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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APPENDIX 4(f)(i)(E)

AEP:TMC:jac
DJ 168-42-4

9 NOV 1982

Intervention in Parents Association of the St. Louis State School and Hospital v. Bond, No. 82-852-C (E.D. Mo.)

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

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I recommend that the attached Complaint in Intervention and Certificate be forwarded to the Attorney General for signature pursuant to Section 5 of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997c. The gravamen of the Complaint is that residents of the St. Louis State School and Hospital (hereinafter referred to as the "State School"), a state-owned and operated facility for mentally retarded persons, are confined under egregious and flagrant conditions that deprive them of constitutional rights.

I. INTRODUCTION

The individual plaintiffs in Parents Association v. Bond represent a putative class of all present and future residents of the State School, a residential facility for mentally retarded persons located in North St. Louis County. The institution is owned and operated by the State of Missouri. The Parents Association, a non-profit organization made up of relatives of some of the residents at the State School, is a co-plaintiff. Defendants are the Governor of Missouri and other state officials responsible for the operation of the facility and the provision of community-based services.

The complaint, filed on May 28, 1982, alleges that the conditions of confinement at the State School, and within certain community residences, violate residents' rights under the Fourteenth Amendment, Section 504 of the Rehabilitation Act, and state law. As with many of the mental retardation cases in which we are involved, plaintiffs seek improved health services, a sanitary environment, freedom from abuse, and evaluation, treatment, and habilitation. In marked contrast

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to our other cases, however, plaintiffs here seek to halt Missouri's extant deinstitutionalization plan, which attempts to substantially increase the number of retarded persons placed in small, home-like community residences. We view intervention in this action as an excellent opportunity to not only make Romeo-type arguments, in order to remedy existing constitutional deficiencies in the conditions at the institution, but also to support the state's generally constructive efforts to expand community placement. Indeed, we view plaintiffs' requested relief as a potentially dangerous precedent-setting attempt to prevent state governments from pursuing placement of retarded people in the least restrictive environment consistent with their habilitative needs, even when a state legislature (as in Missouri) has mandated that process.

II. JURISDICTION AND PROCEDURAL REQUIREMENTS

Section 5(a)(1) of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997c, provides:

> Whenever an action has been commenced in any court of the United States seeking relief from egregious or flagrant conditions which deprive persons residing in an institution of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to sufier grievous harm and the Attorney General has reasonable cause to believe that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may intervene in such action upon motion by the Attorney General.

The Act further provides, at section 5(b)(1):

> The Attorney General shall certify to the court in the motion to intervene filed under subsection (a)-
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> (A) that he has notified in writing, at least fifteen days previously, the Governor or chief executive officer, attorney general or chief legal officer of the appropriate State or political subdivision, and the director of the

institution of-

(i) 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 and practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(ii) the supporting facts giving rise to the alleged conditions, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred; and

(iii) to the extent feasible and consistent with the interests of other plaintiffs, the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance; and

(B) that he believes that such intervention by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

III. FACTS

A. Sources

Our investigation has included review of ICF/MR surveys supplied by the Regional Office of the Health Care Financing Administration, HHS, in Kansas City; newspaper reports; State Community Placement Plans; transcripts of State Senate hearings; interviews of former employees of the State School; interviews of operators of current community facilities; Report of the Residential Committee of the Select Task Force on MR/DD Developmental Services Model of the Missouri Department of Mental Health, Division of Mental Retardation-Developmental Disabilities, A Model for the Delivery of Services to Missouri's Developmentally Disabled Citizens (September, 1981); Missouri Department of Mental Health, Consolidated Plan, Fiscal Years 1981-83; St. Louis State School-Hospital, Official Brochure; Missouri Department of Mental Health, Report on Community Residential Services for the Division of Mental Retardation-Developmental Disabilities in the State of Missouri (1982); St. Louis State School and Hospital, Fact Sheet (June, 1982); and monthly newsletters of the Parents Association of St. Louis State School and Hospital (1981-1982).

