U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 28, 2019

The Honorable Eric Chaney
Boyd County Judge Executive
P.O. Box 423
Catlettsburg, KY 41129

Re: Notice Regarding Investigation of the Boyd County Detention Center

Dear Judge Executive Chaney:

We write to report the results of the Civil Rights Division's investigation into the conditions of confinement at the Boyd County Detention Center ("the Jail"), in Catlettsburg, Kentucky, conducted under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997. Consistent with the statutory requirements of CRIPA, we provide this Notice of the alleged conditions that we have reasonable cause to believe violate the Constitution. We also notify you of the supporting facts giving rise to, and the minimum remedial measures that we believe may remedy, those alleged conditions.

After carefully reviewing the evidence, we conclude that there is reasonable cause to believe that conditions at the Jail violate the Fourth, Eighth, and Fourteenth Amendments to the Constitution and that these violations are pursuant to a pattern or practice of resistance to the full enjoyment of rights protected by the Fourth, Eighth, and Fourteenth Amendments. In particular, we have reasonable cause to believe that Boyd County routinely subjects prisoners to excessive force through the use of chemical agents, electronic control devices, and restraint chairs. We also have reasonable cause to believe that Boyd County routinely violates prisoners' rights to bodily privacy through its use of restraint chairs. We do not conclude that there is reasonable cause to believe that the Jail violates the Constitution with respect to the placement of prisoners in restrictive housing.

We thank the Jail and the Boyd County officials for accommodating our investigation and our access to the Jail's facilities, staff, documents, data, and prisoners. We hope that we can continue to collaborate to resolve the issues raised in this Notice.

We are obligated to advise you that 49 days after issuance of this Notice, the Attorney General may initiate a lawsuit under CRIPA to correct the alleged conditions we have identified if Jail officials have not satisfactorily addressed them. 42 U.S.C. § 1997b(a)(1).

lawyers assigned to this investigation will be contacting the County to discuss this matter in further detail. Please also note that this Notice is a public document. It will be posted on the Civil Rights Division's website.

If you have any questions, please call Steven H. Rosenbaum, Chief of the Civil Rights Division's Special Litigation Section, at (202) 616-3244.

Sincerely,

Eric S. Dreiband

Eric S. Dreiband
Assistant Attorney General
Civil Rights Division

cc: C. Phillip Hedrick
Boyd County Attorney

William D. Hensley
Boyd County Jailer

Attachment: Section 1997b Notice

INVESTIGATION OF THE BOYD COUNTY DETENTION CENTER (CATLETTSBURG, KENTUCKY)

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

February 28, 2019

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I. SUMMARY

The Department of Justice (DOJ) provides notice, pursuant to 42 U.S.C. § 1997b, that there is reasonable cause to believe that conditions at the Boyd County Detention Center violate the Fourth, Eighth, and Fourteenth Amendments of the United States Constitution and that these violations are pursuant to a pattern or practice of resistance to the full enjoyment of rights protected by the Fourth, Eighth, and Fourteenth Amendments. This Notice provides the Department of Justice's assessment of the facts and the law in its capacity as a law enforcement agency authorized to conduct an investigation and file a lawsuit. The Department does not serve as a tribunal authorized to make factual findings and legal conclusions, and nothing in this Notice should be construed as a factual finding or legal conclusion. Accordingly, this Notice is not intended to be admissible evidence and does not create any legal rights or obligations.

Specifically, we provide notice of the following alleged conditions:

- Correctional officers routinely use excessive force when they use chemical agents such as pepper spray or electronic control devices, and when they place prisoners in the restraint chair.

- Boyd County violates the constitutional rights of bodily privacy of prisoners by restraining nearly naked prisoners in full view of both prisoners and staff of the opposite gender. Prisoners identified as a suicide risk and non-suicidal prisoners being punished, are stripped of their clothing and placed in suicide smocks with no undergarments, and strapped with their legs apart to the restraint chair in an open hallway, their genitals exposed to passers-by.

