

Civil Rights of Institutionalized Persons Act: hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, Ninety-eighth Congress, first and second sessions ... December 7, 1983, and February 8, 1984.

United States.

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Memorandum

APPENDIX 3(g)(iv)



AEP:JPM:TMC:eh
DJ 168-42-4

Subject

Intervention Pursuant to Civil Rights
of Institutionalized Persons Act

Date

8 FEB 1963

To J. Harvie Wilkinson, III
Deputy Assistant Attorney General
Civil Rights Division

From Arthur E. Peabody, Jr.
Acting Chief
Special Litigation Section

Attached please find the memorandum you requested of Tim Cook regarding intervention in the St. Louis case and intervention generally. The points he raises will assist in our development of intervention criteria pursuant to the Act. His analysis of the legislative history regarding intervention is particularly worthy of consideration.

cc: Records
Chrono
Peabody
MacCorm
Cook
Hold

APPENDIX J

Memorandum

APPENDIX 3(g)(iv)(A)



Subject <u>United States v. St. Louis State</u> <u>School and Hospital (E.D.Mo.)</u>	Date 1-20-83
To J. Harvie Wilkinson, III Deputy Assistant Attorney General Civil Rights Division	From Timothy M. Cook <i>TC</i> Attorney Special Litigation Section

Following our meeting of January 25, 1983, which was held at my request, you requested a brief memorandum that concisely sets forth our objections to Mr. Reynolds' memorandum and determination dated November 23, 1982, in the above case. That memorandum sets forth a new policy for this Section: that we are not to propose interventions in any cases pursuant to our authority under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997c, when plaintiffs are "adequately represented" by counsel. We strongly object to this new policy, for the following reasons.

1. This new policy represents a drastic change that is not justified by the passage of CRIPA. Over the past twelve years, to date, we have intervened in numerous cases, either as party plaintiff or litigating amicus, involving the rights of institutionalized persons. Our efforts, in terms of bringing the resources of the federal government to bear to remedy unconstitutional conditions in institutions, have been quite successful in these cases. Many of these accomplishments could not have been achieved were it not for our involvement. Your sole explanation for this change in policy is the passage of the Civil Rights of Institutionalized Persons Act. However, far from being required by that Act, this new policy constitutes an abdication of our responsibilities under CRIPA. The plain language of the Act specifically authorizes interventions by the United States; indeed, the procedural requirements imposed upon us by Congress for interventions are substantially less than for de novo suits. Compare 42 U.S.C. 1997b with id. 1997c. Additionally, the Conference Report on the Act specifically noted with approval the 25 suits in which we had intervened prior to the enactment of CRIPA. In these cases, the Conference Report stated, "the Justice Department invariably has brought to the litigation process investigative resources, technical advice, and legal expertise unavailable to private litigants. Courts have been openly appreciative of these efforts." Conf. Rep. No. 96-897, 96th Cong., 2d sess. 8, 9 (1980). Moreover, the legislative

history specifically indicates that the intervention authority in CRIPA merely "codifies the authority which the Attorney General has been exercising since 1971." Id. at 15. To cease the activities that Congress provided us specific authority to continue flies in the face of the purposes of CRIPA.

2. The new policy is particularly unwise in cases in which plaintiffs have misframed their arguments, as they have here. As Mr. Reynolds' memorandum recognizes, a state legislature is well within its authority to require habilitation and placement of mentally retarded people in lesser restrictive settings than institutions. The Missouri legislature has passed just such a statute. These requirements are consistent with those we have supported in numerous cases to date, including cases in which such pleadings have specifically been approved by Mr. Reynolds. However, plaintiffs here, represented by attorney Joel Klein, who is adversary counsel in several of our cases, plead in their complaint that state officials should not be permitted, in the exercise of their professional judgments, to place mentally retarded people in community settings since such placements are inherently inferior to institutions; according to plaintiffs' counsel, any attempt by state officials to exercise their professional judgments in this manner is unconstitutional. We do not understand how plaintiffs represented by counsel filing such specious pleadings can be considered "adequately represented." Moreover, we can bring a needed balance to the presentation of this case to the court. The lawsuit is unique and important, and may receive some notoriety as a result. We have a definite interest in seeing that the law in this area is developed properly.

3. The Special Litigation Section has adequate resources to undertake this litigation. The Chief of Special Litigation, in recommending approval of this intervention, judged that this Section has adequate resources to undertake this litigation. Certainly the lawyers in this Section are busy pursuing CRIPA investigations. However, no one is too busy to undertake an additional case. Moreover, one of the reasons attorneys get discouraged and leave is the absence of in-court litigation experience. In addition, it would be good experience for some of the several new lawyers coming on board shortly to have some live cases to work on in order to give them the experience of undertaking discovery, examining witnesses, etc. Your new policy will preclude this, and may result in the near elimination of litigation for the Section, at least for the short term.

Since you have specifically requested that we keep this memorandum succinct, we have not gone into detail regarding any of the above points, but would be pleased to do so at a meeting with you and Mr. Reynolds.