B. Background

In 1922, the City of St. Louis enacted an ordinance establishing the St. Louis Training School. Five hundred acres of land were purchased in then-rural north St. Louis County, building construction was begun, and the initial facility was formally dedicated just two years later. The institution was to become one of the very few mental retardation institutions in the United States to be fully funded and operated by a municipality. By 1940, the institution had been turned over to the state. 1/

Early records of the institution fail to indicate the numbers of persons the various buildings were initially designed to accommodate. However, mention was made that the intent was for the "institution to eventually accommodate 1,200 to 1,600 feeble-minded children and young people." 2/ By 1934 the population of the facility had already reached nearly 600. In that year, the St. Louis City Grand Jury investigated the institution and reported conditions as "deplorable." 3/ Population data indicate a steady increase through the 1950's and early 1960's, reaching a peak of 834 residents in 1962.

As of June, 1982, 443 persons resided at the State School. Contrary to the original mission of the institution, only 2% of the remaining residents are under eighteen years of age. The average age is 29. The population spans all levels of retardation. The vast majority of the residents

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1/ Final Report of the Residential Committee of the Select Task Force on MR/DD Developmental Services Model, Missouri Department of Mental Health, Division of Mental Retardation-Developmental Disabilities, A Model for the Delivery of Services to Missouri's Developmentally Disabled Citizens (Sept., 1981) (hereinafter "Task Force Report").

2/ E. M. Anderson, Development of Public Institutional Care for Feebleminded Children in St. Louis with Special Reference to the History of the St. Louis Training School, Unpublished Master's Thesis, Washington University Department of Social Work, St. Louis, Mo. (1936).

3/ Id.

are court committed. The cost of caring for each resident at the State School currently amounts to $49.98 per day or $18,736.00 per year. 4/

Community residential services in Missouri first received state support in 1959 when the 70th General Assembly funded a "nursing, family, and boarding home care" program. This legislation led to the development of a community placement program, authorized by Mo. Rev. Stats., § 202.831. 5/ However, only slightly more than one hundred mentally retarded persons were placed in the community in the early 1960's.

In 1965, the General Assembly created nine diagnostic and evaluation centers. By the time the first of these regional centers opened in 1967, still only about three hundred persons had been placed in the community. This state of events was dramatically altered in the 1970's however. Between 1972 and 1975, more than two thousand mentally retarded clients were added to the community placement rolls, quadrupling the number that had been placed in the preceding ten years. By the end of FY 1981, mentally retarded persons in community placement numbered 3,571. 6/ The state community placement budget for the Missouri Division of Mental Retardation/ Developmental Disabilities (MR/DD) for FY 1983 is in excess of $19 million, appropriated out of state general revenue funds. The total funding available, including private, federal, and other sources for the Division of MR/DD for its community placement program will exceed $30 million for FY 1983.

4/ St. Louis State School and Hospital, Fact Sheet (June, 1982).

5/ Missouri Department of Mental Health, Report on Community Residential Services for the Division of Mental Retardation-Developmental Disabilities in the State of Missouri (1982).

6/ Task Force Report, supra note 1.

C. Physical Environment

Interviews and HCFA reports present a picture of a harmful and dangerous setting for residents at the State School, in buildings that fail to comply with health, safety, and fire regulations.

HCFA surveys recently have identified serious health hazards at the State School. 7/ For example, the campus is infested with rodents. Numerous insects were also observed in living areas. A further health hazard is the extreme heat in the buildings, and lack of ventilation due to the fact that numerous windows were painted or nailed shut. In addition, potentially hazardous foods were stored at unsafe temperatures prior to their being served.

The HCFA surveys also indicate that residents have no privacy whatsoever, even for showering or toileting. Commodes are in the open, without so much as privacy curtains. A strong stench of urine permeates the living areas. Shower and toilet areas are soiled with fecal matter. Bathrooms have not been properly sanitized. Residents use the same dirty razors, which are commonly stored. Floors in the dayrooms are not cleaned regularly. Walls are encrusted with dirt. Kitchen areas have not been cleaned for long periods of time.