II. INVESTIGATION

On November 1, 2016, DOJ notified Boyd County officials of our intent to conduct an investigation of the Boyd County Detention Center (Jail) pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (CRIPA). As we stated in our notice letter, the focus of our investigation was whether the Jail: (1) adequately protects its prisoners from harm due to excessive force; (2) violates prisoners' rights to bodily privacy; and (3) places prisoners in restrictive housing without due process of law.

The Special Litigation Section of DOJ's Civil Rights Division conducted the investigation with the assistance of a correctional security consultant. On November 14-17, 2016, our correctional security consultant accompanied us on an onsite inspection of the Jail. During our onsite inspection, we observed facility processes, interviewed current and former staff and prisoners, met with county officials, and reviewed facility records. Before, during, and after our onsite inspection, we reviewed an array of documents, including policies and procedures, organizational charts, incident reports, prisoner grievances, medical and mental

health records, and other materials. After our visit, we also conducted additional interviews with former prisoners and correctional officers.

At the close of our onsite inspection, we conveyed our preliminary assessment to Jail and county officials. We thank Jail staff for their cooperation throughout the course of the investigation and appreciate their receptiveness to our consultant's recommendations.

III. BACKGROUND

The Boyd County Detention Center is located in Catlettsburg, Kentucky. Originally opened in 1991 with a capacity of 93 beds, the Jail expanded in 2006 to its current capacity of 206 beds. The Jail often holds more prisoners than its rated capacity, holding 238 prisoners during our visit in November 2016 and holding 292 prisoners in August 2017. The Jail houses both prisoners who have been convicted of a crime and pre-trial detainees who have been arrested or charged with a crime. Historically, approximately one-third of all prisoners in the Jail were sentenced and sponsored by the state of Kentucky. The Jail houses both men and women. Women prisoners make up about 30% of the Jail's overall population. Most prisoners are housed in dorm-style cells. The Jail is currently overseen by Chief Jailer William Hensley. Jailer Hensley took office in January 2019. The Jail is funded by the Boyd County Fiscal Court, which consists of a county judge executive and three county commissioners.

During our visit, medical services at the Jail were provided through a contract with Advanced Correctional Healthcare. A Licensed Practical Nurse (LPN) was onsite at the Jail from 8:00 a.m. until 4:30 p.m. three days per week, and then from 8:00 a.m. until 1:30 a.m. one day per week. A physician's assistant and physician was on call between 1:30 a.m. and 8:00 a.m. At the time of our visit, Advanced Correctional Healthcare was not providing any mental health care services at the Jail, beyond issuing prescriptions for psychotropic medications. The Jail had a contract with a local organization, Pathways, which provides emergency mental health services to prisoners on suicide watch.

Since our site visit, conditions and security at the Jail have deteriorated further. On the night of August 21, 2017, there was a riot at the Jail when ten maximum-security prisoners forced their way out of their cell and into a hallway. Once in the hallway, the prisoners ignited flammable items they had stacked against the entry doors. Heavy smoke quickly filled the hallways and began seeping into surrounding cells. Fortunately, prisoners in those cells were evacuated without injury. But the damage to the Jail was extensive; the Jail was forced to shut down, and all 292 prisoners were transferred to other jails. The Jail partially reopened on September 15, 2017. Although some state-sponsored prisoners returned to the Jail, the Kentucky Department of Corrections has since removed all state prisoners from the Jail due to ongoing concerns about security and prisoner safety. In June of 2018, a prisoner died of a drug overdose and in November of 2018 a second prisoner died of a drug overdose. On December 21, 2018, five correctional officers were indicted for first degree manslaughter of a prisoner found dead in a restraint chair on November 29, 2018 from blunt force trauma to his side which fractured three ribs and caused internal bleeding, resulting in death.

IV. ALLEGED CONDITIONS

The Department's investigation has uncovered facts that provide reasonable cause to conclude that conditions at the Jail violate the Constitution. In particular, the Department has reasonable cause to believe that the Jail (1) routinely subjects prisoners to excessive force in violation of the Eighth and Fourteenth Amendments; and (2) exposes prisoners in the restraint chair nearly naked before the opposite sex in violation of the Fourth Amendment. The Department also has reasonable cause to conclude that these violations are pursuant to a pattern or practice of resistance to the full enjoyment of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. We do not conclude that there is reasonable cause to believe that Boyd County violates prisoners' constitutional rights by placing prisoners in restrictive housing without adequate due process of law.

