

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.

Washington : U.S. G.P.O. : 1986.

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U.S. Department of Justice
Civil Rights Division

APPENDIX 3(g)(v)

Office of the Assistant Attorney General

Washington, D.C. 20530

February 18, 1983

MEMORANDUM

TO: Timothy M. Cook
Attorney, Special Litigation Section

FROM: Wm. Bradford Reynolds
Assistant Attorney General *WBR*
Civil Rights Division

SUBJECT: Intervention in St. Louis State School
and Hospital (E.D. Mo.)

Jay has shared with me your memorandum speaking to the policy of intervening in ongoing CRIPA actions. In light of your comments, it is apparent that there is a need for further clarification.

First, my sense is that perhaps you have overreacted in your characterization of my earlier memorandum. The position set forth therein hardly outlines a "new" policy, or even a dramatic departure from previous policy.

As I am sure you appreciate, the Division unfortunately has limited resources, and only a percentage of those resources are available for enforcement of CRIPA. In determining how best to utilize the talent available, certain priorities must be followed. The first priority logically is assigned to new S. 10 investigations under CRIPA. Above all else, we should be pursuing those "egregious and flagrant" conditions not already under judicial scrutiny in a private lawsuit. The second priority goes to interventions in pending lawsuits where plaintiffs have inadequate representation. I agree fully with the point in your memorandum emphasizing legislative recognition of the value of Department involvement in these cases. The third priority is left for intervention in private lawsuits where plaintiffs have adequate representation, but where we believe the Department can nonetheless make a meaningful, non-duplicative contribution. This last option would likely be sparingly exercised.

To suggest that this approach signals a "drastic change" from the past is suspiciously misleading. Prior to passage of CRIPA, the intervention policy was materially the same as today. With the new statute, the initiation of our own S. 10 investigations has from the outset assumed the premier spot. But the Division has continued to intervene in private litigation as warranted based on the legal issues involved and the adequacy of the representation by retained counsel. That policy has not even undergone minor alteration during my tenure.

As for the St. Louis case, it clearly falls into the "third priority" class. The Special Litigation Section currently has a number of active S. 10 investigations. There are in addition cases that are presently in litigation. Many new matters are under consideration for possible action. In these circumstances, I am reluctant to enter an ongoing case as intervenor where our contribution will be marginal, at best. Counsel for plaintiffs is highly competent and there is no suggestion that funding problems exist that might impede effective prosecution.

While your memorandum suggests some personal disagreement with the position espoused on behalf of plaintiffs regarding community placement, that hardly suggests a reason to intervene. To my knowledge, plaintiffs have given no indication that they are dissatisfied with their counsels' arguments, or that they have a different view on community placement than the one being advanced on their behalf. It is, in my view, the height of arrogance for the United States to intervene on plaintiffs' behalf to argue at cross-purposes on the pretense that we somehow know better than they what is best for them. That novel excuse for intervention does not even make the "priority" list.

Your memorandum concludes with a suggestion that further discussion might be appropriate. As you know, I am always open to exploring with Division lawyers policy initiatives and litigation strategy. To this end, if you continue to feel that a meeting on the St. Louis case would be fruitful, I will gladly arrange a time in my schedule when we can get together.

cc: J. Harvie Wilkinson III
Arthur E. Peabody, Jr.