The HCFA surveys further reported a general lack of routine maintenance. Flooding has occurred in several of the buildings from roof leaks and blocked drains. Chipping paint and plaster are commonly observed, and there are holes in the walls. Debris accumulates for long periods of time before being removed.

The facilities lack even minimal human comforts. Basic furnishings, such as chairs, are absent. Where furniture does exist, it is usually damaged. Recreational equipment, when it does exist, is also damaged. Bed frames are rusted. Mattresses are often without sheets.

7/ Health Care Finance Administration, Medicaid Audits of St. Louis State School and Hospital (1981) [hereinafter "HCFA Audits"].

Numerous fire hazards were also observed. These included faulty fire-fighting materials, frequent failure to use flame retardant materials, failure to test fire alarms, and faulty fire evacuation procedures. Windows that could not be opened were designated for use as fire escapes. Obviously, the presence of large numbers of handicapped persons, many with impaired mobility, only aggravates the seriousness of these problems.

D. Clothing

The shortage of adequate clothing for the residents is a serious problem at the State School. What clothing does exist is ill-fitting and essentially consists of hand-me-downs. 8/ Due to the lack of shoes, barefootedness is the rule. Numerous clients are typically observed dressed only in underwear or diapers. 9/ Part of the shortage problem is reportedly due to theft by staff. 10/ Moreover, because of the shortages, residents are given no choice in the selection of clothes. 11/

E. Staffing and Care

The State School suffers from extreme staff shortages. The ratio of staff to mentally retarded residents is well below recognized minimum standards in all areas, but particularly among direct care staff. State officials indicate in their own documents that the "isolated location" of the institution, "coupled with size of the facilities, has historically contributed to

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8/ Interview with Carol Harris, Executive Director, "Lifeskills" (a private, non-profit agency that operates community-based residence and day programs in the St. Louis area) (August 16, 1982).

9/ HCFA Audits, supra note 8.

10/ Harris Interview, supra note 7.

11/ HCFA Audits, supra note 8.

a lack of sufficient, appropriate professional services." 12/ The most recent available figures, for FY 1981, indicate an annual staff turnover rate of 24% at the State School. 13/

Lack of staff supervision has led to injuries to State School residents. According to the original Complaint, one unattended plaintiff was allegedly assaulted and raped by other residents; another received a broken arm, scars, and bruises; a third received bitemarks and bruises from another resident; and a fourth was observed with cigarette burns. The lack of training and habilitation and the absence of basic supervision present a serious threat to the health and safety of the residents.

Staff levels are inadequate to permit the provision of even minimal training and habilitation. Residents who are fully capable fail to receive training that would enable them to follow directions and to take appropriate action for self-preservation under emergency conditions; e.g., many residents could be trained how to evacuate in the event of a fire. 14/ Numerous residents who are capable of being toilet-trained have been observed in diapers. Staff are so burdened by the provision of custodial care and performance of housekeeping chores that no time is left to teach self-care, self-feeding, walking, or any skills. 15/ Although many residents have been evaluated and have "individual habilitation plans" on paper, the plans go unimplemented because of the staff shortages. Some residents receive psychotropic medication as a substitute for programming. 16/

12/ Task Force Report, supra note 1.

13/ Fact Sheet, supra note 4.

14/ HCFA Audits, supra note 7.

15/ Id. Moreover, what resources do exist often go unused due to staff shortages. E.g., a therapeutic pool built at significant expense has been closed, depriving residents of an important habilitative activity.

16/ HCFA Audits, supra note 7.

F. Medical Care

As the preceding section indicates, there is a severe staffing shortage at the State School. This shortage carries over into nursing services and related medical services such as physical, occupational, and speech therapy.

Medications at the State School are administered at irregular intervals, are not given as prescribed and are taken from pharmaceutical supplies that bear out-of-date markings. 17/ A death occurred in 1981, as a result of a resident having a fatal reaction to halodol when another drug had been prescribed. 18/

Special diets have been prescribed for some residents with special health needs. However, these diets are rarely followed. 19/

In addition, the medical records at the State School have been found to be in a state of disarray. Numerous records were missing, medical procedures and administration of medications were found to be recorded in advance for some residents. 20/ Thus, several aspects of the delivery of medical care at the State School appear defective.