As detailed below, the combination of numerous, specific and repeated violations of the Fourth, Eighth, and Fourteenth Amendments at the Jail, taken together with deficient policies and processes that caused or contributed to those violations, is sufficient to establish a pattern or practice of constitutional violations under CRIPA. To establish a pattern or practice of violations, the United States must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). *See also E.E.O.C. v. Wal-Mart Stores, Inc.*, No. k6:01-CV-339, 2010 WL 11530704, at *1 (E.D. Ky. Feb. 17, 2010) (stating that to prove a pattern or practice of discrimination, plaintiff can use statistics as well as "historical, individual, or circumstantial evidence"). *See also, e.g.*, *Alkrie v. Irving*, 330 F.3d 802, 815-18 (6th Cir. 2003) (concluding, in a Section 1983 action, that the plaintiff produced sufficient evidence of a policy or custom of violations of his Fourth, Thirteenth, and Fourteenth Amendment rights to survive summary judgment after he provided evidence of nine other similar violations and evidence of county official's routine practice).

A. The Jail Fails to Protect Prisoners from Harm Due to Excessive Force

The Department has reasonable cause to believe that the Boyd County Jail has engaged in a pattern or practice of failing to protect prisoners from harm in violation of the Eighth and Fourteenth Amendments.

The Eighth Amendment protects prisoners from "cruel and unusual punishment," U.S. CONST. amend. VIII, which involves "the unnecessary and wanton infliction of pain" or punishment that is "grossly disproportionate to the severity of the crime." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citations omitted). The Eighth Amendment contains objective and subjective components. *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001). To violate the Eighth Amendment, the deprivation must be sufficiently serious and the prisoner must demonstrate that the prison official had a sufficiently culpable state of mind such that he was deliberately indifferent to prisoner health or safety. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

Pain inflicted on a prisoner satisfies the objective component if it violates contemporary standards of decency. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). This is true "whether or not

significant injury is evident." *Id.* at 9. The Eighth Amendment also prohibits infliction of pain that is "totally without penological justification." *Rhodes*, 452 U.S. at 346. Excessive force violates the Eighth Amendment when it is applied "maliciously and sadistically to cause harm," instead of "in a good-faith effort to maintain or restore discipline." *Barker v. Goodrich*, 649 F.3d 428, 434 (6th Cir. 2011) (quoting *Hudson v. McMillan*, 503 U.S. 1, 7 (1992)).

Jail conditions violate the subjective component of the Eighth Amendment's prohibition against cruel and unusual punishment when they result from prison officials' deliberate indifference to the substantial risk of serious harm to prisoners. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Jail officials show deliberate indifference when they disregard obvious risks to prisoner safety. *Hope v. Pelzer*, 536 U.S. 730, 738-45 (2002). The prisoner need not show that the official acted "for the very purposes of causing harm or with knowledge that harm will result," but acted in reckless disregard of the substantial risk of serious harm. *Comstock*, 273 F.3d at 703 (citing *Farmer*, 511 U.S. at 835-36).

Pretrial detainees, who have not been convicted of any crime, are protected by the Fourteenth Amendment, which affords detainees protections at least as great as those given to sentenced prisoners under the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979). The Due Process Clause of the Fourteenth Amendment protects individuals from any excessive force that "amounts to punishment." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (citation omitted). The Due Process Clause also protects pretrial detainees from intentional force that is "objectively unreasonable," *id.*, even if it does not cause "extensive physical damage." *Coley v. Lucas Cnty, Ohio*, 799 F.3d 530, 539 (6th Cir. 2015) (citations omitted).

The Department has reasonable cause to believe that the Jail violates the Eighth Amendment rights of state prisoners and sentenced county prisoners and the Fourteenth Amendment rights of pretrial detainees by routinely subjecting these prisoners to the use of chemical agents, electronic control devices, and the use of a restraint chair as corporal punishment without any penological justification. We identified multiple incidents of excessive force, coupled with deliberate indifference to the use of excessive force on the part of Jail officials and staff.

