their burden of proof and the county’s assertions are insufficient to rebut the staff’s claims of noncompliance, the Board could make a finding that the county remains out of compliance.

- c. The Board could defer making any final determinations of suitability and request staff to conduct further inspections and continue the suitability determination to a future board meeting.

11. If the Board finds the county facilities “not suitable” how quickly will the Board staff notify the county of its findings? If the county comes into compliance within the 60-day notice period, does the Board have to reconvene to find the county suitable?

If the Board finds one or more of the facilities “not suitable” the Board will notify the county as quickly as reasonably possible. It is recommended that the Board delegate to staff the authority to provide the notice and written findings to the county without formal approval by the Board. It should be noted that the next calendared board meeting is November 18, 2021, which is 63 days following the September 16, 2021 board meeting. Once a county facility is found “not suitable,” the facility can only become “suitable” once the board “finds, after reinspection of the facility that the conditions that rendered the facility unsuitable have been remedied, and the facility is a suitable place for confinement of minors.” (Welf. & Inst. Code, § 209, subd. (a)(4).) While the reinspection presumably can be delegated to a BSCC field representative, the Board itself would likely have to make the “finding” of suitability at a 10-day noticed public meeting.

12. Will the Board have access to records and documentation that the Field Representative used to verify compliance with the Board’s regulations? For example, if the county adopted a new policy to address issues of noncompliance, will the Board be able to see the new policy?

Yes. Board staff can make available any documents in their possession that the Board wishes to review.

13. In the county’s response, the county indicates that it is working towards “substantial compliance.” What is that and does it apply to the Board’s regulations?

“Substantial compliance” is a term that can frequently be found in standards from other regulatory agencies. For example, the Community Care Licensing Division (CCLD) within the California Department of Social Services (DSS) oversees, monitors compliance, and enforces regulations over various community care facilities, including child residential programs and group homes. The CCLD identifies deficiencies, issues fines and civil penalties, and requires corrective action when a licensee fails or is unwilling to maintain substantial compliance with licensing laws and regulations. In the context of child care centers, “substantial compliance” means the absence of serious deficiencies. (Cal. Code Regs., tit. 22,

§ 101152 subd. (s)(5).) “Serious deficiency” means any deficiency that presents an immediate or substantial threat to the physical health, mental health or safety of the children in the child care center.” (Cal. Code Regs., tit. 22, § 101152 subd. (s)(3).)

When examining compliance with the Board’s regulations, BSCC staff do not evaluate whether a facility “substantially complies” with any individual regulation. (The term “substantial compliance” does not appear in the Board’s minimum standards for adult or juvenile facilities.) A facility must have policies and procedures that comport with the Board’s regulations and implement those policies and procedures in conformance with the Board’s regulations to be found in compliance. During an inspection, BSCC staff evaluate whether the facility is presently out of compliance or has ongoing, systemic, or reoccurring issues of noncompliance before a finding of noncompliance is issued. A single incident of noncompliance that occurs during a 2-year inspection cycle generally will not result in a finding of noncompliance. However, detection of a single incident of noncompliance will frequently result in additional inspection to ensure the incident is not a pattern or practice that results in noncompliance or potential future noncompliance.