17/ DCFA Audits, supra note 7.

18/ Interview with Peter Bastion, a St. Louis lawyer who has been appointed by St. Louis probate courts as legal guardian for some of the residents of St. Louis State School and Hospital (September 10, 1982).

19/ DCFA Audits, supra note 7.

20/ Id.

C. Community Placement

In apparent recognition of the substantial deficiencies at the State School, Missouri officials have undertaken, successfully, to establish community-based programs, utilizing such alternatives as group homes, foster placements, small-scale nursing facilities, sheltered workshops, day treatment centers, and the like. The current plaintiffs, represented by attorney Joel Klein, seek to block this effort.

Eschewing individualized, professional determinations, the present plaintiffs in this case allege that community residences "are inherently unable to provide the basic services that mentally retarded persons need to prevent deterioration in their condition." Complaint, ¶ 76. We agree, however, with Missouri's Attorney General, who, in answer to the Complaint, states: "Ironically, this flies directly in the face of the overwhelming trend of professional opinion and the law." Similarly, Alan R. Harry, Executive Director of the St. Louis Regional Advisory Council for Comprehensive Psychiatric Services, has called plaintiffs' efforts "a shame. They're trying to turn the page of history backward." 21/

Additionally, Paul R. Sar, the Director of the Missouri Department of Mental Health, and a named defendant, has stated: "To keep [many of the retarded residents] in State School and Hospital would be irresponsible." 22/ This is especially true since a very large number of residents at the State School are practically identical to retarded people being served in extant community programs. 23/

Thus, we recommend opposing plaintiffs' requested remedial actions, which would essentially halt Missouri's community placement initiatives. We would request the court instead to allow the state to continue to follow its program for placing

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21/ Smith, Parents Plan Suit Over Release of Retarded, St. Louis Globe Democrat (March 27, 1982).

22/ Id.

23/ Harris interview, supra note 8.

residents of the State School in the environment appropriate to the individual's needs, consistent with the state's own professional judgments. The state's own reports explain how this is to be accomplished. 24/ As the official brochure for the State School states: "Although some may require longer residence, treatment objectives are to maintain the least restrictive environment which will lead to eventual community placement. No Person Is Admitted to State School Permanently!"

24/ According to the Department of Mental Health's Task Force Report, supra note 1:

> "[W]herever and whenever possible and feasible, living environments adopted for use by mentally retarded/developmentally disabled citizens shall be within or close to the normal realm of society and not be unnecessarily or overly modified strictly for protective purposes. All living environments should be as "home like" as possible with due considerations given to adaptive behaviors, associated elements of risk, and the habilitation needs of those living within the environment. . . .
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> . . . [T]he ideal system will allow for enough community settings which will negate the need for any mentally retarded/developmentally disabled client from having to unnecessarily reside in an institutional setting. For children, generally the most normal and appropriate living environment is the natural or adoptive home setting. For adults, generally the most normal and appropriate living environment is independent living in his/her own personal residence. Less normal environments, and particularly those which are more restrictive or in which others participate in determining, should be defined in an Individualized Habilitation Plan. The individual and/or parent or legal guardian, as appropriate, must participate in the decisions provided id the plan, including decisions about placement in a living environment. . . .
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> . . . Operationally, the least restrictive environment imposed upon any person should be defined within the Individualized Habilitation Plan. The concept of the least restrictive environment should be based upon the developmental model, and therefore, should never be considered static. It should also adhere to the principles of reasonable risk. This recognizes that all individuals fail at some time or another but that this is essential

[footnote continued on next page]

IV. APPLICABLE LAW

The proposed letter to Governor Bond and the proposed Complaint in Intervention cite deprivation of rights to substantive and procedural due process of law under the Fourteenth Amendment to the United States Constitution. These rights can be analyzed along the following lines.