In particular, we reviewed all of the Jail's incident reports for the period from March 2016 to November 2016. The reports showed that there were 60 incidents involving the use of pepper spray and 15 incidents involving the use of a taser. These numbers underrepresent the use of force because Jail policy does not require correctional officers to report every use of force, and staff interviews confirmed that written reports are not regularly generated. Moreover, even incident reports generated for reasons other than use of force revealed that use of force is underreported. For example, in the "Force Used" section of one incident report, the officer wrote "None." However, in his narrative of the report, he wrote that an officer fired "four rounds of OC pepper ball" and that another officer shot the pepperball gun into the floor. This and other uses of force were not captured in the Jail's data.

After careful review, we identified a substantial number of uses of pepper spray and uses of a taser that involved excessive force over the period we reviewed. These incidents provide

reasonable cause to conclude that the Jail is engaged in a pattern or practice of use of excessive force in violation of the Eighth and Fourteenth Amendments.

We also conclude that Jail officials are deliberately indifferent to a pattern or practice of improper use of force by Jail staff. Jail policies appropriately outline a continuum of force to be used for prisoner disturbances before resorting to pepper spray, electronic control devices, or the restraint chair. However, Jail staff are not trained on the continuum of force policy and do not follow the policy in practice. Jail officials are fully aware or should be aware of staff failures to follow the Jail's continuum of force policy and properly employ appropriate de-escalation techniques to prevent excessive force. Under Jail policy, staff are required to report all uses of force, and the Jailer or his designee is required to review all uses of force to specifically determine the appropriateness of the use of force and recommend any corrective action. Either the Jail has intentionally ignored the multiple instances we found of excessive force contained in its own incident reports, or has failed adequately to review, monitor, track, supervise, and/or investigate the documented excessive use of chemical agents and electronic control devices per its own policy.[1] Jail officials' failure to act to address the excessive force documented in its incident reports is borne out in the Jail's lack of any disciplinary report or action against staff in the last six years. By disregarding its own policies and procedures governing use of force, failing to train staff adequately on the appropriate continuum of de-escalation techniques contained in those policies and procedures, and deliberately ignoring incidents of excessive force and/or failing to adequately monitor, supervise, investigate or review the use of its chemical agents and electronic control devices, officials at the Jail evince a deliberate indifference to prisoners' constitutional rights to protection from use of excessive force. *See Farmer*, 511 U.S. at 837 (a prison official is liable under the Eighth Amendment if he "knows of and disregards an excessive risk to inmate health or safety"); *Hope*, 536 U.S. at 738-41. *See also Flanory v. Bonn*, 604 F.3d 249, 253-54 (6th Cir. 2010) (deliberate indifference standard satisfied if the official knows of and disregards an excessive risk to inmate health or safety) (citing *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000)).

1. The Jail Subjects Prisoners to Corporal Punishment With Electronic Control Devices, Chemical Agents, and the Restraint Chair Without Penological Justification

In response to a lack of cooperation to verbal commands and without sufficient cause, correctional officers at the Jail use force that is excessive and that violates prisoners' constitutional rights.

Correctional officers use electronic control devices against prisoners without penological justification and in a manner that violates the Constitution. Jail officials often deploy electronic control devices against individuals in the Jail who are not threatening violence or anyone's safety, but are merely verbally disruptive or non-responsive to verbal commands from correctional officers. An electronic control device, such as a Taser, is "a weapon that sends up to 50,000 volts of electricity through a person's body, causing temporary paralysis and excruciating pain." *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010). This weapon

[1] We also reviewed one incident in which the former Jailer failed to follow his own policy and engaged in use of excessive force himself. In this incident, the former Jailer used pepper spray as an immediate response to a woman who was kicking her cell door and refused to hand over her shoes.

should be used "to temporarily incapacitate a threatening person, and to give the officers involved momentary advantage and a chance to neutralize the threat—not to cause pain to force compliance with facility rules or to make an example out of the prisoner." *Hickey v. Reeder*, 12 F.3d 754, 758 (8th Cir. 1993). Gratuitous or excessive use of an electronic control device violates "a clearly established constitutional right" to be free from the disproportionate use of force. *See Landis v. Baker*, 297 F. App'x 453, 463 (6th Cir. 2008).

