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Via Overnight Delivery via UPS

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Acting Assistant Attorney General
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue
Washington, DC 20530

RE: US DOJ v. Erie County and Erie County Sheriff
Our File No.: 31-20070052

Dear Ms. King:

This correspondence represents the substantive response by the County of Erie, New York ("County") to the Department of Justice ("DOJ" or "Department") Civil Rights Division's ("Division") investigation ("Investigation") and "Findings Letter"[1] ("Letter") under the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997 *et seq.*, at the Erie County Holding Center and Erie County Correctional Facility (individually referred to as "ECHC" or "ECCF", and collectively referred to as "Facilities"). The law is clear that prisoners cannot expect, and the County is not required to provide, "the amenities, conveniences and services of a good hotel."[2] However, Erie County is committed to providing, does provide, and will continue to provide, constitutionally adequate conditions of confinement to prisoners incarcerated in the Facilities. It is the position of the County that the Division has improperly utilized fictional

[1] The County wishes to note at the outset its concern with the fact that the Division even suggests that the allegations in the Letter constitute legal "Findings." Black's Law Dictionary defines "finding of fact" as "[a] determination by a judge, jury or administrative agency of a fact supported by the evidence in the record, usu[ally] presented at the trial or hearing." BLACK'S LAW DICTIONARY 646 (7th ed. 1999). Thus, given that the Letter is made up of one-sided allegations based on a limited investigation by the Division, to call such allegations "findings" improperly suggests to the public that the allegations are findings of fact that were made by a neutral arbiter based on a complete factual record, which is clearly not the case herein.

[2] Prisoners "cannot expect the amenities, conveniences, and services of a good hotel." McBride v. Shackleford, No. 2:07CV 143-O-B, 2008 WL 544941, 1 (N.D. Miss. Feb. 22, 2008)(dismissing, for failure to state a claim upon which relief could be granted, in inmates civil rights case alleging that he was compelled to wash and re-use his disposable cup and eating utensils and that his window was covered with sheet metal)(citing Wilson v. Lynaugh, 878 F.2d 846, 849 n. 5 (5th Cir. 1989), cert denied, 493 U.S. 969 (1989)).

events and incomplete information as "facts" to reach an improper, outcome determinative conclusion. Furthermore, the Letter falls far short of the statutory prerequisites under CRIPA to commence a suit against the County.

A. Procedural and Factual History

On November 13, 2007, the Division notified the County that it instituted an investigation at the Facilities "concerning allegations of use of excessive force by staff on inmates" and "allegations of inadequate medical treatment." Significantly, the letter went on to read, "We have not reached any conclusions about the subject matter of the investigation[,]" and "[W]e will consider all relevant information, particularly the efforts [the Facilities] have undertaken to ensure compliance with federal law."[3]

On January 30, 2008, the Division requested voluminous documents from the County. The Division specifically advised the County at that time, "We are committed to providing a fair, objective, and comprehensive review." The County engaged in open dialogue with the Division shortly thereafter, advising that many of the Division's document requests were protected from disclosure under New York Mental Hygiene Law, New York Civil Procedure Law, New York Civil Rights Law and state and federal HIPPA regulations. Approximately two months later, the County produced several hundred non-privileged documents to the Division including, but not limited to, New York State Commission of Correction reports; organizational charts; incident reports; grievances; Professional Standards Division reports; monthly census figures, daily population figures and staffing complements; training manuals; inmate handbook; policy and procedure manuals; nursing protocols; medical formularies; and forensic mental health information.

Unsatisfied with the County's response, the Division sought additional documentation and dates to tour the Facilities. The County informed the Division that it was welcome to tour the Facilities at a mutually convenient date and time, and made the reasonable request that an Assistant County Attorney be present during the entirety of the tour and that a court reporter be present to transcribe requested interviews to obtain factually accurate information. The Division immediately denied this request by the County and refused to engage in any further dialogue on the topic.

The denial of this reasonable request by the County, coupled with the Division's complete unwillingness to discuss several concerns of the County, including the constitutional criteria to be utilized during the Investigation, revealed that the Division was disingenuous in its representation that it would provide "a fair, objective and comprehensive review."[4]

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[3] See Letter from Rena J. Comisac, Acting Assistant Attorney General, to County dated November 13, 2007. (Initial Letter)

[4] See Letter from Gregory Gonzalez, Senior Trial Attorney, Special Litigation Section, to County dated January 30, 2008; see also Harris County's Response to the United States Department of Justice Civil Rights Division June 4, 2009 Civil Rights of Institutionalized Persons Act "Findings" Letter regarding: The Harris County Jail System from Vince Ryan, Harris County Attorney to the Honorable Eric Holder, Attorney General of the United States, Harris County Judge Emmett, Commissioners Lee, Radack, Eversole and Garcia, Sheriff Garcia, District Attorney Lykos and Members of the Criminal Justice Coordinating Council (August 24, 2009) [hereinafter Harris County Response] (citing throughout its more than 200 pages, the lack of objective and fair review by the Division despite its representations to the contrary). "The Civil Rights Division encouraged full cooperation with their investigation, repeatedly pledging transparency in their investigation. Notwithstanding this pledge, the Division declined to allow

Additionally, the County conducted a thorough examination of the Division's prior investigations and consent decrees, wherein a clear pattern emerged. In sum, it appears that all jurisdictions subject to a Division investigation, whether cooperating or otherwise, are allegedly engaged in violating the constitutional rights of inmates[5] where the jurisdiction is not following "best practices" for its jail management and inmate services, as opposed to the less rigorous standard imposed under CRIPA. CRIPA merely requires a showing that the minimum constitutional requirements of inmates are being met. In some instances, even the best practices standards apparently are not good enough to the Division as it appears the Division cannot resist issuing a negative "findings letter" against every jurisdiction it investigates, regardless of merit.[6]

On June 16, 2008, after several months of communications with the Division regarding the Investigation and the framework under which it would progress, the County ultimately determined that the Investigation was not warranted. At that time the County declined the additional overtures of providing the Division with unfettered access to documents and the Facilities as the Division had requested. Communications between the County and the Division were extremely limited thereafter. Significantly, once this decision was made by the County, the New York State Commission of Corrections (sometimes referred to herein as"NYSCOC" or "NYSCC") began to aggressively conduct "surprise inspections." This is in addition to its normally scheduled cycle audits at the Facilities, presumably in an effort to assist the Division in its Investigation.[7]

Harris County's non-uniformed consultants to silently observe witness interviews. . . . While Harris County believed that no negative inferences could logically be drawn from its consultant's silent observation of individual inmate interviews, Harris County indicated that it would not refuse the Division's requests for individual inmate interviews during the Division's inspections of the Harris County Jail system. Harris County was thus placed in a position where its consultants could not independently (and silently) observe the individual interviews conducted by the Division. Harris County could not immediately and accurately respond to any claims lodged by the inmates during these private interviews. Harris County could not later follow-up on the Division's private interviews with these same inmates for fear that the inmates would later lodge claims of retaliation. Thereafter, the Division relied upon unsubstantiated inmate complaints in their June 4, 2009 letter."

[5] It is worth noting that CRIPA investigations generally encompass detention facilities and mental health facilities.

[6] *See, for example*, Findings Letter against Harris County Texas dated June 4, 2009 and lengthy responsive letter by Harris County Texas County Attorney Vince Ryan dated August 24, 2009. This is further belied by the fact that the County pressed the Division to provide at least one example where the Division had not issued a negative findings letter against a jurisdiction where an investigation had been initiated, in its meeting with the Division on August 10, 2009, and the Division would not [and presumably could not] provide such an example because it does not appear to exist.

[7] It is common knowledge that the NYSCOC has provided the Division with extensive support in the Division's Investigation of the County. In fact, the NYSCOC Board Meetings, which are available over the internet, routinely break into "executive session" for the sole purpose of discussing the "County of Erie." Given the fact that the COC Board Meetings are subject to New York's Open Meetings Law, the NYSCOC's attempts to shield it cooperation with the Division under the guise of "executive session" appear to be suspect.

In December 2008, the Division informed the County that it intended to conduct interviews of inmates at the Facilities. Given that none of the inmates at the Facilities had ever expressed to the County or to staff members at the Facilities that they desired to speak with the Division, the County again declined to provide the Division with the unrestricted access it requested.

Apparently recognizing that CRIPA provides limited investigative authority and does not grant the Division subpoena power, the Division then sought alternative means of gaining access to inmates. The Division ultimately settled on a ruse whereby the Division worked with the U.S. Marshals to perpetrate a fraud and deceit against the County, and on certain inmates themselves, by removing inmates from the Facilities under the false pretense that the inmates were required to appear in court.[8] Unaware of the ruse, the Facilities delivered the requested inmates to the U.S. Marshals, and the inmates were thereafter interviewed by members of the Division regarding conditions at the Facilities.

The Division issued its Letter to the County on July 15, 2009 stating that while the Division had "[i]nitially [] informed [the County] that our investigation would focus on medical care, mental health care, and protection from harm, in the course of our investigation, we also became aware of environmental health and sanitation conditions that warranted investigation." Within the Letter, the contents of which will be discussed in more detail hereafter, the Division relies upon a report issued by the National Commission on Correctional Health Care ("NCCHC"), Health Services Study: Erie County Corrections Facilities dated January 10, 2008, revised, February 11, 2008, in an effort to establish a negative inference against the County relative to the delivery of medical and mental health services at the Facilities. Significantly, the County specifically engaged NCCHC as a consultant to provide technical advice and recommendations for the delivery of health services at the Facilities long before the County was ever notified that the Division instituted an Investigation. Not surprisingly, the Letter issued by the Division improperly implies that the NCCHC came into the County to cite or regulate it in some way. This is wholly inaccurate and the Division appears to include such bias for purely self-serving purposes. Moreover, it is disappointing that the County's good faith efforts to evaluate its own facilities were neither mentioned nor recognized in the Letter at all.

[8] The County became aware of this ruse only after conducting its own interviews with the inmates that had been removed from the Facilities by the U.S. Marshals. The Division confirmed the County's understanding, however, when it noted in the Letter that the Division was "able to communicate with a number of current and recently transferred ECHC inmates through an arrangement with the United States Marshals Service." Letter at 2. The fraud and deceit perpetrated on the County and the inmates by the Division, in cooperation with U.S. Marshals, is extremely disturbing in light of the ethical obligations by which DOJ attorneys are bound. *See generally* 28 C.F.R. Part 77. Moreover, the American Bar Association's Model Rules of Professional Conduct ("Model Rules") state that a lawyer shall not knowingly "make a false statement of material fact or law to a third person." Model Rule 4.1. Similarly, Model Rule 8.4 makes clear that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." In this case, the evidence known to the County suggests that attorneys in the Division intentionally caused the U.S. Marshals to make false and misleading statements to the County and its officials in order to obtain custody of certain inmates in the facilities. Furthermore, it appears that attorneys in the Division caused the U.S. Marshals to make false and misleading statements to the inmates themselves. As such, it may be appropriate for the Department to refer this matter to the DOJ Office of Professional Responsibility ("OPR") for further investigation into possible ethical violations.

Since the issuance of the Letter, members of the Division, specifically Samuel Bagenstos, Deputy Assistant Attorney General , have repeatedly indicated that the Division is prepared to file a CRIPA suit based on the allegations in the Letter. In light of the fatal flaws in the Letter, as discussed below in more detail, any suit filed pursuant to the allegations made in the Letter would be improper under CRIPA.

On August 10, 2009, the undersigned, along with First Assistant County Attorney, Kristin Klein Wheaton, traveled to Washington, D.C. and met with Division representatives to discuss in detail the content of the Letter and the next steps going forward. Representatives of the Division were unwilling to discuss reasonable requests made by the County at the meeting, instead reiterating the Division's demand to gain access to the Facilities. The County made clear to the Division at this meeting that while it was committed to engage in good faith discussions with the Division, it would be unable to do so in the absence of establishing the threshold constitutional standards and applicable federal law, which the Division had committed to follow in the first instance.[9] While the County is confident that it provides more than the minimally required constitutional level of care and services to inmates pursuant to CRIPA, the requested articulation of the applicable standard by the Department is essential to quantify the cost of remedial measures suggested by the Division given the fact that such remedial measures, if any, will ultimately be borne by the County taxpayers. In sum, the Division made clear at the meeting that its only interest was access to the Facilities and any concerns raised by the County could wait for another day.

On August 11, 2009, the Division requested that the County execute a letter authorizing the Division to tour the Facilities with its consultants, all but ignoring the issues the County had raised in person the previous day. On August 12, 2009 the County responded by offering a counter-proposal in the spirit of cooperation and as an alternative for moving forward. The Division denied the County's reasonable request on August 19, 2009 claiming that, "[it] sets forth a one-sided process that imposes unprecedented preconditions." Quite to the contrary, the experience of the County thus far with the Division has been one in which the Division has dictated to the County as opposed to negotiating in good faith toward a mutually agreeable solution that legitimately reflects the constitutional threshold issue in question.

B. Scale of the Erie County Jail System's Operations

Erie County is a metropolitan center located on the western border of New York State covering 1,058 square miles. Erie County is bounded by Lake Erie to the west, Niagara County and Canada to the north, Genesee County and Wyoming County to the east, and Cattaraugus and Chautauqua Counties to the south and has approximately 950,265 residents. Located within Erie County are three cities and 25 towns, including the City of Buffalo, the second largest city in New York State.

The Erie County Sheriff's Office ("ECSO") provides law enforcement services to Erie County and is the primary law enforcement agency in several towns and villages who do not have their own police agencies. Moreover, the County and City of Buffalo ("City") entered into a contractual agreement in 2003 whereby the County agreed to assume, for a fee, all City cell block inmates in an effort to avoid duplication of services in the County. At this time the City

[9] *See* Initial Letter.

has a small cell block that is no longer in use and the delivery of all inmate services, including transportation to and from court, and medical and mental health services, to name a few, are delivered by the County.

In addition to performing law enforcement functions, the ECSO runs the two Facilities which in terms of number of beds, constitutes the fourth largest in New York State behind Rikers Island, Nassau County and Westchester County. There are currently 895 professional and dedicated employees assigned to the ECSO, including approximately 740 assigned to the jail management division. This represents 17.5%of Erie County's entire workforce of 5100 employees.

The Facilities consist of the ECHC located downtown in the City of Buffalo and the ECCF located in Alden, New York. Inmates awaiting arraignment, trial and sentence are housed at both facilities. The ECHC is a maximum security facility, while the ECCF is a medium security facility. The ECHC is situated, along with the connected building which houses the ECSO administration on 1.58 acres. The ECHC is 121,093 square feet with additions and expansions to the original building in 1968 and 1982. The ECCF is situated on 103 acres of land and is 254,700 square feet. The ECCF was constructed in 1982 and an addition was constructed in 1998. Moreover the Yankee Building, which previously served as a facility for the Erie County Home and Infirmary and Erie County Youth Detention center, was renovated in 2007 and 2008 and is now provides additional housing for inmates.

Over the past five years, the Facilities have admitted approximately 132,704 inmates, averaging about 26,540 inmate admissions per year. In addition to inmates admitted by local police jurisdictions, the Facilities house prisoners from the United States Marshal Service and United States Immigration Service pursuant to contract. Inmates are generally held for short periods of time before release or transfer to other correctional facilities. Typically, 18% of all inmates are released in under 24 hours and a total of 40% of inmates are released within 1 day. In 2008, 56% of inmates were released within 1 to 3 days, another 12.9% were released within 4 to 9 days, and another 11.9% of inmates were released within 10 to 15 days. Accordingly, 80.8% of inmates were released by the 15th day of incarceration. Although prisoners charged with felony cases, parole violations, awaiting transfer to the New York State Department of Corrections, etc. can remain incarcerated for much longer periods, the average length of stay for males during the past five years was approximately 16.8 days. For females, the average length of stay was approximately 6.9 days.

Generally, the intake process includes, but is not limited to, a search, property inventory, fingerprinting, photograph, distribution of inmate handbook, suicide and medical health history screening, phone call and change out. The Facilities provide a wide range of services to inmates at taxpayer expense. In most instances, inmates received better services at no cost to them, than Erie County taxpayers. Services for inmates are provided through a combination of both on sight and off-sight referrals, which include dental, podiatry, orthopedics, opthamologic and metabolism [diabetes] care, just to name a few.

The Facilities include basic inmate service components including, for example, a medical unit, commissary, recreation areas, law library, visitation areas, laundry and kitchen. In addition, the inmate units are equipped with televisions having conversion boxes that receive the major network television stations. Likewise, inmates also receive the Buffalo News on a daily basis free of charge.

. The combined rated capacity for the Facilities is approximately 1589 beds. To provide an example of operational scale, the Facilities' kitchens prepare and serve more than 5000 meals per day. Given the diverse dietary needs of this population, the County employs a registered dietician to ensure that inmates who have diabetes, by way of example, receive meals for their specific medical issues. In 2008 alone, the Facilities prepared and served 1,850,289 meals to inmates. Indeed, at the ECHC alone, in 2008, the medical unit provided treatment to 25,742 inmates, administered 310,434 doses of medication, 8,662 inmates were seen on sick call, 235 lab tests were performed, 1,259 inmates were transferred to the Erie County Medical Center ("ECMC")[10] for clinic referrals, 171 inmates were sent for Emergency Room assessments, and 46 inmates were admitted to the lock up unit at ECMC.

Since 2004, Erie County taxpayers have paid approximately three hundred sixty eight million tax dollars ($368,000,000) to run the Facilities. The projected taxpayer dollars anticipated to be spent for the facilities in 2009 is approximately sixty nine million dollars ($69,000,000) or almost five (5%) percent of the County's one billion dollar budget. The tax payer cost of running the Facilities has steadily increased, while aid from both federal and state governments has sharply decreased. For example in 2006, the County received approximately fifteen million dollars ($15,000,000) in state and federal aid to supplement the local tax share to defer some costs in running the facilities. This amount was above and beyond the approximately fifty eight million dollars ($58,000,000) in local tax payer share. In 2009, the County is only expected to receive three million dollars ($3,000,000) in state and federal funding to supplement the local tax payer share of sixty nine million dollars ($69,000,000). In the past five years, in addition to the amounts listed above, the County has spent more than three million dollars ($3,000,000) for capital improvements. Other Erie County departments also incur costs in the support of the ECSO detention operations. These costs include, but are not limited to, human resources and risk management, retiree healthcare, management services, building services, utilities and building maintenance, and legal services.

The ECSO is committed to providing training to its personnel. All jail deputies and corrections officers are required to attend a 176 hour Basic Corrections Training course with four (4) COC exams administered during the Course. In addition, new jail deputies and corrections officers complete an eight (8) hour suicide prevention screening course, eight (8) hour adult CPR and First Aid course, a forty-seven (47) hour weapon course and an eight (8) hour Chemical Agent Course. These courses also require the employee to pass a written examination. New deputies and corrections officers are provided at least 200 hours of field training with frequent evaluations. The County is proud of its dedicated work force.

[10] The County has a contractual arrangement with ECMC to provide clinical and other specialty services to the inmates as they as they are referred by health care providers.

Furthermore, the NYSCOC and New York State Division of Criminal Justice Services ("DCJS") standards require annual training of one hour on use of force, one hour on chemical agents and eight (8) hours on handgun requalification. The ECSO also provides refresher courses on workplace harassment and discrimination, suicide prevention policy and procedure, general order review, contraband control, fire safety, extinguishers and evacuation and adult CPR. Newly hired sworn staff also complete an eighty (80) hour employee orientation program that covers a variety of topics.

The County has allocated significant resources to the ECSO for the jail management division in recent years. As outlined above, sixty nine million dollars ($69,000,000) will be spent on the Facilities in 2009. Capital funding was bonded in 2009 to implement software facilitating electronic medical records for inmates at the Facilities scheduled to "go live" in the Fall of 2009. In 2004, one million dollars ($1,000,000) was spent to renovate the constant observation area at the ECHC. An additional one million dollars ($1,000,000) was spent in 2004 to upgrade the HVAC systems at the Facilities. Twenty-two thousand dollars ($22,000) was spent in 2005 to replace the fire alarm system at the ECHC. In 2007, six hundred fifty-thousand dollars ($650,000) was spent to install security windows as required by the NYSCOC in the Yankee Building. These amounts are just a few examples of the monies spent by Erie County taxpayers on behalf of inmates. Erie County has also expended a great deal of resources in maintaining the Facilities. During 2008 and 2009, 4061 work orders were processed and closed at the Facilities. It took 31,544 hours of labor to process these work orders at a cost of $884,389, exclusive of materials.

The ECSO faces broad challenges in its management of the Facilities with a shrinking tax base, weak economy and rising costs. Notwithstanding these challenges, the County continues to commit resources and tax dollars to comply with New York State mandates and improve its Facilities. Significantly, the County has been proactive in addressing concerns which have been raised. The County is confident that inmates in the Facilities have been provided with care that exceeds what is required by the United States Constitution.

C. CRIPA Standards

I. The CRIPA Framework.

To provide a context for the discussion of the Letter's inadequacies, it is significant to briefly summarize several key elements of the CRIPA statutory scheme. This section outlines the CRIPA framework by addressing: (1) the statutory requirements for the application of CRIPA, (2) the Attorney General's certifications that are required before the Department can file suit under CRIPA, and (3) issues related to the County's decisions regarding cooperation with the Division's investigation as they relate to the application of CRIPA.

1. Statutory requirements for application of CRIPA.

CRIPA is a narrowly tailored statute granting the Attorney General authority to initiate and intervene in certain civil rights actions in order to redress "systematic deprivations of constitutional rights of institutionalized persons."[11] Such enforcement authority is limited to

[11] *See* S. REP. NO. 96-416 at 1, *reprinted in* 1980 U.S.C.C.A.N. 787, 787; H.R. REP. 96-897 at 9, *reprinted in* 1980 U.S.C.C.A.N. 832, 833.

situations in which a detention facility has a "pattern or practice" of subjecting institutionalized persons to "egregious or flagrant conditions" which deprive such persons of rights, privileges, or immunities under the Constitution, thereby causing such persons to suffer "grievous harm."[12]

A "pattern or practice" sufficient to allow the Department to invoke its CRIPA authority must involve conduct undertaken pursuant to an official policy or custom of the State or political subdivision's final policymaker that was the moving force in causing the constitutional deprivations.[13] A governmental unit may not be sued for federal constitutional violations for an injury inflicted solely by its employees or agents.[14] "Instead, it is when execution of a governmental unit's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy inflicts the injury that the government as an entity is responsible."[15] The Department must also establish that the governmental unit was "deliberately indifferent" to the known consequences of the policy or procedure at issue.[16]

The legislative history of the statute confirms that CRIPA was intended to be a narrowly targeted statute providing the Department with jurisdiction over only the most flagrant, egregious, and pervasive patterns or practices of conduct depriving inmates of their constitutional rights. The House Committee Report on CRIPA thus emphasized that CRIPA enforcement was to be targeted only at conduct that was a "part of a 'pattern or practice' of [the] denial [of constitutional rights] rather than an isolated or accidental incident."[17] CRIPA enforcement should therefore be limited to "cases where unconstitutional or illegal practices are widespread, pervasive, and systematic, and adversely affect significant numbers of institutionalized individuals."[18] "[M]inor or isolated acts or injuries are not intended to be the subject of litigation under [CRIPA]."[19] Similarly, [t]he adoption . . . of the language 'egregious or flagrant' establishes a standard for the Department's involvement that reflects a Congressional sensitivity to the fact that a high degree of care must be taken when one level of sovereign government sues another in our Federal system. This is a higher standard than that required of plaintiffs other than the United States."[20]

Examples of the types of correctional facilities that CRIPA was intended to target included: a facility in which "[g]roups of four men were regularly confined in 6-by-6-foot cells with no ventilation, no hot water, and sewage leaks;" a facility in which there were "40 stabbings, 44 serious beatings, and 19 violent deaths" in a three year period; and a facility in which "cattle prods were used to keep inmates standing or moving" and in which inmates were "confined naked for up to three days, without hygienic materials, heat, or adequate food" in a "6-by-6-foot cell with no light, toilet, sink, bed, or mattress."[21]

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[12] *See* 42 U.S.C. 1997a(a).
[13] *See generally,* Collins v. City of Harker Heights, 503 U.S. 115, 120 (1992).
[14] *See generally,* Board of Comm'rs of Bryan County v. Brown, 520 U.S. 397, 403 (1997).
[15] *See,* Monell v. Dep't of Soc. Services, 436 U.S. 658, 695 (1978).
[16] *See,* Id.
[17] H.R. REP. NO. 99-987, at 11 (1980)(Conf. Rep.).
[18] S. REP. NO. 96-416, at 29 (1979).
[19] *Id.*
[20] H.R. REP. NO. 99-897, at 11 (1980)(Conf. Rep.).
[21] S. REP. NO. 96-416, at 12 (1979).

The legislative history further confirms that Congress intended to allow the Department to pursue only such "minimum corrective measures" as are necessary to remedy the alleged pattern or practice of unconstitutional conduct. CRIPA was never intended to permit the Department to impose mandates against local jurisdictions and taxpayers that amount to what the Division views as "best practices" rather than constitutionally imposed standards. Indeed, the legislative history of CRIPA specifically notes that CRIPA authority should be exercised by the Department "to represent the national interest in securing *constitutionally* adequate care for institutionalized citizens," and that the Department does not "directly represent any institutionalized plaintiffs."[22] Furthermore, CRIPA was intended to "give States the primary responsibility for correcting unconstitutional conditions in their own institutions and to attempt to reach an agreement on the necessary remedies to correct the alleged conditions through informal and voluntary methods."[23] Indeed, "[i]n the face of good-faith efforts by appropriate State and local officials to comply with constitutionally required minima . . . [it is] preferable to give such officials the opportunity to fashion their own specific solutions."[24] The Division's stated position that the County is not entitled to any explanation of the constitutional standards that the Division believes are applicable to the Facilities, unless the County first provides unfettered access to the Facilities, thus contradicts the express intention of Congress to encourage the Department to give state and local officials a meaningful opportunity to undertake voluntary remedial efforts to the extent that such efforts are necessary.

2. Attorney General certifications prior to filing suit under CRIPA.

Once the Department has properly invoked its authority under the CRIPA by establishing the existence of the many prerequisites noted above, the statute then requires the Department to satisfy several other procedural safeguards which are included in the CRIPA to prevent overreaching by the federal government into state affairs that are beyond the Department's jurisdictional purview. The most significant of these safeguard provisions are the pre-suit certifications required under 42 U.S.C. §1997b, which the Attorney General must personally attest to before the Division can file suit under CRIPA. In short, CRIPA requires the Attorney General to personally certify that he has informed the Governor or chief executive officers and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution in question of:

- the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

- the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification, and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General; and

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[22] H.R. REP. No. 990897, at 13 (1980)(Conf. Rep.)(emphasis added).
[23] *Id.*
[24] S. REP. NO. 96-416, at 32 (1979).

- the minimum measures which the Attorney General believes may remedy the alleged conditions and the alleged pattern or practice of resistance;[25]

In addition, CRIPA requires the Attorney General to certify that he:

- [has] made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which the Attorney General believes may assist in the correction of such conditions and pattern or practice of resistance;

- [has] encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation, and persuasion including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and that it is the Attorney General's opinion that reasonable efforts at voluntary correction have not succeeded; and

- [is] satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions and pattern or practice, taking into consideration the time required to remodel or make necessary changes in physical facilities or relocate residents, reasonable legal or procedural requirements, the urgency of the need to correct such conditions, and other circumstances involved in correcting such conditions;[26]

The Attorney General's certification as to each of these six requirements is non-delegable, which highlights the fact that Congress viewed the completion of these prerequisites to suit as essential limitations on the Department's enforcement authority in order to protect the principles of federalism that make up the core of our system of government.[27]

In this case, the Division's Investigation and subsequent Letter to the County failed to satisfy all of these prerequisites to suit. As such, the County respectfully submits that it would be inappropriate for the Attorney General to certify that the Department has met these prerequisites and a suit against the County under CRIPA would be impermissible.

3. Cooperation under CRIPA.

Since the inception of the Investigation, the Division has taken the view that the County is not entitled to any specific guidance regarding the applicable constitutional standards that the Division intended to apply in conducting the Investigation. Instead, as discussed below, the Division has gone so far as to refuse repeated requests by the County to the Division, to provide any guidance as to what it considers to be the minimally acceptable constitutional standards related to the alleged conditions of confinement and patterns or practices at issue in the

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[25] 42 U.S.C. § 1997b(a)(1).
[26] 42 U.S.C. § 1997b(a)(2).
[27] 42 U.S.C. § 1997b(b); *see generally* 42 U.S.C. § 1997a(c) (requiring that the Attorney General personally sign any CRIPA complaint).

Investigation. Previous consent decrees and investigations conducted by the Division offer little guidance on the subject as it is clear that the consent decrees and recommendations in previous investigations by the Division by and large impose a "best practices" standard that well exceeds the minimal constitutional requirements in the specified areas. Given this outright refusal by the Division to engage in good faith discussions with the County about the applicable constitutional standards, the County has been compelled to deny the demanded access by the Division to the Facilities.

Despite the Division's unsupported position, CRIPA does not require a state or local entity such as the County to cooperate with the Division's investigation in any way, much less to provide unrestricted access to all of its facilities, inmates, employees, and documents without first being provided with some guidance as to the constitutional standards by which the entity will be judged. Furthermore, the County's decision not to provide the Division with such access in no way eliminates CRIPA's requirement that the Division meet the Attorney General's pre-suit certification standards before filing suit against the County.

II. The Division has not satisfied the requirements for pre-suit certification.

The Division has failed to satisfy the requirements for the Attorney General's pre-suit certification because: (1) the Letter fails to adequately identify the allegedly unconstitutional conditions and alleged patterns or practices at issue; (2) the Letter fails to sufficiently detail the supporting facts giving rise to any allegedly unconstitutional conditions and any alleged pattern or practice; (3) the Letter fails to identify the minimal measures by which any alleged conditions and any alleged pattern or practice could be remedied; (4) the Division has not made a reasonable good faith effort to discuss financial, technical, or other assistance that might assist the County in correcting any allegedly unconstitutional conditions and any alleged pattern or practice; (5) the Division has not encouraged voluntary implementation of minimum corrective measures; and (6) the County has not had a reasonable time to take appropriate actions to correct any alleged conditions and alleged pattern or practice, if such actions are indeed necessary.[28]

1. The Letter fails to adequately identify any allegedly unconstitutional conditions and any alleged patterns or practices.

Before a CRIPA suit can be filed in this case, the Attorney General must certify that the County has been informed of "the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities."[29] Despite this explicit requirement, the Letter fails to even allege that specific conditions within the Facilities are unconstitutional, much less that there is a pattern or practice of resistance to changing such conditions.

The lengthy Letter includes precious little discussion of what conditions of confinement are required by the Constitution or federal laws. In fact, the Division's discussion of constitutional law in the Letter is primarily located in five pages at the beginning of the Letter which reference constitutional requirements only in the broadest of terms and primarily in the

[28] *See* 42 U.S.C. § 1997b(a).
[29] 42 U.S.C. § 1997b(a)(1)(A).

context of § 1983 suits against individual officers.[30] Noticeably absent from the Division's meager legal analysis is any case law establishing what constitutes an unconstitutional policy or custom sufficient to establish a "pattern or practice" for purposes of CRIPA.[31] Moreover, none of the cases discuss in any level of detail the alleged standards the Division seeks to impose in this case. Thus, on its very face the Letter's discussion of law falls far short of providing the County with notice of the constitutional standards upon which the Facilities' policies and customs will be judged. Additionally, throughout the "Findings" section of the Letter, the Division cites virtually no case law in discussing the Division's allegations related to the Facilities. The Letter does not contain any legal authority justifying the recommendations made by the Division. Nor does the Letter set forth where any Court, in any jurisdiction, has required a jurisdiction to adopt the "Recommended Remedial Measures" outlined in the Letter. In fact, the Letter fails to identify any particular instances in which conditions at the Facilities, much less the patterns or practices of the Facilities, fail to satisfy constitutional standards.

To be sure, the Division repeatedly indicates in the Letter its view that the policies and/or practices at the Facilities are "inadequate" in some way. Tellingly, however, the Letter is devoid of any explanation of the ways in which such policies or practices rise to the level of being *unconstitutional* as supported by applicable case law and/or statute. Instead, the Division apparently focuses on aspirational best practices rather than articulating what is minimally required by the Constitution. This is so despite the explicit statutory mandate that the Department shall invoke CRIPA only to ensure that the operator of an institutional facility takes the "minimum corrective measures" necessary to remedy a "pattern or practice" of "flagrant and egregious" constitutional violations.

For example, the Letter alleges that the Facilities' "current suicide prevention practices do not comport with generally accepted standards of correctional mental health care."[32] In so stating, however, the Division fails to cite any source for its purported "generally accepted standards."[33] Significantly, the Division does not allege that suicide prevention practices that do not meet the Division's nebulous "generally accepted standards" are unconstitutional.[34] Even more astounding, however, is the Division's failure to even *allege* that the Facilities' current suicide prevention practices fail to meet the minimally adequate standards required by the Constitution.[35] This vague analysis, bereft as it is of any references to the specific requirements of the Constitution, falls far short of informing the County of any alleged conditions and alleged patterns or practices of the Facilities that purportedly violate the Constitution.

Similarly, the Letter alleges that the Facilities "fail[] to provide inmates with adequate mental health care" and goes on to discuss purported "[g]enerally accepted correctional mental health care standards."[36] Once again, the Division fails to cite any source for these purported "generally accepted" standards, much less any source which would even tend to suggest that such standards are the minimally adequate standards required by the Constitution as opposed to "best practices."[37] The Division fails to even allege that the Facilities' mental health care

[30] *See* Letter at 4-8.
[31] *See id.*
[32] *Id.* at 9.
[33] *See id.*
[34] *See id.*
[35] *See id.*
[36] *Id.* at 13.
[37] *See id.*

services in any way fail to meet the minimally adequate standards required by the Constitution.[38] Thus, the Division again failed to put the County on notice of any alleged conditions and alleged patterns or practices of the Facilities that constitute "flagrant and egregious" violations of the Constitution.

While it is possible to repeat a similar analysis for each and every allegation in the "Findings" section of the Letter, the County does not wish to belabor the point. Suffice it to say that the Letter utterly fails to identify the appropriate minimally sufficient constitutional standards for each of the subject matters raised. Furthermore, the Letter does not specify in any detail the ways, if any, in which conditions and patterns or practices at the Facilities fail to meet those requirements, relying instead on vague suggestions that conditions, policies, or procedures are "not adequate" or fail to comply with "generally accepted standards." Such vague allegations, devoid of references to specific constitutional standards, do not satisfy the notice requirements of CRIPA.

This problem is compounded by the many instances in which the Letter refers to alleged problems with the Facilities' conditions, policies, or procedures that clearly do not rise to the level of being unconstitutional. For instance, the Letter states that "the organization of the [Facilities'] Manuals is confusing."[39] Surely the Department would not contend that "confusing" organization of jail manuals is so flagrantly and egregiously unconstitutional as to fall properly within the scope of a CRIPA enforcement action. Nonetheless, due to the Division's wholesale failure to frame its allegations in terms of minimum constitutional requirements, the County is left to speculate as to which portions of the Letter involve discussions of mere best practices and which, if any, address minimally adequate constitutional conditions and patterns or practices.