A. Substantive Due Process Rights

In Youngberg v. Romeo, 102 S.Ct. 2452 (1982), the Supreme Court was first presented with the question "whether liberty interests . . . exist in safety, freedom of movement, and training." Id. at 2458. The Court then proceeded to recognize a substantive due process right to safety, freedom from undue bodily restraint, and minimally adequate training. Id. at 2458-60. These rights are denied to residents of the State School.

We have identified serious deficiencies in the areas of food preparation, sanitary living conditions, adequate clothing, and medical care. The courts have found substantive due process rights to minimum adequacy in the provision of such services to mentally ill and mentally retarded persons. E.g., Harper v. Cserr, 544 F.2d 1121, 1123 (1st Cir.1976); Halderman v. Pennhurst State School and Hospital, 446 F.

[footnote continued]
to learning. Retarded individuals also have the right to learn from their mistakes. It also recognizes that some risk is inherent in all environments. Learing [sic] to cope with risk must be developmentally approached. . . .

. . . The residential service unit supports the premise of the developmental model and that the individual involved, unless medically contraindicated, should actively participate in a normal rhythm of daily activities both in and out of the living environment. For children, this includes attending to the business of going to school and the participation in related activities. Unless medically contraindicated, and so documented within the Individualized Habilitation Plan (IHP) this must be outside of the living environment and within the public school system. For adults who have not retired, this includes attending to the activities normally associated with the basic work-a-day world. Therefore, considerations equally important to the selection of a living environment include availability of transportation, medical treatment, appropriate education or vocational opportunities, and accessible leisure time pursuits. A full compliment of such available services along with the placement bed define an adequate residential service unit. Anything less is inadequate."

Supp. 1293, 1339 (E.D.Pa.1977); NAACP v. Rockefeller, 387 F.Supp. 732 (E.D.N.Y.1973). 25/ Although the Supreme Court has yet to specifically decide the question, it seems evident that the Court would hold such services to be constitutionally required, were it presented with the issue. In Romeo the Court, noting the state's concession of a substantive due process right to adequate food, shelter, clothing, and medical care," 102 S. Ct. at 2458, indicated that it was required to decide "whether other liberty interests also exist." Id. (emphasis supplied). Thus, it seems that, absent a Romeo-type concession by a state, the Court would find a substantive due process right to such services. Accord, Association for Retarded Citizens of North Dakota v. Olson, No. A1-80-191 (D.N.Dak.)(slip opinion, Aug. 31, 1982), at p. 24 et id.

The right to reasonably safe conditions, an "historic liberty interest," Youngberg v. Romeo, 102 S.Ct. at 2458, quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977), is infringed at the State School by the inadequacy of the physical facilities, the fire evacuation procedures, and the inadequacy of supervision in dangerous situations. This right also concerns the failure of staff at the State School to prevent residents from being attacked. In addition, it concerns the infestation of vermin and rodents and the serving of potentially hazardous foods.

The right to freedom from undue restraint upon liberty "always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Youngberg v. Romeo, 102 S.Ct. at 2454, quoting Greenholtz v. Nebraska penal Inmates, 442 U.S. 1, 18 (1979)(Powell, J.,

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25/ Courts also have enumerated such rights for residents of penal institutions, based upon the Eighth Amendment prohibition against cruel and unusual punishment. See, e.g., Battle and United States v. Anderson, 564 F.2d 388 (10th Cir.1977), Cates v. Collier, 349 F.Supp. 881, 894 (N.D.Miss.1972), aff'd, 521 F.2d 91 (5th Cir.1975); Hamilton v. Love, 328 F. Supp. 1182 (E.D.Ark.1971); Holt v. Sarver, 442 F.2d 304 (8th Cir.1971), subsequent opinion sub nom. Holt v. Hutto 505 F.2d 194 (8th Cir.1974), subsequent opinion sub nom. Finney v. Hutto, 548 F.2d 740 (8th Cir.1977), aff'd, 437 U.S. 678 (1978); Newman v. Alabama, 349 F.Supp. 278 (N.D.Ala.1972), aff'd, 503 F.2d 1320 (5th Cir.1974), cert. denied, 421 U.S. 948 (1975). If it is cruel and unusual punishment to abrogate such rights of convicted criminals, it must be unconstitutional to confine mentally retarded people -- "who may not be punished at all" -- in institutions that abrogate those rights. Accord v. Youngberg, 102 S.Ct. at 2454.