We have identified incidents where Boyd County correctional officers use electronic control devices when they are not necessary to restore order and when prisoners are not threatening. As illustrated by the examples below, such force causes significant pain and violates the Constitution because it is gratuitous and not necessary to address an immediate threat to the safety of officers or others. *See id*.; *McDowell v. Rogers*, 863 F.2d 1302, 1306-07 (6th Cir. 1988) (uses of force that are "unprovoked and unnecessary" may cross the constitutional line). Examples from our investigation of uses of electronic control devices in a manner that violates the Constitution include:

- A female pre-trial detainee who refused a male Captain's order to leave a shower was pepper-sprayed and then removed from the shower by four correctional officers. After the correctional officers had placed the naked woman face down on the floor, they tased her four times: twice in her back, and once on each of her legs. When the woman attempted to return to the shower to wash off the initial burst of pepper spray, the correctional officers again pulled her from the shower. This time, they placed her on her back – still naked. As she lay on her back, one correctional officer grabbed her right leg, another grabbed her left leg, and a third deployed pepper spray into her vagina.[2]

- A prisoner in a restraint chair, who was calm enough to be released to use the bathroom, verbally refused to re-submit to the restraints. He was immediately tased twice, even though he was not posing a threat to himself or others. Correctional officers did not attempt any other means to control the prisoner.

- A male prisoner was tased by an officer upon intake simply because the prisoner said that he could not remove his wedding band, which he had been wearing for 20 years. Even after being tased, he still was unable to remove his wedding band.

Similarly, the Jail uses pepper spray as a first response to non-threatening behavior in a manner that is excessive and violates prisoners' constitutional rights. *See Roberson v. Torres*, 770 F.3d 398, 406 (6th Cir. 2014) (ruling that officer who deployed pepper spray as a first response without attempting less intrusive means was not entitled to qualified immunity); *see also Williams v. Curtin*, 631 F.3d 380 (6th Cir. 2011) (plaintiff sufficiently stated an Eighth Amendment claim for use of excessive force when he alleged that after asking a question in response to a deputy's command, the deputy and a squad of officers deployed pepper spray).

[2] It is clearly established that "putting exceptional pressure on a [prisoner's] back while that [prisoner] is in a face-down prone position," not to mention then using chemical munitions in the prisoner's genitals, "constitutes excessive force." *Landis v. Baker*, 297 F. App'x at 464 (quoting *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902-03 (6th Cir. 2004)).

Current and former staff and prisoners overwhelmingly reported that correctional officers at the Jail routinely use pepper spray as a first resort against non-threatening prisoners, without any attempts to de-escalate or employ less restrictive options. Non-threatening conduct results in the immediate use of pepper spray, often to a prisoner's face, without any other control technique attempted. *See, e.g.*, *Davis v. Pickell*, 562 F. App'x 387, 392 (6th Cir. 2014) (stating that prisoner was not resisting or threatening the deputies when they tackled and pepper sprayed him and concluding that "if [the prisoner] was neither threatening nor resisting [] officers" then the use of chemical spray "on a compliant inmate shocks the conscience" and violates the prisoner's clearly established constitutional rights); *Robinson v. Danberg*, 673 F. App'x 205, 212 (3d Cir. 2016) (spraying mace into locked cell when inmate posed no imminent threat to staff and other inmates could violate the Eighth Amendment); *Shuford v. Conway*, 666 F. App'x 811, 816 (11th Cir. 2016) (using chemical agents and deploying electronic control device against inmates in isolation holding cells who were obeying verbal commands to kneel or lie down in their cells with their hands on their heads could constitute excessive force in violation of the Fourteenth Amendment); *Vineyard v. Wilson*, 311 F.3d 1340, 1348-49 (11th Cir. 1993) (denying qualified immunity to an officer who used pepper spray against a handcuffed arrestee who was screaming and using foul language while secured in the back of a patrol car).