Given the Division's abject failure to properly frame its allegations in terms of what is mandated by the Constitution, it is unclear to the County which, if any, of the allegations in the Letter are matters properly falling within the scope of the Department's enforcement authority under CRIPA. In light of the Letter's inadequacies, the County has requested, both in person and in writing, that the Division specify the applicable constitutional standards in this case as a first step in moving toward a cooperative resolution of any issues that are properly of concern in a CRIPA investigation. Inexplicably, however, the Division has flatly refused these requests. Instead, the Division has informed the County that it must either bend to the Division's demands for unfettered access to the Facilities, without so much as an explanation of the legal basis for the Division's purported enforcement authority, or risk defending itself against the full might of the Department in a CRIPA suit.

The Division has taken an astoundingly broad view of its authority under CRIPA, apparently deeming itself the proper authority to require the County to implement what the Division views as "best practices" in total disregard of the limits placed on federal government enforcement authority by both CRIPA and the Constitution. In addition, the Division has repeatedly refused to satisfy CRIPA's pre-suit requirements by informing the County of any alleged unconstitutional conditions and alleged patterns or practices at the Facilities. As such, the County respectfully submits that the Attorney General cannot properly certify that the Department has identified the alleged conditions or alleged pattern or practice as required by 42 U.S.C. Section 1997b(a)(1)(A).

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[38] *See id.*
[39] *Id.* at 15.

2. The Letter fails to sufficiently detail the supporting facts giving rise to any allegedly unconstitutional conditions and any alleged pattern or practice.

Before a CRIPA suit could be filed in this case, the Attorney General must certify that the County has been informed of "the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification; and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General."[40] The Letter fails to satisfy this requirement as well.

As a threshold matter, the Letter fails to satisfy this requirement because, as discussed above, the Letter fails to adequately identify with specificity any allegedly unconstitutional conditions and patterns or practices properly within the scope of the Department's authority under CRIPA. Given this failure, no amount of factual detail could cure the Letter's defects. Setting aside this fundamental failure, however, the facts as alleged in the Letter fail to meet the requirements for this element of the Attorney General's certification.

With respect to each allegation, the Letter fails to specify with particularity the relevant dates or time period during which the purported condition and pattern or practice occurred.[41] At most, the Letter identifies the date on which a particular instance of conduct allegedly occurred,[42] though the Division failed to provide even that much detail in some instances.[43] This shortcoming is particularly significant given that many of the policies and procedures referenced in the Letter undergo frequent revisions. As such, by failing to adequately indentify the time periods during which the alleged policies or procedures were in place, the County cannot be certain which iteration of a given policy the Division considers problematic.

In addition, for the vast majority of the specific alleged incidences referenced in the Letter, the Division failed to note the identity of the guards and inmates allegedly involved in a given alleged incident and the specific date on which the alleged conduct occurred.[44] The Division has not provided the names of individuals involved in the incidents and has provided such little information that in most instances, the County is left to try to comb through years of documents to determine whether the alleged incident even occurred. Given the fact that the County admits over 24,000 inmates per year into its facilities, searching for these alleged incidents is like searching for a needle in a haystack. Finally, the Letter does not indicate the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General.[45]

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[40] 42 U.S.C. § 1997b(a)(1)(B).
[41] *See, e.g.*, Letter at 9-10 (addressing suicide prevention); *id.* at 13-14 (addressing mental health care); *id.* at 28-29 (addressing medical care).
[42] *See, e.g., id.* at 18, 21, 25.
[43] *See, e.g., id.* at 10, 18, 20, 25 (addressing specifically alleged incidents but referencing, at most, the year or years in which the incidents allegedly occurred and, in some instances, providing no time period or date whatsoever).
[44] *See, e.g., id.* at 10, 11, 12, 14, 18, 21, 25, 31.
[45] *See generally id.*

Given the fact that the Letter does not meet the basic factual disclosure requirements of CRIPA, the County respectfully submits that the Attorney General cannot properly certify that the Department has met its obligations under this CRIPA prerequisite.

3. The Letter fails to identify the minimal measures by which any allegedly unconstitutional conditions and any alleged pattern or practice could be remedied.

Before a CRIPA suit could be filed in this case, the Attorney General must also certify that the County has been informed of "the minimum measures which the Attorney General believes may remedy the alleged conditions and the alleged pattern or practice of resistance."[46] The Letter fails to satisfy this prerequisite to suit as well.

As discussed at length above, the Division has repeatedly refused to even discuss with the County what the Division believes are the applicable minimally adequate constitutional requirements in each of the areas referenced in the Letter or to specify the ways in which the Facilities' conditions and patterns or practices allegedly fail to satisfy those standards with any level of specificity. Similarly, the Division has failed to provide any legal analysis or citations in support of its "Recommended Remedial Measures" indicating that such measures are the minimal measures sufficient to comply with the requirements of the Constitution.[47] Given these shortcomings of the Letter, the County cannot possibly know which of the Letter's "Recommended Remedial Measures," if any, should be viewed as *minimum measures* sufficient to comply with the Constitution.[48] This is particularly problematic given that some of the "Remedial Measures" are clearly not the minimum measures necessary to comply with the Constitution while others are so vague that they provide no meaningful guidance to the County at all.

Contrary to the Division's articulated position in its Letter, there are no regulations or guidelines imposing the "Recommended Remedial Measures" made by the Division upon the County. Despite the Division's repeated assertions, the standards imposed by the Department are not constitutionally mandated standards. One must review the case law applicable in the relevant jurisdiction for guidance as to the truly mandated constitutional standards. The Division has failed to set forth any relevant case law in the Second Circuit requiring any of the measures set forth as a "Recommended Remedial Measure" in its Letter. Rather, the Division has determined what it believes to be a best practices and has attempted to impose these best practices as a constitutional standard.

One example of a "Recommended Remedial Measure" that is clearly not a minimum measure necessary to comply with the Constitution is the Division's recommendation that the Facilities "[e]nsure ECHC and ECCF properly identifies inmates with mental illness through adequate screening."[49] Assuming *arguendo* that minimally adequate constitutional standards require the Facilities to have an "adequate" screening process for mental illness, whatever the term "adequate" might mean in that context, it is clearly not the case that a minimally adequate screening process must *in fact ensure* that all inmates with mental illness are properly

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[46] 42 U.S.C. § 1997b(a)(1)(C).
[47] *See generally* Letter at 36-49.
[48] *See generally id.* at 36-49.
[49] *Id.* at 38.

identified.[50] No mental health screening process could possibly be perfectly accurate in identifying each and every case of mental illness among inmates, and the Constitution certainly does not require the Facilities to undertake such an impossible task. Thus, this "Recommended Remedial Measure" is clearly aspirational rather than a statement of the minimum remedial measures necessary to comply with the Constitution.

There are also numerous instances in which the Division's "Recommended Remedial Measures" are so vague that they provide the County with virtually no meaningful guidance as to what the Division believes the County should do. For example, the Division recommended that the Facilities "[p]rovide adequate treatment for inmates with self-injurious behavior" without defining what treatment would be considered "adequate" for minimum constitutional purposes or how the Facilities' existing treatment procedures are purportedly "inadequate."[51] Similarly, the Division recommended that the Facilities "[e]nsure that medications are provided to inmates in a timely manner and that they are properly monitored" without defining "timely manner" or what it means to "properly" monitor for purposes of meeting minimally necessary constitutional requirements or how those standards purportedly differ from the Facilities' existing standards.[52]

Even assuming *arguendo* that the Division considers such recommendations to be the minimum measures necessary to comply with the Constitution, the terms used in the recommendations are so vague that they fail to provide the County with any meaningful notice as required under CRIPA. Thus, given that the County is still not on notice of what "minimum measures" the Division considers necessary to satisfy the Constitution, the Letter has not satisfied this prerequisite to suit under CRIPA.

4. The Division has not made a reasonable good faith effort to discuss financial, technical, or other assistance which may assist in the correction of any allegedly unconstitutional conditions and any alleged pattern or practice.

Before a CRIPA suit could be filed in this case, the Attorney General must also certify that he has "made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which the Attorney General believes may assist in the correction of such conditions and pattern or practice of resistance."[53] The Division has failed to meet this prerequisite to suit.

Specifically, there has been no offer of funding by the Division to correct what it perceives to be the alleged constitutional deficiencies. What is clear from the consent decrees and investigations of the Division is that the Division imposes best practices to be paid for by the local taxpayers with no funding or assistance from the Division. The Division's wholesale failure to articulate the constitutional standards applicable to any alleged conditions and any

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[50] Indeed, of the nearly 100 "Recommended Remedial Measures" in the Letter, more than 60 purport to require the Facilities to "ensure" that something occurs. *See id.* at 36-49.
[51] *Id.* at 36.
[52] *Id.* at 39.
[53] 42 U.S.C. § 1997b(a)(2)(A).

alleged policies or practices at issue in this matter has likewise resulted in the Division's refusal to engage in any reasonable good faith effort to discuss possible assistance from the Attorney General in correcting any allegedly unconstitutional conditions and any alleged pattern or practice. Until such time as the Division adequately identifies which conditions and patterns or practices it considers unconstitutional, along with the associated financial cost of bringing the County into what the Division perceives as compliance, it is impossible for the County and the Division to engage in any good faith discussions about means by which the Department might assist the County in implementing minimally necessary remedial measures if such measures are indeed required. Thus, the Division has not satisfied this prerequisite to suit under CRIPA either.

5. The Division has not encouraged voluntary implementation of minimum corrective measures and has not even attempted to engage in discussions of such measures.

Before a CRIPA suit could be filed in this case, the Attorney General must also certify that he has "encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation and persuasion, including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and it is the Attorney General's opinion that reasonable efforts at voluntary correction have not succeeded."[54] The Division has failed to meet this prerequisite to suit as well.

As discussed above, the Division has not even attempted to identify with specificity which conditions and policies or procedures at the Facilities are allegedly unconstitutional, if any. Given the Division's abject failure to provide this information, it is clear that the Division cannot be said to have encouraged appropriate corrective action, if such corrective actions are indeed required pursuant to the Constitution. Moreover, the Division has failed to identify minimum corrective measures sufficient to satisfy the Constitution, instead providing a list of overbroad and vague "Recommended Remedial Measures" without providing any legal analysis to suggest that the recommended measures are the minimum corrective measures necessary to comply with the Constitution.

Thus, far from discussing "the possible costs and fiscal impacts of alternative minimum corrective measures," the Division has failed to even identify one set of possible minimum corrective measures or inquired of the County's financial ability to implement one or all of the "Recommended Remedial Measures." Indeed, when pressed to engage in discussions about the constitutional standards governing the matters addressed in the Letter, the Division has flatly refused to enter into such discussions with the County. Thus, the Division has not satisfied this prerequisite to suit under CRIPA either.

6. The County has not had a reasonable time to take appropriate action to correct any allegedly unconstitutional conditions and any alleged patterns or practices.

Before a CRIPA suit could be filed in this case, the Attorney General must also certify that he is "satisfied that the appropriate officials have had a reasonable time to take appropriate

[54] 42 U.S.C. § 1997b(a)(2)(B).

action to correct such conditions and pattern or practice."[55] The Division has failed to meet this prerequisite to suit as well.

Given the Division's failure to engage in any meaningful analysis of whether, or to what extent, any allegedly unconstitutional conditions and alleged patterns or practices even exist at the Facilities, and given the Division's failure to adequately identify any minimum corrective measures related thereto, the County is not yet even aware of whether any remedial measures are in fact required by the Constitution. Assuming *arguendo* that the Division's recommendations in the Letter constituted minimum corrective measures, however, the Division's repeated threats to file suit 49 days after the date of the Letter obviously would not provide the County with a "reasonable time to take appropriate action to correct such conditions and pattern or practice."

Many of the "Recommended Remedial Measures" are so vague as to provide virtually no guidance as to what changes would be required in many instances. For example, the Letter's recommendation that the County "[d]evelop policies and procedures to ensure appropriate management of suicidal inmates" provides no reasonable guidance as to what specific remedial measures the Division is recommending or whether the County's attempts to implement such recommendation would satisfy the Division's understanding of "appropriate."[56] Thus, before the County could reasonably be expected to implement any remedial measures, the Division would have to be willing to better define those recommendations.

In addition, to the extent if any, the "Recommended Remedial Measures" would require sweeping changes to a wide range of policies and procedures at the Facilities in areas such as suicide prevention, mental health care, use of force, medical care, and sanitation and environmental conditions,[57] the County would require a significant amount of time to consult with others in each of these areas in order to implement such changes.

Given the vagueness of the Division's "Recommended Remedial Measures" and the breadth of those recommendations, 49 days from the date of the Letter would be a patently unreasonable amount of time to implement those recommendations even if they were sufficiently detailed, properly articulated recommendations of minimum corrective measures sufficient to comply with the Constitution. As things now stand, however, the County cannot reasonably be expected to implement any "remedial measures" until the proper contours of the constitutional matters at issue have been defined by the Division. Thus, the County has not had a reasonable time to implement any minimum corrective measures as required under CRIPA's prerequisites to suit.

CONCLUSIONS REGARDING COMPLIANCE WITH CRIPA

CRIPA is a narrowly tailored enforcement statute with a number of fail-safes built in through the certification process to prevent the Department from overreaching in its enforcement efforts. In this case, the Division's Letter to the County totally disregards those fail-safes by forsaking any discussion of what specific conditions and patterns or practices are required by the Constitution and any analysis of how the Facilities' conditions and patterns or practices purportedly fail to satisfy those standards. Instead, the entire letter is couched in terms of vague

[55] 42 U.S.C. § 1997b(a)(2)(C).
[56] *See generally* Letter at 37.
[57] *See generally id.* at 36-49.

references to "generally accepted standards" and "adequate" conditions. Similarly, the Division's "Recommended Remedial Measures" do not even purport to apply existing constitutional standards to determine minimum corrective measures, instead addressing possible changes to the Facilities' policies and procedures in the broadest and vaguest possible terms.

At the very least, CRIPA inarguably requires the Department to put the County on adequate notice about the extent to which the conditions and patterns or practices of the Facilities allegedly violate the Constitution. Given this fact, it is truly astounding that the Division has repeatedly refused to even engage the County in a conversation regarding the appropriate constitutional standards at issue. Given the Division's sweeping failures to provide even the most basic information required under the pre-suit certification standards of CRIPA, the County respectfully submits that the Attorney General cannot properly certify that the Department has met the preconditions to filing suit against the County under CRIPA.

More broadly speaking, the County respectfully urges the Attorney General to take a close look at the Division's investigation and enforcement practices under CRIPA. If the Division's total failure to adhere to the requirements of CRIPA in this case is an indication of the Division's regular practices in CRIPA cases, then the County respectfully submits that changes to those practices are urgently required. Indeed, the recent submission to the Department by Harris County, Texas, advancing many of the same issues raised herein suggests that the inadequacies of the Letter to Erie County and the apparent overreaching by the Division in Harris County may not be isolated incidents.

CRIPA does not require state and local entities such as the County to ensure that the conditions and patterns or practices in their institutions adhere to the Division's amorphous notions of best practices for conditions of confinement. Rather, entities such as the County are simply required to provide minimally adequate conditions of confinement that are consistent with the mandates of the Constitution. It is an affront to the principles of federalism that are at the very heart of our system of government for the Department to allow the Division to invoke its CRIPA authority in a manner that seeks to force entities such as the County to make changes to conditions of confinement that exceed minimally adequate conditions as defined by the Constitution.

Each such change in policy or procedure that the County ultimately implemented would be funded by tax revenue from the citizens of the County of Erie to the detriment of funding for schools, roads, libraries, and other public works. The separation of power between state/local and federal government requires that such changes be left in the hands of the elected officials of the County of Erie who answer directly to the citizenry for how tax dollars are spent. Indeed, Congress explicitly recognized the risk of overreaching under CRIPA and sought to protect the principles of federalism by setting forth numerous procedural safeguards in the CRIPA statutes which the Division has completely ignored.

D. Rejection Of "Findings"

1. Mental Health Care

According to a national study, at midyear 2005, 64% of inmates in jails had a mental health problem.[58] About 76% of jail inmates who had mental health problems also met the criteria for substance dependence or abuse.[59] Since 2004, Erie County taxpayers have paid mental health professionals a total of seven million nine hundred thirty nine thousand nine hundred fourteen dollars ($7,939,914) to treat inmates at the Facilities. This figure does not include mental health medications provided to inmates, including expensive psychotropic medications, at taxpayer expense. On a daily basis, licensed mental health professionals, including but not limited to, psychiatrists, nurse practitioners, clinical staff and forensic mental health staff engage in crisis intervention, lethality assessments, mental status examinations, medication treatment and supportive counseling for inmates. Even though not legally mandated, the forensic mental health professionals receive annual training in psychopharmacology and lethality assessment/suicidality, as well as training in cultural competency, therapeutic approaches, and community resources.

On page 13 of the Letter, the Division declared, without any factual or legal support, that the Facilities fail to provide inmates with adequate mental health care. In doing so, the Division cites a single example of an inmate, Jimmie Roberts.[60] Without any factual detail or citation to any applicable legal standard, the Division states that "ECHC and ECCF inmates require mental health assessments and treatment to avoid the unnecessary suffering of acute and chronic episodes of mental illness."[61] Relying on a report completed by the NYSCOC, the Division summarily concluded that the treatment rendered by the ECHC physician to Jimmy Roberts was inadequate, "rising to the level of professional misconduct."[62] By adopting the findings of the NYSCOC, the Division concluded that the ECHC physician engaged in misconduct with respect to Jimmie Roberts; however, neither agency has the expertise, knowledge or responsibility to make such a determination. In fact, the agency with authority to make that determination, the New York State Office of Professional Conduct has cleared the ECHC physician[63] with respect to the medical treatment he provided to inmate Jimmie Roberts.

A District Court in Pennsylvania has examined allegations made by the Division under CRIPA and rejected the assertion that such claims violated constitutional standards.[64] In that case the Western District of Pennsylvania noted, "[t]he Supreme Court has held that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professional choices should have been made."[65] "Liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or

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[58] *See* DORIS J. JAMES& LAUREN E. GLAZE, U.S. DEP'T , BUREAU OF JUSTICE STATITICS SPECIAL REPORT, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006).
[59] Id.
[60] Letter at 13; Jimmy Roberts is a pseudonym
[61] Id.
[62] Id.
[63] The NYSCOC apparently made a complaint to the New York State Office of Professional conduct about the physician at issue in relation to the medical treatment provided to Jimmy Roberts.
[64] *See*, United States v. Commonwealth of Pennsylvania, 902 F. Supp. 565, 582 (W.D.P.A.1995).
[65] Id. at 582, citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982).

standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[66] "'[P]rofessional judgment' has nothing to do with what course of action would make patients 'safer, happier and more productive.' Rather, it is a standard that determines whether a particular decision has substantially met professionally accepted minimum standards."[67]

The Court went on to note, "Even if every expert testifying at trial agrees that another type of treatment or residence setting might be better, the federal courts may only decide whether the treatment or residence setting that actually was selected was a 'substantial departure' from prevailing standards of practice."[68] The Court further held that "Isolated instances of inadequate care, or even malpractice, do[] not demonstrate a constitutional violation."[69] The Court concluded that the Division failed to establish a CRIPA violation.

Strikingly similar to the present case, the Division falls far short of demonstrating any unconstitutional custom or policy with respect to the provision of mental health services to inmates at the Facilities. To the contrary, the Facilities are providing care that far exceeds the minimal constitutional requirements and inmate "Jimmie Roberts" clearly received constitutionally adequate medical care while incarcerated at the ECHC.

2. Suicide Prevention Measures

"In the case of an inmate who presents a suicide risk, prison officials have an obligation to take reasonable measures to protect the inmate's vulnerable mental state and to protect him or her from self-inflicted injury."[70] The court went on to say that "[A] prison official does not act in a deliberately indifferent manner unless that official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" [71] Where courts have analyzed this standard, it has noted that "the search for blame or fault, particularly with the benefit of hindsight, can too easily infect what must be dispassionate analysis. Simply laying blame or fault and pointing out what might have been done is insufficient. *The question is not whether the jailers did all they could have, but whether they did all the Constitution requires.*" [Emphasis added]. [72]

In a recent case from the Eastern District of New York, the court opined, "It is deceivingly inviting to take the suicide, *ipso facto*, as conclusive proof of deliberate indifference. However, where suicidal tendencies are discovered and preventive measures taken, the question is only whether the measures taken were so inadequate as to be deliberately indifferent to the

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[66] Id. at 582, citing *Youngberg* at 322-23.
[67] Id. at 583, citing, Society for Good Will to Retarded Children Inc v. Cuomo, 737 F.2d at 1239, 1248 (2d Cir. 1984)(Isolated incidents do not give rise to unconstitutional policies and certainly do not demonstrate deliberate indifference to the mental health needs of inmates).
[68] Id. at 584.
[69] Id. at 589.
[70] Eze v. Higgins, No. 95-CV-6S, 1996 WL 861935, at *8 (W.D.N.Y. Mar. 20, 1996)
[71] Id. at *3 (quoting Hathaway v. Coughlin, 37 F.3d 63, 66 (2d. Cir. 1994)).
[72] Rellergert v. Cape Girardeau County, 924 F.2d 794, 797 (8th Cir. 1991).

risk."[73] There is no doubt that at all times the County was exceeding the constitutional standards with respect to suicide prevention measures for inmates. Furthermore, the County is currently meeting the best practices standard recommended by the NCCHC, an authority that the Division routinely relies upon for technical advice in its CRIPA investigations.

On pages 9-10 of the Letter, the Division stated that "ECHC and ECCF's current suicide prevention policies do not comport with generally accepted standards of correctional mental health care." The Division further purported, "[a]lthough the policies we reviewed appear sound, it is clear by the number of recent suicides and attempted suicides that there are serious problems with how the policy is implemented and followed."[74] Implicit in this axiomatic statement by the Division is that it has the ability to prevent both attempted and actual suicides of inmates, which is nothing short of wishful thinking.

Significantly, the Division did not cite any legal support for its articulated nine (9) part suicide prevention standard, leaving the County to speculate where such "standard" was expressed. Indeed, given the fact that the County has at all times followed the guidelines promulgated by the COC relative to suicide screenings, if the Division's supposition were true, which it is not, then all detention facilities in New York utilizing the State mandated intake screening form are apparently in violation of CRIPA as well.

Even more surprising is the fact that while the Division had obtained a complete copy of the NCCHC study initiated by the County for purposes of providing technical assistance, the Division failed to mention that of the 12 component "best practices" standard promulgated by NCCHC, the County had ten components in place at the time the NCCHC study was completed and since that time the County has implemented the full twelve components into its suicide screening process at the Facilities.

The Division failed to identify what if anything about the County's policies or practices violate the constitution. The Division also alleges that the NCCHC "warned" the Facilities about housing potentially suicidal inmates in unsafe cells and stated that since 2003, at least 23 inmates either committed, or attempted to commit, suicide or took steps that demonstrated suicidal ideation.[75] The Division goes on to state "Between 2007-2008 there were three suicides and at least ten attempted suicides."

As noted in section "B" of this letter which provides extensive statistical information related to the County's jail operations, the County expends a significant amount of taxpayer dollars to fund mental health professionals who provide services to inmates. All inmates are given a suicide prevention screening at intake. As outlined in the suicide prevention policy for the Facilities, inmates who are deemed to be at risk for suicide (as determined by the many mental health professionals who examine and treat inmates at the Facilities), are placed on constant observation. Constant observation is the practice whereby a deputy constantly observes the inmate to ensure that he or she does not attempt to harm him or herself and regularly records the inmate activity. An inmate is maintained in constant observation until such time as a mental

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[73] Kelsey v. City of New York, 2006 U.S. Dist. LEXIS 91977, at *14 (E.D.N.Y. December 18, 2006)(citing Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996).
[74] Letter at 9-10.
[75] Letter at 10.

health professional clears the inmate by determining that the inmate no longer presents a risk for suicide. In addition, forensic mental health professionals determine whether the inmate is permitted to have certain items, especially if the item(s) could harm the inmate.

The Division did not cite any authority or statistics to support its suggestion that the suicide rate in the Facilities is higher than similar facilities. To the contrary, the suicide rate at the Facilities is much lower than the national average for local jails and lower than the rate in New York State Prisons. The Bureau of Justice Statistics (hereafter "BJS"), another agency of the United States Department of Justice, maintains national suicide rates for inmates in local jails. In its last report issued in 2005, the BJS reported that the suicide rate for inmates in local jails was 47 per 100,000 inmates.[76] The BJS noted that violent offenders had suicide rates over twice as high as those for non violent offenders (31 and 9 per 100,000 respectively).[77] The BJS noted that suicide rates in State Prisons were three times less than the rates in local jails and have been historically lower.[78] Significantly, the suicide rate in New York State Department of Corrections Facilities (even though it should be lower than local jails) was 28.3 per 100,000 for the year 2007.

Given the statistical data, the sound policies, and professional efforts exerted by staff at the Facilities, including classification and housing deputies, forensic mental health staff and medical staff to identify and prevent suicides, it is clear that the County is not deliberately indifferent to suicide prevention. Rather, the facts reveal that the number of suicides in the Facilities do not even approach the national average or average in the State facilities which historically have lower statistical deaths from suicides. While any suicide is an unfortunate occurrence, it is a nationally recognized phenomenon that occurs in prisons and jails, as well as in the community at large despite the best efforts of mental health professionals and family members. This statistical evidence further establishes that the Facilities meet the constitutional requirements for suicide prevention.

In short, the Division refused to acknowledge that the County was complying with the rigorous COC standards for suicide screening, and was in substantial compliance with the NCCHC best practices for suicide screenings, instead engaging in self-selective conclusory allegations. This transparent attempt by the Division to make a case where none exists should be not be condoned.

3. Protection From Harm / Use of Force

Under the Use of Force section of the Letter, the Division initially criticizes the policies and procedures manuals of the Facilities.[79] Without challenging the substance of the policies, the Division is critical of the fact that there are separate manuals for each facility and that the inmate handbook is available in Spanish at ECCF, but not at ECHC.[80] The Division is also critical of the fact that the County employs "two separate workforces" to supervise the inmates, apparently referring to the two public employee unions who work at the Facilities.[81] Even if there was

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[76] See Suicide and Homicide in State Prisons and Local Jails, Bureau of Justice Statistics report issued August 2005.
[77] *Id.*
[78] BJS Report.at 2
[79] Letter at 15.
[80] Letter at 15.
[81] Letter at 23.

credence for these criticisms, such deficiencies do not constitute constitutional violations. Indeed, the Division does not cite any case law or regulation that states otherwise.

a. Two Workforces

The dysfunctional governance of New York is well-known throughout the United States, as are the protections afforded to public employees. The history of the two work forces at the Facilities is well documented in a nine year legal battle that occurred between 2000 and 2009 and went all the way up to the New York State Court of Appeals, New York State's highest court, by permission.[82] Two separate work units historically worked in each facility when one facility was managed by the Executive branch of County government and one facility was managed by the Sheriff.[83] Traditionally, the Civil Service Employees Association ("CSEA") supervised sentenced inmates at ECCF, while Teamsters supervised pretrial inmates at the ECHC.

In 2000 the Facilities were merged under the Sheriff and proceedings before the New York State Public Employment Relations Board resulted in rulings that the County and Sheriff could not merge prisoners and had to keep the work separate due to union work rules.[84] The issue was brought to a head when the Sheriff attempted to implement the classification system mandated by the NYSCOC which required the Sheriff to segregate prisoners solely by risk and not by sentence status. After implementing a unified classification system in 2002 in accordance with the NYCOC mandate, both unions filed suits against the County and Sheriff alleging violations of the New York State Taylor Law.[85]

The County and Sheriff lost at every administrative level and in the lower courts until the Court of Appeals reversed in 2009 concluding that the Sheriff had authority to assign prisoners in accordance with State regulations without regard to allocation of work between unions.[86] Given the history of these costly, lengthy and well publicized legal proceedings that culminated with the proper result, any suggestion by the Division that the County voluntarily set up its work force in this manner is specious. Notwithstanding these facts, the Division's observations regarding the two union work forces and its perceived inefficiency does not rise to a constitutional violation and no authority is cited for same.

For the same reason, the Division's comments about the Facilities' classification system fails.[87] Prior to the ruling, the Sheriff classified prisoners according to risk and housed them safely in accordance with NYCOC regulations. After the merger in 2000, the NYCOC mandated that it wanted the Sheriff to use all beds at both Facilities for efficient purposes, which required the co-mingling of post-sentenced and pre-trial detainees. During the legal proceeding cited above, both the New York State Public Employment Relations Board and lower courts prevented the Sheriff from implementing this unified classification plan. Although ultimately vindicated by the Court of Appeals, the Sheriff has only recently been given the freedom to implement the plan.

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[82] *See* County of Erie v. State of New York Public Employment Relations Board, 12 N.Y.3d 72 (2009).
[83] *Id.*
[84] *Id.*
[85] *See* Civil Service Law §209-a.
[86] *Id.*
[87] Letter at 24.

The Division does not link any alleged incidents to its commentary on the two work forces or classification plan. Furthermore, there is no demonstration in the Letter of a custom or practice involving classification which has resulted in the deprivation of an inmate's constitutional rights. As with other topics, the Letter fails to contain even a single court case addressing this issue and supporting its position that the classification plan is "inadequate."[88]

b. Deficient Use of Force Policies and Procedures.

Glaringly absent from this section of the Letter is any case law, rule or regulation that supports the Division's unfounded opinion that changes should be made to the Facilities' manual or that any alleged deficiency in the manual has caused deputies to violate inmate's constitutional rights by using excessive force. Moreover, the NYCOC, who regularly conducts cycle audits and surprise inspections at the Facilities, has not cited the Facilities for its use of force, policies, or procedures. The NYCOC requires completion of a Use of Force Form when force is applied to a prisoner. The policies and procedures at the Facilities comply with NYCOC standards and forms are completed under appropriate circumstances.

Reportable incidents (as defined by the NYSCOC) at the Facilities are regularly sent to the NYCOC, as required, for its review. There have been no issues raised by the NYCOC regarding the use of force at the Facilities and certainly no systemic allegations of abuse can be established.

c. Excessive Use of Force.

As the Division is surely aware, the Courts have articulated that conduct in an excessive force case must be particularly egregious to rise to a constitutional violation.[89] Moreover, the Courts distinguish between liability against individual officers for constitutional violations and liability against supervisors such as the Sheriff and municipalities such as the County.[90]

i. Standard Against Individual Officers

The Eighth Amendment, which applies to states through the Due Process Clause of the Fourteenth Amendment,[91] prohibits the infliction of "cruel and unusual punishment."[92] The appropriate test under the Eighth Amendment involves both subjective and objective elements.[93] The subjective element is that the defendant must have had the necessary level of culpability, shown by actions characterized by "wantonness."[94] The objective element is that the injury actually inflicted must be sufficiently serious to warrant Eighth Amendment protection. Still,

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[88] It appears the Division relied upon NYSCOC reports criticizing the classification plan and the NCCHC report which commented on the issue. The NYSCOC was well aware of the legal battle between the County and the unions regarding the merger as some of its employees were called as witnesses before PERB at a hearing in the legal proceeding. The NYSCOC was also aware that the labor issues between the two facilities were completely outside the control of the Sheriff or the County.

[89] Blyden v. Mancusi, 186 F.2d 252 (2d Cir. 1998).

[90] Id. at 262-265.

[91] Robinson v. California, 370 U.S. 660, 666 (1962)

[92] Id.

[93] Id., *See* Wilson v. Seiter, 501 U.S. 294, 298-99 (1991); Davidson v. Flynn, 32 F.3d 27, 29 (2d Cir.1994)

[94] Id., quoting Wilson, 501 U.S. at 298-99 (citing Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)).

this standard requires that only the deliberate infliction of punishment, and not an ordinary lack of due care for prisoner interests or safety, lead to liability.[95]

The "wantonness" inquiry turns on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[96] The objective component of the Eighth Amendment test is also context specific, turning upon " 'contemporary standards of decency.'" [97] "Because society does not expect or intend prison conditions to be comfortable, **only extreme deprivations are sufficient to sustain a 'conditions-of-confinement' claim.**"[98]

ii. Standard Against the Sheriff and Erie County

A supervisor or municipality is not vicariously liable for acts committed by its employees and officers under 42 USC §1983.[99] Similarly CRIPA requires an unconstitutional custom or policy before the Department obtains jurisdiction. "The liability of a supervisor under Section 1983 is thus analytically distinct from that of a subordinate who directly caused the unlawful condition or event."[100] To impose liability upon the County or Sheriff under CRIPA, the Department must establish a constitutional violation of an officer and that such constitutional violation was proximately caused by an unconstitutional custom or policy of the Sheriff and/or the County.[101] The Letter falls far short of describing any unconstitutional custom or policy that violates CRIPA at the Facilities.

iii. Response to Alleged Incidents

In its letter, the Division, outlines alleged isolated and unrelated incidents in an attempt to cobble together a "finding" of alleged excessive force, alleged inadequate reporting of the use of force, alleged deputy encouraged violence, alleged inmate on inmate violence and alleged unprofessional and provocative attitudes towards inmates.[102] The examples on pages 18 and 19 of the Letter lack any identifying information and certainly not the names of alleged inmates involved or dates of the alleged incidents as required by CRIPA. Perhaps more details could have been provided if the inmate interviews were transcribed by a stenographer as requested by the County with the transcripts being provided to the County.[103] Nonetheless, the County and Sheriff are really without means to verify any of the alleged incidents due to lack of factual

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[95] Id.
[96] Id. at 263 quoting Hudson v. McMillian, 503 U.S. 1, 7 (1992).
[97] Id., citing Hudson, 503 U.S. at 8. (quoting Estelle, 429 U.S. at 103).
[98] Id., quoting Hudson, at page 9 (emphasis added).
[99] Id., citing Monell v. Department of Soc. Servs., 436 U.S. 658, 692-94 (1978)(other citations omitted).
[100] Id., (other citations omitted).
[101] Blyden, supra.
[102] Letter at 18-23
[103] The Division's claim that it cannot provide the County this information because of fear of inmate retaliation is bogus. As demonstrated by the statistical data, 80% of inmates are released from custody within 15 days of admission. Accordingly, any of the inmates who allegedly witnessed this alleged conduct are probably no longer in the custody of the Facilities and have no reason to fear reprisal. By accepting off the record, unsworn hearsay statements as fact, the Division has adopted wholly unreliable recitations of events that may or may not have occurred. The County requested recorded statements so that the record would be clear as to what was said by the inmates, whether true or false.

detail.[104]

The County can state affirmatively that at least two of the incidents never occurred and are pure fabrication by inmates. The Facilities' policies provide that no body cavity searches may be performed without the explicit authorization of the Superintendent pursuant to court order. Indeed, very specific conditions must be present before the Superintendent can obtain such court order under the policy. Moreover, if a body cavity search is ordered by the Court, the body cavity search is conducted at ECMC by a licensed Physician, Nurse Practitioner or Physician's Assistant as directed by the Facilities' policy. Deputies at the Facilities do not search anal or vaginal cavities. Accordingly, the second allegation on page 18 is unequivocally false.

Additionally, the County and Sheriff have searched their records to ascertain whether a pregnant inmate really had her teeth knocked out. There is absolutely no evidence that this event even occurred. Moreover, if such an outrageous event had occurred, we expect that the County or Sheriff would have been sued since inmates do not hesitate to bring lawsuits if they feel their rights have been violated. There has been no such claim made. In addition to lawsuits, inmates can file grievances if they are dissatisfied with conditions at the Facilities. There have been no grievances filed alleging that this event occurred. Accordingly, this too appears to be wholly fabricated.

The Division then claims that "ECHC fails to elicit adequate information about the use of force incidents, making management review ineffective."[105] In doing so, the Division claims that on a few occasions a use of force form was not used. There is no case law cited in which a Court has held that failure to use a use of force form is a constitutional violation under CRIPA. Indeed, even if this occurred, which is not conceded, it would not rise to a systemic constitutional violation.

In fact, the administration of the ECSO works diligently to ensure that the appropriate amount of force is used in the Facilities through monitoring, training and policy. Annual training is provided on the use of force as required by the NYSCOC. In addition, separate training is provided for OC Spray. New sworn staff spend a great deal of time at the Training Academy on use of force concepts, techniques, forms and procedures.

Not only are all reportable incidents that are forwarded to the NYCOC reviewed by top level administrators at the Facilities, other steps are taken to monitor the use of force at the Facilities. Management conducts regular and frequent reviews of statements from staff involved in use of force incidents, as well as statements made by supervisors. Management regularly meets with staff to discuss and question about incidents as needed. Management reviews any video or pictures, as well as use of force forms. Medical reports (if the inmate was seen by medical) are also reviewed and management will confer with medical staff if necessary to obtain additional information.

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[104] Again, given the fact that the Facilities process in excess of 20,000 inmates per year, the lack of identifying information really burdens the County in trying to ascertain whether events even occurred.
[105] Letter at 19.

Any suspicious incidents or incidents in which management feels excessive force might have been utilized are referred to the Professional Standards Division for investigation. Management also regularly reviews staff performance evaluations to identify whether any staff appear to be more involved in incidents, have problems managing inmates, and/or have a large number of inmate complaints or grievances against them. Depending on the circumstances, management may add additional training, and /or investigate and discipline staff member up to and including termination as a result of the reviews. Accordingly, the Division's conclusion that inadequate monitoring occurs is erroneous.

The Division further claims that the Facilities lack adequate staff to protect inmates. The NYCOC regulates and mandates the amount of staff that must be present at posts in order for the Facilities to be in compliance with State regulations. The Facilities meet the minimum staffing requirements of the NYCOC.[106] Between January 1, 2007 and February 9, 2008, the Division cited over 70 reported incidents of inmate-on-inmate violence, including sexual assaults. The Division does not indicate how it came up with that number. For instance, it is not clear that if two inmates were involved in one incident, whether the Division counted the incident as one incident or two incidents. Similarly, the Division does not define what it considers "inmate-on-inmate violence." The Division also comments on the alleged social habits between prisoners, and how prisoners become angry over trivial matters which offers nothing to the analysis.

There is no comparative information of similar facilities set forth by the Division to support its conclusions that these alleged incidents have statistical significance in light of the population at the Facilities. Moreover, the NYCOC, which receives reports of all reportable incidents from the Facilities has not cited the Facilities as having any problems with excessive force, assaults or sexual assaults.

In a perfect world, the County would like to have as much staff as possible at the Facilities. However, given the fact that the County must balance its budget on the backs of taxpayers, priority must be given to meet State and Federal mandates (including staffing levels at the Facilities) while balancing other critical services that taxpayers expect and want from County government. Given the astronomical amount of funding that has been provided to the Facilities over the years, neither the County nor Sheriff (or the Erie County taxpayer for that matter) have been deliberately indifferent to the needs of inmates. The Facilities clearly meet the constitutional requirements with respect to use of force and supervision and treatment of inmates.

4. Medical Care

The County meets, and in some instances exceeds, the constitutionally minimum requirements for providing medical services to inmates. The Facilities have continued to make improvements in the delivery of medical care to its inmates both before the Investigation of the Division and after receipt of technical assistance from the NCHCC report in February 2008.

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[106] Being in compliance with NYCOC standards, which are more rigorous than what the Constitution requires, means that the facility is not staffed below unidentified constitutional standards relied upon by the Division. By the same token, to the extent the Division alleges the Facilities are not in compliance with NYCOC standards, being out of compliance with the more rigorous standards does not automatically result in a constitutional violation under CRIPA.

The County has also made significant financial investments in the health care of inmates. In 2008 personnel costs for medical staff totaled one million six hundred forty six thousand four hundred seventy six dollars ($1,646,476). In addition, in 2008 the County contracted the services of physicians and physicians assistants to provide medical care at the Facilities at the cost of ninety-nine thousand seven hundred eighty two dollars ($99,782). The County also added new positions to the budget for fiscal year 2009 to increase the amount of staff delivering medical care at the Facilities.

Twenty three (23) new positions were added to the budget for 2009 at a total cost of almost one million dollars ($1,000,000). Additional positions approved were a Psychiatric Nurse Clinician and other registered nurse positions. In a move to streamline operations under the Health Department, as well as to better utilize resources within that department for the delivery of medical services to inmates, the medical unit positions in the ECSO budget were transferred into the Department of Health in the summer of 2009. Additional staff have been hired and with the cooperation of the labor unions[107] nurses from the Health Department have worked overtime at the Facilities to increase coverage.

In recent years, the County contracted with a Nursing Supervisor/Administrator, as well as a Chief Medical Officer and to review and overhaul operations where necessary. This Nursing Administrator was recently certified by the NCCHC in correctional health standards after taking an examination. This certification is so rare, that there are very few individuals in New York State who possess it.

Officials have been meeting regularly to discuss continued improvements to medical services at the facilities. Some of the improvements that have been implemented, include, but are not limited to, improved documentation in nursing notes, new unified charts consistent at ECHC and ECCF to be instituted by end of 9/09, implementation of a program to better transfer charts and medication between facilities and implementation of electronic records to be completed by early 2010 (which will eliminate the need to transfer paper charts). In addition, forensic mental health now has an area close to medical which has resulted in more collaboration between the forensic mental health unit and the medical department.

In 2008, the County entered into a new contract with a pharmaceutical company to provide blister pack prescriptions customized for inmates. Nurses now pass blister packs assigned to inmates. This cuts down on any potential errors. Also, with the use of on line technology, prescriptions are filled in a much more expedient manner. A pharmacy license was also obtained for the ECHC. The use of blister packs will also save money as unused medications can be returned for a refund. The total cost of prescriptions for the Facilities in 2008 was one million sixty-eight thousand fifty one dollars ($1,068,051). The projected cost for 2009 is eight hundred sixty-five thousand nine hundred fifty dollars ($865,950) with the projected savings attributable to the credit for returned unused medications.

In 2009, two new head nurses were appointed. They perform day-to-day activities, chart review and supervise staff. The Nursing Administrator has been instrumental in persuading a local college to institute a curriculum for Correctional Health and encouraging a four-year

[107] Teamsters and New York State Nurses Association

program. In conjunction with this local college interns have been utilized to help out in the medical department.

Training of medical staff has been increased over the last couple years. In -services have been provided on many areas, including, but not limited to, TB policies and procedures and H1N1 policy and procedure. In addition, nursing protocols have been revised, completed and instituted in the Facilities. Training and orientation on new policies has been completed. A Clinical Laboratory Improvement Amendment (CLIA) license has been obtained for testing in both facilities. In addition, a mortality review committee was established to review appropriate cases in accordance with NCCHC recommendations.

Nonetheless, in yet another scathing indictment by the Division of the County's allegedly constitutionally inadequate policies, the Division claims, "Our investigation revealed that medical care provided at [the Facilities] falls far below constitutionally required standards of care."[108] The Division attributed this "finding" to allegedly inadequate administration of health care services at the Facilities, no quality improvement programs or monitoring procedures in place to internally assess the quality of health care, and medical policies and procedures that fail to provide staff operational guidance on quality of care.[109]

In order to make a showing of inadequate medical care in violation of the Eighth Amendment's prohibition of cruel and unusual punishment, "a plaintiff must demonstrate that defendants acted with 'deliberate indifference to [his] serious medical needs' through the intentional 'den[ial] or delay[] [of] access to medical care or [that they] intentionally interfered with the treatment once prescribed."[110] "To support a claim of deliberate indifference, a plaintiff must show: (1) the objective seriousness of his medical condition, i.e., that he was suffering from 'a condition of urgency, [or] on that may produce death, degeneration, or extreme pain,' and (2) that defendants had a subjectively culpable mind set in treating or failing to treat this condition, i.e, that defendants knew of and disregarded an excessive risk of harm to the inmate."[111] In order to have jurisdiction under CRIPA, the Division show more than individual incidents of denial of medical treatment. It must demonstrate a systemic deliberate indifference to serious medical needs of inmates resulting in constitutional violations. The Division has clearly not done so in the Letter.

By way of example, the Division claims that inmates "suffering from serious medical conditions require continual observation and consistent treatment and care in order to protect them from harm," which, according to the Division, is not provided at the Facilities.[112] In so "finding" the Division cites to "four inmates suffering multiple seizures who were told to sleep on the floor"; "providing inadequate dental care to an inmate suffering pain and a sensitivity to food and liquids;" and "while delivering prescribed medication to an inmate, it was discovered that the inmate had died due to unknown causes." Because the Division failed to identify any specific inmates at issue, through a pseudonym or otherwise, the County has been required to cull through extensive records to attempt to identify the alleged inmates at issue.

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[108] See Letter from Loretta King to County dated July 15, 2009 at p. 28.
[109] See Letter from Loretta King to County dated July 15, 2009 at p. 29.
[110] Patrick v. Amicucci, 2007 WL 840124, at * 5 (S.D.N.Y. 2007) (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976); see also Goodson v. Evans, 438 F. Supp. 2d 199 (W.D.N.Y. 2006).
[111] Id.
[112] See Letter from Loretta King to County dated July 15, 2009 at 31.

Initially, none of the allegations at issue rise to the level of a constitutional violation of inmates civil rights under CRIPA. Rather, the County has employed sound medical practice and protocol in connection with inmates suffering from and diagnosed with seizure disorders. In sum, the County's protocol recommends that inmates suffering from seizure disorders be instructed to remove their mattress from the bed to the floor for purposes of sleeping so they are not in danger of injury from falling out of bed should they experience a seizure. There is no mandatory requirement that inmates do so and this protocol is entirely discretionary.

With respect to the allegation that an inmate expired in March 2007 due to "unknown causes," the Division has yet again exaggerated the truth.[113] The inmate at issue, who will be described as inmate AA for purposes of identification, was incarcerated several times at the Facilities from early 2003 through March 2007. Upon inmate AA's return to the ECHC on September 8, 2006 he received a routine medical evaluation. Inmate AA had a past medical history including non-insulin dependent diabetes, congestive heart failure, hypertension and dyslipidemia. Inmate AA was continued on 3 separate medications for hypertension, one medication for dyslipidemia, two medications for coronary artery disease, one medication for diabetes and another medication for constipation. Inmate AA was seen in the medical department for various medical issues on 9/12/06, 9/14/06, 9/16/06 and 9/18/06, at which time he was transferred to ECMC for the implantation of a pacemaker (at taxpayer expense). Inmate AA returned to the ECHC on 10/1/06 following surgical implantation of the pacemaker with instructions for follow-up, new medications and diet. Inmate AA was subsequently seen in the medical department on 10/5/06 and 10/6/06. Inmate AA was also seen at the ECMC clinic on 11/2/06. On 11/8/06 inmate AA was again evaluated in the medical department and transferred back to ECMC for additional observation until 11/17/06. Inmate AA was again seen by medical personnel at the Facilities on 11/17/06, 11/18/06 and 11/21/06 when he was again returned to ECMC to be further evaluated. Inmate AA returned from ECMC on 11/28/06. Inmate AA had blood work done on 12/5/06, and was returned to ECMC on 12/7/06 through 12/19/06 for treatment related to congestive heart failure and pedal edema. It was noted at this time that inmate AA was feeling much better and medications were obtained as ordered by ECMC. Inmate AA was seen at the ECMC renal hypertension clinic for regular follow up on 1/18/07 and blood work was performed on 2/2/07. The results of the blood work were noted in the file on 2/12/07 and on 2/18/07 inmate AA made a special request for medication related to his dry skin. On 2/23/07 another blood sample was collected and the labs were returned and recorded in the chart on 2/28/07. Inmate AA was seen in the ECMC pacemaker clinic on 3/1/07, and was reported as doing well. A follow up visit was scheduled for 8/16/07. On 3/23/07 the inmate visited the podiatry clinic. On 3/24/07 inmate AA received a diabetic breakfast which was left at the cell bunk pursuant to inmate AA's request. During the regular rounds between 6 a.m. and 9:30 inmate AA was observed sleeping. When the nurse came to cell block to distribute medication inmate AA was summoned. Inmate AA did not respond to the request at which point the nurse attempted to awaken inmate AA, who was non-responsive. An emergency was called and the medical team performed CPR until an ambulance arrived. Inmate AA left the unit at 10:39 a.m. and was pronounced dead at ECMC at 10:52 a.m. The medical examiner ruled that the death was natural, due to hypertrophic and atherosclerotic cardiovascular disease. The amount of medical care and treatment rendered to inmate AA clearly contradicts the allegations

[113] Upon information and belief the Division was provided with a copy of the COC report regarding this inmate in connection with its Investigation findings.

of the Division. Try as it may, and it does, the Division cannot in good faith accuse the County of deliberate indifference to the medical needs of inmate AA.

In its Letter, the Division also cites as an example of inmates suffering from serious medical conditions not receiving adequate medical treatment, a citation issued to ECCF regarding dental care of an inmate.[114] The report states "In April 2007, ECCF was cited for providing inadequate dental care to an inmate suffering from pain and a sensitivity to food and liquids. The Citizens Policy and Complaint Review Council found that ECCF took too long to respond to the inmate's request to see a doctor regarding his pain, finding 21 days unreasonably long".

The inmate described above, referred to as Inmate BB herein, was brought into custody at ECHC on November 25, 2006. Inmate BB was transferred to the ECCF on 12/21/06 and remained there until 1/22/07, at which time inmate BB was transferred back to the ECHC. On 12/21/06 inmate BB was evaluated at the ECCF, where the only complaint noted by the inmate's self-report was hearing loss in the right ear, with a notation of chronic mastoiditis in the right ear. An evaluation at ECMC occurring on 12/16/06. There is an additional note to check with ECMC on prescription ear drops. There is no indication that inmate BB made any complaint at that time regarding dental discomfort of any kind.

On 1/19/07, inmate BB submitted an inmate grievance form indicating that a request was made for an emergency sick call with a facility dentist five times because a cavity filling came out. According to the dental sick call log book, it appears that inmate BB requested to be placed on the dental sick call list on 1/1/07. There is no record of any additional requests. The grievance was investigated on 1/23/07 and denied. Inmate BB had been scheduled to see the dentist on 1/25/07, but was transferred back to the ECHC on 1/22/07, where inmate BB was re-scheduled for a dental visit on 1/31/07. On 1/31/07, inmate BB returned to court and was unable to keep the re-scheduled appointment. Inmate BB was seen by the dentist on 2/9/07, who placed a temporary filling. Inmate BB was seen again by the dentist on 2/16/07, was examined in the medical department following the loss of the temporary filling on 3/23/07, and saw the dentist again on 3/28/07.

The NYSCOC letter of 5/24/07 to the County advising that there was an unacceptable delay in treating this inmate's dental complaints does not contain any basis for the finding given the facts at issue. There is no basis given for the arbitrary statement that a twenty-one day wait to see a dentist is too long. In fact a 2009 survey of physician appointment wait times surveyed fifteen metropolitan areas in five practice areas, including cardiology, dermatology, obstetrics-gynecology, orthopedic surgery and family practice. The average in all surveyed markets for all the practice areas was 20.5 days.[115] At the time in question, inmates at the ECCF were seen in the dental clinic one day per week, and were scheduled according to the severity of the complaints.

As the Supreme Court has observed that, "society does not expect that prisoners will have unqualified access to health care."[116] Accordingly, deliberate indifference to medical needs

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[114] The Division examined a letter from the NYSCOC to the County dated April 24, 2007 in reaching its conclusions. See p. 31 at footnote 54.
[115] See Merrit Hawkins & Associates, 2009 Survey of Physician Appointment Wait Times at p. 14
[116] Hudson v. McMillian, 503 U.S. 1, 9 (1992).

amounts to an Eighth Amendment violation only if those needs are "serious."[117] "For a plaintiff to satisfy the objective prong, 'more than minor discomfort or injury is required . . . to demonstrate a serious medical need."[118] While a lost filling can cause discomfort, it hardly rises to a "serious medical need" of the magnitude of a constitutional violation. In fact, the dental treatment report for 2/9/07 does not note the presence of any infection, or the need for any medication or prescribed treatment, other than the temporary filling that was placed that day.

The inclusion of this treatment as an example of inadequate medical care rendered to inmates at these facilities only highlights the fact that the Division has not cited constitutional violations.

5. Sanitation and Environmental Conditions

The threshold for a prisoner alleging unconstitutional conditions of confinement is the showing of "extreme deprivations."[119] "Because society does not expect or intend prison conditions to be comfortable, only extreme deprivations are sufficient to sustain a 'conditions-of-confinement' claim."[120] Conditions of confinement must not involve wanton and unnecessary infliction of pain or be grossly disproportionate to the severity of the crime warranting imprisonment.[121] "Because routine discomfort is 'part of the penalty the criminal offenders pay for their offenses against society,' 'only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of [a constitutional] violation."[122]

The Division boldly asserts that "ECHC has severe environmental health and safety problems at numerous levels of operation." [123] In support of this accusation the Division sets forth the tale of an inmate who claimed "he was housed, for at least one month, in an ECHC cell with four inches of standing water due to toilet flooding." [124] Despite the fact that there is absolutely no evidence in the possession of the County to support this specious claim, and the laws of science coupled with the physical plant structure would prohibit such an occurrence at the Facilities in any event, the Division is statutorily required under CRIPA to provide "factual" information regarding such allegations. This includes, but not limited to, the housing unit, cell number or inmate name, which would then allow the County to identify and investigate this "claim."

The Division also referred to a COC ECHC Cycle 2 Evaluation from August 2007 which reported Styrofoam food trays and other clutter observed in certain inmate's cells. [125] The Division failed to articulate how an inmate's failure to remove his/her Styrofoam food tray from his/her cell after finishing a meal rises to the level of a constitutional violation. Indeed, it does not.

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[117] Id. (citing Estelle, 429 U.S. at 104.).
[118] Patrick, 2007 WL 840124 at * 6 (S.D.N.Y. 2007) (citing Sully-Martinez v. Glover, No. 00 Civ. 5997, 2001 WL 1491278, at *4 (S.D.N.Y. Nov. 26, 2001).
[119] Sims v. Artuz, 230 F.3d 14, 21 (2d Cir. 2000)(quoting Hudson v. McMillian, 503 U.S. 1, 8 (1992).
[120] Blyden v. Mancusi, 186 F.3d 252, 263 (2d Cir. 1999).
[121] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
[122] Hudson v. McMillian, 503 U.S. 1, 9 (1992)(internal citations omitted).
[123] *See* Letter at 34.
[124] *Id.* at 35.
[125] *Id.*

Additionally, the Division reports that "[COC] has cited ECSO and JMD for electrical hazards that neither correctional officers nor maintenance staff seemed to be concerned about..."[126] The Division does not identify when the alleged citation was issued or what specific "electrical hazards" were cited. A review of the materials generally referenced by the Division leads the County to conclude that the Division is referring to COC's ECHC Cycle 2 Evaluation from April 2007. In the April 2007 Cycle 2 Evaluation, COC reported observing exposed wires in the Foxtrot East housing area where a wall clock, which no longer functioned, had been removed.[127] In the same evaluation, COC reported observing a light fixture in the ground level shower of the Gulf East housing area that was missing three screws.[128] In what appears to be yet another transparent attempt to assuage a visceral reaction to such allegations against the County, the Division fails to report that these "electrical hazards" were immediately remedied as noted in the COC's ECHC Cycle 2 Evaluation from August 2007.[129] Rather than acknowledging that the "deficiencies" discussed above were promptly and properly resolved, the Division recommended that the County "Repair electrical shock hazards; develop and implement a system for maintenance and repair of electrical outlets, devices, and exposed electrical wires."[130]

Given the fact that over the last year and a half the County has processed over 4000 work orders at the Facilities reflecting approximately 31,500+ labor hours at a cost of $884,389 to County taxpayers, it is obvious that the County takes its obligation to provide constitutionally adequate conditions of confinement seriously.

The Division also addresses laundry services at ECHC and ECCF, "finding" that such services at both facilities are inadequate[131] and reporting that inmates were required to wash their own garments in their cell sinks or arrange for the pick-up and laundering of their personal items by family or friends.[132] The fact that inmates may have to wash his/her garments in his/her cell sink is not a constitutional violation. As noted by NYSCC in its Cycle 3 evaluation from October 2008, inmates are provided bar soap to clean their clothes and are able to purchase cleaning detergent through the commissary. No constitutional violation exists where inmates are permitted to wash their clothes in sinks and are provided with laundry detergent or bar soap.[133]

In short, the Division's "finding" that ECHC has severe environmental health and safety problems at numerous levels of operation, is false. The Division's self-serving omissions are a blatant attempt to find violations where none exist or have previously been remedied. Further, even assuming *arguendo*, that the Divisions allegations of environmental health and safety deficiencies are accurate, which they are not, the Division fails to articulate how said deficiencies rise the level of constitutional violations supported by applicable case law and/or statute. Instead, the Division apparently focuses on aspirational best practices rather than expressing what is minimally required by the Constitution. "[A] prisoner must demonstrate that he has been deprived of a 'single, identifiable human need such as food, warmth, or exercise.' If, however, the condition is not sufficiently prolonged or severe, it does not rise to the level of a

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[126] Id.
[127] NYSCC ECHC Cycle 2 Evaluation April 2007, p. 6.
[128] Id.
[129] NYSCC ECHC Cycle 2 Evaluation August 2007, p. 3.
[130] *See* Letter at 48.
[131] Id. at 36.
[132] Id.
[133] Benjamin v. Fraser, 161 F.Supp.2d 151, 178-179 (S.D.N.Y. 2001), *affirmed in part and vacated in part*, 343 F.3d 35 (2d Cir. 2003

[constitutional] violation. As recognized by the Supreme Court, 'the Constitution does not mandate comfortable prisons,' and conditions that are 'restrictive and even harsh . . . are part of the penalty that criminal offenders pay for their offenses against society.'"[134] In this instance, it is clear that the Division has proffered no evidence to support its baseless allegations of constitutional inadequacies.

CONCLUSION

Neither the ECHC nor ECCF are violating the constitutional rights of inmates. The intent of CRIPA was to allow the federal government, through the Department to go into detention facilities, under very limited circumstances, to eradicate conditions that are so extreme they deprive inmates of the basic necessities of daily life. The intent of CRIPA was not to make the Division a prisoner advocacy group. CRIPA clearly does not grant the federal government, through the Department, unchecked authority to force locally run detention centers like the Facilities to implement best practices desired by the Division.

To the contrary, CRIPA was intended to provide the Department with a means of requiring operators of institutional facilities to reform only the most flagrantly unconstitutional policies or customs. Indeed, CRIPA itself states that the Department may institute a civil action under CRIPA only to cause the operator of an institutional facility to implement "the minimum corrective measures necessary" to protect the full enjoyment of the rights of institutionalized persons under the Constitution. The legislative history similarly confirms that Congress' intent in enacting CRIPA was to provide a narrowly tailored means by which the federal government could seek minimally sufficient constitutional remedies for flagrant and egregious patterns or practices of violations.

In closing, the County urges you to refuse to permit the Division to bring a CRIPA suit against the County on behalf of the Department unless and until the Division has fully satisfied the requirements of CRIPA. Prior to initiating suit, the Division should be compelled to give notice to the County as to the specific constitutional requirements that have allegedly been violated. I would welcome the opportunity to address any questions or concerns that you might have about the matters raised herein.

Very truly yours,

CHERYL A. GREEN, ESQ.
Erie County Attorney

cc: Hon. Chris Collins – Erie County Executive (via hand delivery)
Hon. Timothy Howard – Erie County Sheriff (via hand delivery)
Hon. Erie County Legislature (via hand delivery)
Hon. Eric H. Holder, Jr. - Attorney General of the United States (via overnight delivery)

CAG/dkw

[134] Cusumano v. Sobek, 604 F.Supp.2d 416, 487-88 (2d Cir. 2009)(internal citations omitted).