concurring). Thus, where no legitimate government objective is served by a restraint upon a liberty interest, such a restraint is inconsistent with due process. This right imposes a standard for the court's determination of whether professional judgment is being exercised in the use of medication and physical means to restrain residents. It may also prohibit the arbitrary denial of certain freedoms to residents, such as the opportunity to make small personal decisions concerning what to wear or what to eat. This right further prevents the State School from refusing to provide capable retarded residents with reasonable opportunities to make trips into the outside community. Finally, it provides for less restrictive methods of care and habilitation insofar as professional judgment determines that such alternatives are appropriate to serve the residents' needs where, as here, a significant number of residents have been determined by the professionals to have those needs. See Dixon Association for Retarded Citizens v. Thompson, No. 54831 (Ill.S.Ct. Aug. 20, 1982).

With regard to training, "[a] court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case." Youngberg v. Romeo, 102 S.Ct. at 2460 n. 25. This right bears here upon the assessment and development of each resident of the State School, and the availability of staff and facilities to supply the training necessary for acquisition of needed skills. Fully capable residents of the State School fail to receive even training that would enable them to follow directions and to take appropriate action for self-preservation under emergency conditions. Many residents, for example, could be trained to evacuate in the event of a fire. Moreover, numerous residents are in need of toilet-training and other self-care skills. Under Romeo, these residents possess a right to training, insofar as that training serves at least to allow them to live safely and without undue restraints upon their liberty. It also gives residents the opportunity to develop skills needed to avoid suffering the harm of physical and psychological regression to the extent that they become self-injurious.

4. Procedural Due Process

In 1980, the Missouri legislature enacted a statute that grants special "entitlements" and other guarantees to the state's retarded citizens. These include entitlements:

- to humane care and treatment;
- to medical care and treatment in accordance with the highest standards accepted in medical practice;
- to safe and sanitary housing;
- to be treated with dignity as a human being;
- to a nourishing, well-balanced and varied diet;
- to be free from verbal and physical abuse; and
- to receive prompt evaluation, care, treatment, and habilitation 26/ in the least restrictive environment. 27/

Mo. Rev. Stats. § 630.115

State law further provides that the Department of Mental Health "shall establish a placement program" for all mentally retarded persons, that "utilizes residential facilities, day programs and specialized services which are designed to maintain a person who is accepted in the placement program in the least restrictive environment in accordance with the person's individualized treatment, habilitation, or rehabilitation plan." Mo. Rev. Stats. § 630.605.

The Department of Mental Health also is required to develop and promulgate standards governing the care and

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26/ "Habilitation" is defined as "a process of treatment, training, care or specialized attention which seeks to enhance and maximize the mentally retarded or developmentally disabled person's abilities to cope with the environment and to live as normally as possible." Mo. Rev. Stats. § 630.005(12).

27/ "Least restrictive environment" is defined as "a reasonably available setting where care, treatment, habilitation or rehabilitation is particularly suited to the level and quality of services necessary to implement a person's individualized treatment, habilitation or rehabilitation plan and to enable the person to maximize his functioning potential to participate as freely as feasible in normal living activities...." Mo. Rev. Stats. § 630.005(18).

treatment of mentally retarded persons placed by the Department in non-institutional residential facilities. Mo. Rev. Stats. § 630.655. Among other things, such standards must provide for the care, treatment, habilitation, or rehabilitation of retarded residents; adequate physical plant facilities, including fire safety, housekeeping, and maintenance standards; safety precautions; and adequate staff. The Department of Mental Health is required to license all non-institutional residential facilities for compliance with these standards. Mo. Rev. Stats. § 630.715. The Department is further directed to conduct periodic inspections of all such licensed facilities to insure continued compliance with the Department's care and treatment standards. Mo. Rev. Stats. § 630.730.