A common practice that correctional officers at the Jail use to silence a disruptive but non-threatening prisoner or to enforce a command involves the use of pepper spray. In particular, correctional officers in those scenarios commonly either spray pepper spray under a cell door, or open the cell door and either spray the prisoner in the face or throw a pepper ball into the cell, leaving the prisoner enclosed in the cell. For example, when a prisoner on suicide watch was knocking on his cell door, officers responded by entering the cell and tackling the prisoner. As he was held down, another officer sprayed his genitals with pepper spray. The prisoner was wearing only a loose suicide smock with no undergarments.

Using pepper spray as a first resort is particularly concerning when it involves non-threatening drunk or intoxicated individuals, who are characteristically unresponsive to verbal commands. It is, however, a common practice at the Jail. For example, an intoxicated prisoner who was handcuffed to the wall was sprayed with two doses of pepper spray to each of his eyes. Another intoxicated prisoner in a locked booking cell was pepper sprayed in the face because she refused to stop hitting the door. Another intoxicated prisoner in a holding cell was sprayed in the face with pepper spray in response to his request for a mat and a blanket.

In addition to using electronic control devices and pepper spray, Jail officials use the restraint chair as the first means of dealing with a prisoner when less intrusive means are available. The restraint chair uses straps and belts to secure a prisoner's arms, legs, and torso in an upright sitting position in the chair. It is used to "restrain a violent, out-of-control inmate." *See McKinney v. Lexington-Fayette Urban Cty. Gov't*, 651 F. App'x 449, 454 (6th Cir. 2016). However, Jail officials have placed prisoners in the restraint chair due to a prisoner's non-physical resistance without trying any less restrictive means. For example, one correctional officer placed a prisoner in a restraint chair because the prisoner complained about being denied a phone call to his family after a family member had died. In another situation, a correctional officer responded to a situation involving two prisoners who had been fighting. When the correctional officer arrived on the scene and opened the door, the prisoners stopped fighting. Nevertheless, the officer handcuffed both prisoners and then placed them in restraint chairs.

2. The Jail's Use of Force Training and Procedures are Deficient

The pattern or practice of excessive force at the Jail is attributable, in part, to its inadequate training on its policies. Jail policies appropriately outline a continuum of force to be used for prisoner disturbances before resorting to pepper spray, electronic control devices, or the restraint chair. The continuum ranges from staff presence, to verbal commands, then to soft hand control, finally progressing to the use of chemical agents and electronic control devices. The Jail's written policies require staff to "temper force by warning where feasible and by de-escalating as the need diminishes and control is gained." This policy is not followed in practice.

Jail staff are not trained on the continuum of force policy. The Jail does not train, prepare, or even expect staff to interact with prisoners through non-forceful or non-combative modalities, such as effective verbal communication and positive inter-personal relationship building. The Jail does not train its staff on how to de-escalate potentially hostile situations or provide any alternatives to using pepper spray and electronic control devices as a first response to prisoner conflict. Staff are given no training to help them manage prisoners in the Jail's overcrowded living conditions.

The Jail fails to monitor, track, or supervise the use of its chemical agents and electronic control devices. Staff at the Jail do not adequately and promptly report uses of force. When a staff member does report a use of force, the reports do not contain adequate information, including an accurate account of the events leading up to the use of force, an account of the actual event written in specific terms in order to capture the details of the event, the type of force used and its justification, potential witnesses, including prisoner witnesses, and the nature and extent of any injuries and whether medical care was provided. Virtually all the reports we examined were written from the perspective of the employee who used the force against a prisoner. Employees who witnessed the use of force rarely, if ever, report on what they observed. Nor did the reports include statements from prisoners who may have witnessed the event. Furthermore, use of force reports rarely contain a videotape of the incident, despite the Jail having surveillance videotape available for review.

In addition, staff carry pepper spray and electronic control devices with them at the Jail, but are not required to sign them in or out at the beginning and end of their shifts. Because the Jail does not track or log the use of pepper spray or electronic control devices by its staff, the Jail does not have necessary information on who is using chemical agents and electronic control devices, the circumstances in which they are used, and how much is being used. Without this information, the Jail has no way of knowing whether officers report and properly document all such uses of force. Supervisors also are not required to, and rarely do, oversee the use of chemical agents and electronic control devices by subordinate officers.

The Jail does not review and investigate its uses of force. Though Jail policy requires all officers to submit use of force reports to the Jailer for review prior to the end of his shift, interviews with supervisory staff and our review of the incident reports confirm that the vast majority of use of force incidents are not reviewed by a supervisor. Most of the use of force reports we reviewed, spanning the year prior to our on-site visit, did not include any comments from a supervisor either confirming that the level of force used was appropriate or counseling the

officer that the force used was excessive. Nor does the Jail track its uses of force to identify trends in the use of force or officers who overuse force. As a result, staff do not face consequences for using excessive force. We uncovered no documentation of discipline of a correctional officer for improper use of force.

B. The Jail Violates Prisoners' Rights to Bodily Privacy When It Publicly Displays Nearly Naked Prisoners In The Restraint Chair

The Department also has reasonable cause to believe that the Boyd County Jail's use of the restraint chair amounts to a pattern or practice of violating the Fourth Amendment.

The Fourth Amendment protects prisoners from unreasonable searches and provides prisoners with a reasonable expectation of personal privacy. *See Bell*, 441 U.S. at 558-60. Specifically, prisoners have a reasonable expectation of privacy from naked exposure before the opposite sex. "A convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners."[3] *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992) (male inmate who was strip searched in an outdoor recreation area in front of several female correctional officers raised a valid Fourth Amendment privacy claim). Any type of naked exposure "is a particularly extreme invasion" of a detainee's Fourth Amendment rights. *Stoudemire v. Michigan Dep't of Corr.*, 705 F.3d 560, 575 (6th Cir. 2013) (concluding that a female correctional officer's strip search of a paraplegic female prisoner in the prisoner's cell, with the window uncovered in full view of people in the hallway who could see the prisoner's prosthetic legs being removed, was an invasion of the prisoner's clearly established right to privacy). The public location of any naked exposure can heighten the invasion of a prisoner's privacy rights, and exposure is particularly egregious when the prisoner is exposed to bystanders with no correctional need to see the prisoner unclothed. *See Williams v. City of Cleveland*, 771 F.3d 945, 953 (6th Cir. 2014) (stating that "[t]he wider an audience for a strip search, the more humiliating it becomes, especially when the stripped individual is exposed to bystanders who do not share the searching officers' institutional need to view her unclothed" and concluding that the strip search of newly admitted prisoners in the presence of other detainees could constitute a valid Fourth Amendment claim).

The Jail's practice of using a restraint chair in a manner that exposes their bare genitals to the opposite sex intrudes on prisoners' expectations of bodily privacy. Prior to placing prisoners in the restraint chair, prisoners are instructed to change out of their uniforms and put on loose fitting "suicide smocks," and are then secured to the chair. The Jail uses restraint chairs both to protect suicidal prisoners and to punish non-suicidal prisoners. At the time of our visit, the Jail did not provide mental health services other than dispensing psychotropic medications and treatment for prisoners who were acutely suicidal. In 2016, although an average of 11% of the Jail's prisoners were taking psychotropic medications, the Jail contacted its off-site contractor

[3] We draw from case law regarding sentenced prisoners, even though many of the individuals housed in the Boyd County Detention Center are pretrial detainees. As noted above, we recognize that the use of the restraint chair also may, in certain circumstances, constitute excessive force in violation of the Fourteenth Amendment (for pretrial detainees) and the Eighth Amendment (for sentenced prisoners). Nonetheless, the analysis here also fits generally under the Fourth Amendment.

only when a prisoner posed an imminent risk of suicide. The contractor triaged the individual over the phone and routinely instructed staff to secure prisoners with suicidal ideation in a restraint chair until someone could arrive to see the prisoner, which sometimes took hours.

A prisoner is strapped to a restraint chair by his or her ankles, waist, chest, and arms. The Jail has two restraint chairs, one in the booking area, and one in the main hallway. Both are typically busy locations. The booking area receives and processes new prisoners, and the main hallway connects the booking area to the control room, the kitchen, women's housing, men's medical, recreation, and the nurse's station. The hallway is also the main method of ingress into the Jail. Any prisoner placed in the hallway restraint chair is in clear view of any staff or prisoners walking down the hall. When prisoners are wearing loose-fitting smocks with no undergarments, their genitals are often in clear view of staff and other prisoners as well.

The Jail's punitive and humiliating method of restraint chair use is sanctioned at the highest level. In one instance, in 2015, the Jailer placed both restraint chairs in the hallway and then ordered two women prisoners wearing suicide smocks to be strapped to the chairs. The straps secured the women's waists and chests to the chair, their arms behind their backs, and their legs to opposite sides of their chairs. The combination of the leg straps and waist strap prevented the women from being able to move their knees together to shield their genitals from exposure. The Jailer then instructed correctional officers to transport male prisoners from their housing unit, past the restrained and exposed women, and into the recreation courtyard.

In another incident, also in 2015, the Jailer ordered a woman who had a panic attack to be restrained in the restraint chair with her legs spread, clothed in nothing but a suicide smock, and placed on public display in the hallway. A former correctional officer photographed the Jail security camera display showing the woman in the restraint chair. This photograph is included below.

Prisoners who express suicidal ideation fare no better in the restraint chair. Instead of putting these individuals in an environment where they can be safe, the Jail actually increases the danger to prisoners at risk of suicide by exposing them to public humiliation and ridicule. While preventing suicide may in some circumstances justify a minor intrusion of a prisoner's right to privacy, the Jail's pattern of exposing a suicidal prisoner's genitals to individuals of the opposite sex violates prisoners' Fourth Amendment rights. *See Mead v. Cnty. of St. Joseph*, No. 06-0555, 2008 WL 441129, at *3 (W.D. Mich. Feb. 13, 2008) (holding that plaintiff stated a Fourth Amendment claim when an allegedly suicidal woman detainee was stripped by male officers, put in an open suicide smock, and placed in an observation cell where passersby could see her); *McCarley v. Logan Cnty. Det. Ctr.*, 2014 WL 2930797, at *3 (W.D. Ky. June 27, 2014) (holding that plaintiff stated a Fourth Amendment claim when, after he was determined to be suicidal, he was stripped naked and kept in a "room up front where everyone in the jail could see him.").

V. MINIMUM REMEDIAL MEASURES

To remedy the constitutional violations identified in this Notice concerning the use of excessive force and violation of prisoners' rights to bodily privacy, Boyd County should promptly implement the minimum remedial measures set forth below:

1. Ensure that all staff are properly trained on policies and procedures surrounding use of force, including chemical agents, electronic control devices, and the restraint chair, with particular emphasis on permissible and impermissible use of force and de-escalation techniques.

2. Ensure that staff adequately and promptly report all uses of force.

3. Ensure that use of force incidents and allegations are properly investigated by trained, qualified investigators, and ensure that incident reports, use of force reports, and prisoner grievances are screened for allegations of staff misconduct and, if the incident or allegation meets established criteria, that it is referred for investigation.

4. Develop and implement a system to track all uses of force by correctional officers and any complaints related to the use of excessive force designed to alert the Boyd County administration to any potential need for retraining, problematic policies, or supervision lapses.

5. When there is evidence of staff misconduct related to excessive force against prisoners, initiate appropriate personnel actions and systemic remedies, as appropriate.

6. Develop and implement accountability policies and procedures for the effective and accurate maintenance, inventory and assignment of chemical sprays, electronic control devices, and other security equipment.

7. Protect the privacy of prisoners secured in a restraint chair by ensuring that restrained prisoners' genitals are protected from public view.

8. Develop procedures that will reduce reliance on chemical agents, electronic control devices, and the restraint chair while still ensuring officer and prisoner safety.

VI. CONCLUSION

We have reasonable cause to believe that Boyd County violates the constitutional rights of prisoners in its care, resulting in serious harm and the substantial risk of serious harm and that these violations are pursuant to a pattern or practice of resistance to the full enjoyment of rights protected by the Fourth, Eighth, and Fourteenth Amendments. Specifically, the Jail fails to protect prisoners from harm due to use of excessive force through the use of chemical agents and electronic control devices, and through the placement of prisoners into the restraint chair. We also have reasonable cause to believe that the Jail violates prisoners' rights to privacy when it places naked or nearly naked prisoners in the restraint chair in public areas of the Jail.

We look forward to working cooperatively with Boyd County to ensure that these violations are remedied.