



COUNTY OF ERIE

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DEPARTMENT OF LAW

September 10, 2009

Via Overnight Delivery

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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

Dear Attorney General Holder:

I am contacting you in my capacity as County Attorney for the County of Erie, New York ("County") to bring to your attention certain issues related to the Department of Justice ("DOJ" or "Department") Civil Rights Division's ("Division") investigation ("Investigation") under the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. Section 1997 *et seq.*, at the Erie County Holding Center and the Erie County Correctional Facility (collectively "Facilities"). Specifically, the issues the County wishes to raise relate to the "Findings Letter"¹ ("Letter") that the Division issued to the County on July 15, 2009.

As detailed below, the Letter fails to satisfy any of the prerequisites to suit under CRIPA. In light of this fact, I was admittedly surprised when Samuel Bagenstos, Deputy Assistant Attorney General, informed me at our August 10, 2009 meeting that you had already personally authorized the Division to file suit against the County. In light of the fact that the Letter falls far short of satisfying CRIPA's prerequisites to suit, the County urges you to reconsider this decision.

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.

This letter addresses the matters at issue by discussing: (1) the factual background of the Investigation, (2) the requirements of CRIPA, (3) the ways in which the Letter fails to satisfy those requirements, and (4) concluding remarks.

I. Factual Background.

On November 13, 2007, the Division notified the County that the Division had instituted an investigation into the Facilities “concerning allegations of use of excessive force by staff on inmates” and “allegations of inadequate medical treatment.” On January 30, 2008, the Division issued a letter requesting voluminous documents from the County. This letter specifically indicated, “We are committed to providing a fair, objective, and comprehensive review...” Several hundred documents were initially provided by the County to the Division, with many of the requested items withheld based upon privilege and privacy issues.

After several months of communications with the Division regarding the Investigation and extensive due diligence by the County, the County ultimately determined that the Investigation was not warranted. The County therefore declined to provide the Division with unfettered access to additional documents or to the Facilities as the Division had requested.

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.² 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.

² 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.

The Division issued the Letter on July 15, 2009. Since the issuance of the Letter, members of the Division have repeatedly indicated that the Division is prepared to file a CRIPA suit based on the allegations in the Letter. On August 10, 2009, the undersigned, along with my 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. Furthermore, Samuel Bagenstos, Assistant United States Attorney, specifically informed the County that the Division has already been authorized to proceed with the suit. In light of the fatal flaws in the Letter, as discussed below, any suit filed pursuant to the allegations made in the Letter would be improper under CRIPA.

II. 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."³ Such enforcement authority is limited to 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."⁴

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.⁵ A governmental unit may not be sued for federal constitutional violations for an injury inflicted solely by its employees or agents.⁶ "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."⁷ The Department must also establish that the governmental unit was "deliberately indifferent" to the known consequences of the policy or procedure at issue.⁸

³ 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.

⁴ See 42 U.S.C. 1997a(a).

⁵ See generally, *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992).

⁶ See generally, *Board of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997).

⁷ See, *Monell v. Dep't of Soc. Services*, 436 U.S. 658, 695 (1978).

⁸ See, *id.*

As such, CRIPA clearly does not grant the federal government, through the Department, broad authority to make sweeping changes to the policies and procedures of state or locally run detention centers like the Facilities simply 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.⁹ 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.¹⁰ 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.¹¹

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

Once the Department has properly invoked its authority under 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

⁹ See 42 U.S.C. § 1997a(a).

¹⁰ *Id.*; see also Rhodes v. Chapman 452 U.S. 337, 349 (1981) (emphasizing that the constitutional inquiry is not aimed at achieving aspirational or ideal prison conditions, but rather ensuring that constitutional conditions are enforced).

¹¹ See, e.g., 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.

- the minimum measures which the Attorney General believes may remedy the alleged conditions and the alleged pattern or practice of resistance;¹²

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;¹³

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.¹⁴

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

¹² 42 U.S.C. § 1997b(a)(1).

¹³ 42 U.S.C. § 1997b(a)(2).

¹⁴ 42 U.S.C. § 1997b(b); *see generally* 42 U.S.C. § 1997a(c) (requiring that the Attorney General personally sign any CRIPA complaint).

related to the alleged conditions of confinement and patterns or practices at issue in the Investigation. 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.

III. 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.¹⁵

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."¹⁶ 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 context of § 1983 suits.¹⁷ Noticeably absent from the Division's meager legal analysis is any case law establishing what constitutes an unconstitutional policy or custom sufficient to establish

¹⁵ See 42 U.S.C. § 1997b(a).

¹⁶ 42 U.S.C. § 1997b(a)(1)(A).

¹⁷ See Letter at 4-8.

a “pattern or practice” for purposes of CRIPA.¹⁸ 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. 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*. 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.”¹⁹ In so stating, however, the Division fails to cite any source for its purported “generally accepted standards.”²⁰ Significantly, the Division does not allege that suicide prevention practices that do not meet the Division’s nebulous “generally accepted standards” are unconstitutional.²¹ 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.²² 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.”²³ 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 required by the Constitution.²⁴ The Division fails to even allege that the Facilities’ mental health care services in any way fail to meet the minimally adequate standards required by the Constitution.²⁵ 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.

¹⁸ *See id.*

¹⁹ *Id.* at 9.

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *Id.* at 13.

²⁴ *See id.*

²⁵ *See id.*

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.”²⁶ 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).

²⁶ *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.”²⁷ 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.²⁸ At most, the Letter identifies the date on which a particular instance of conduct allegedly occurred,²⁹ though the Division failed to provide even that much detail in some instances.³⁰ 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.³¹ 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.³²

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.

²⁷ 42 U.S.C. § 1997b(a)(1)(B).

²⁸ 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).

²⁹ See, e.g., *id.* at 18, 21, 25.

³⁰ 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).

³¹ See, e.g., *id.* at 10, 11, 12, 14, 18, 21, 25, 31.

³² See generally *id.*

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.”³³ 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. 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.³⁴ 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.³⁵ 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.

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.”³⁶ 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 identified.³⁷ 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

³³ 42 U.S.C. § 1997b(a)(1)(C).

³⁴ See generally Letter at 36-49.

³⁵ See generally *id.* at 36-49.

³⁶ *Id.* at 38.

³⁷ 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.

how the Facilities' existing treatment procedures are purportedly "inadequate."³⁸ 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.³⁹

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."⁴⁰ The Division has failed to meet this prerequisite to suit.

The Division's wholesale failure to articulate the constitutional standards applicable to any alleged conditions and any 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, 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,

³⁸ *Id.* at 36.

³⁹ *Id.* at 39.

⁴⁰ 42 U.S.C. § 1997b(a)(2)(A).

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."⁴¹ 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 action to correct such conditions and pattern or practice."⁴² 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

⁴¹ 42 U.S.C. § 1997b(a)(2)(B).

⁴² 42 U.S.C. § 1997b(a)(2)(C).

measures the Division is recommending or whether the County's attempts to implement such recommendation would satisfy the Division's understanding of "appropriate."⁴³ 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 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,⁴⁴ 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.

CONCLUSION

CRIPA is a narrowly tailored statute designed to give the Department jurisdiction to remedy only a "pattern or practice" of "flagrant or egregious" violations of the Constitution. Furthermore, even in cases in which it is appropriate for the Department to intervene under CRIPA, the CRIPA statute only allows the Department to pursue the "minimum corrective measures necessary" to correct the violative conditions and pattern or practice. Despite these statutory limitations on the Department's enforcement authority under CRIPA, however, the Division has taken it upon itself to pursue sweeping changes to the policies and procedures of state and local institutional facilities without regard to the minimum requirements of the Constitution.

In this case, the Division's Letter to the County forsakes 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 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.

⁴³ See generally Letter at 37.

⁴⁴ See generally *id.* at 36-49.

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 you 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 you 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.

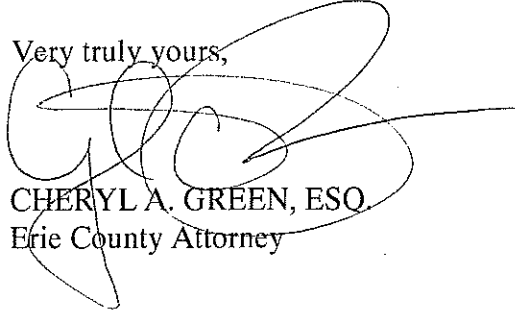
Each such change in policy or procedure that the County ultimately implemented would be funded by tax revenue from the citizens of the County of Erie to the detriment of funding for schools, roads, libraries, and other public works. The separation of power between state/local and federal government requires 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.

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. I would welcome the opportunity to address any questions or concerns that you might have about the matters raised herein.

Honorable Eric H. Holder, Jr.
September 10, 2009
Page 15 of 15

Thank you for your attention and courtesies.

Very truly yours,



CHERYL A. GREEN, ESQ.
Erie County Attorney

CAG/dbm