Finally, Missouri has legislatively mandated specific criteria to govern residential and program placement. These include:

- the best interest of the resident;
- the least restrictive environment for providing care and treatment consistent with the needs and conditions of the resident;
- the ability of the residence or program to provide the individual degree of care and treatment required for the particular resident;
- the relationship of the residents to their families, guardians, and friends, so as to maintain relationships and encourage visits.

Mo. Rev. Stats. § 630.645.

As we argued in our Brief in Opposition to Defendants' Motion for Partial Summary Judgment in Connecticut A.R.C. v. Mansfield Training School (filed July 15, 1982), liberty interests of the mentally retarded residents of state-operated institutions are, of necessity, compromised upon commitment, Youngberg v. Romeo, 102 S. Ct. at 2458, and any denial by a state of rights granted by that state must be consistent with procedural protections normally accorded other rights in which liberty interests have vested, see, e.g., Wolff v. McDonnell, 418 U.S. 539 (1974) (prisoner's "good time"); Fuentes v. Shevin, 407 U.S. 67 (1972) (personal chattel); Bell v. Burson, 402 U.S. 535 (1971) (driver's license). Decisions regarding institutionalization, which entails a "massive curtailment of liberty," Humphrey v. Cady, 405

U.S. 504, 509 (1972), likewise enjoy procedural protections, see Parham v. J. R., 442 U.S. 584, 599 (1979). 28/

Moreover, as we argued in Connecticut, due process requirements do not end with the decision to take a mentally retarded person into state custody. Vitek v. Jones, 445 U.S. 480, 491-94 (1980). Indeed, in Parham v. J. R., 442 U.S. at 604, the Supreme Court held that even persons who are voluntarily committed for treatment of mental disabilities are entitled to neutral professional evaluations of their conditions. Where, as in Missouri -- and as it did in Connecticut -- state law speaks to habilitation and placement in the least restrictive environment, procedural due process requires that such interests not be arbitrarily denied. See Mills v. Rogers, 102 S. Ct. at 2449 ("state-created liberty interests are entitled to the protection of the federal Due Process Clause"). See also Jackson v. Indiana, 406 U.S. 715, 738 (1972) ("due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed"); cf. Association for Retarded Citizens of North Dakota v. Olson, slip op. at 30 (where state law ensures rights to appropriate treatment, services, and habilitation, due process might well bind the state to delivery of such rights.)

Where, as here, professional judgments have been rendered pursuant to state law, and those judgments require, inter alia, habilitation in community settings, due process then requires that those judgments be implemented within the state statutory framework. Moreover, by making this contention we shall be arguing in favor of permitting the state to follow its own policies, on the basis of its own professional judgments.

28/ As the Supreme Court indicated in Mills v. Rogers, 102 S. Ct. 2442, 2448 (1982):

> Procedural due process concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance. See Parham v. J. R., 442 U.S. 584, 606 (1979); Mathews v. Eldridge, 424 U.S. 319, 335 (1976). As a practical matter . . . issues [concerning procedural due process] are intertwined with questions of state law.

Finally, since residents have state law rights to humane care, medical treatment, safe and sanitary housing, treatment with dignity as a human being, nourishing food, and freedom from verbal and physical abuse, the State cannot arbitrarily deny those rights, as they have at the State School, without rendering due process a hollow shell.

V. CONCLUSION:

Based upon the foregoing, I recommend approval of our participation in this lawsuit. Accordingly, I forward herewith:

1. Proposed Complaint in Intervention;

2. Proposed Motion to Intervene, Memorandum in Support, and draft Order;

3. Certificate of the Attorney General;

4. Notice letter to Governor Bond containing the information required under Section 5(b)(1) of the Civil Rights of Institutionalized Persons Act;

5. Letters to the Secretaries of the United States Departments of Health and Human Services and of Education, required to be sent simultaneously with the sending of the notice letter to the Governor pursuant to Section 10 of the Civil Rights of Institutionalized Persons Act.

Approved _____

Disapproved _____

Comments: