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## Advocates Needed to Safeguard Rights of Youth in DOJ Conditions Cases

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On June 11, 2004, a Youth Corrections Officer in Hawaii assaulted a confined youth in his care. He repeatedly punched the youth in the face and body, choked him, and threw him against the wall. The provocation? They were arguing about whether cereal was an acceptable evening snack.<sup>1</sup> At the time of the incident, the Hawaii Youth Corrections Facility (HYCF), where the youth was confined had few, if any, rules regulating staff behavior.<sup>2</sup> The facility also had chronic staff shortages, limited access to mental health services, inadequate education for children with disabilities, and a rampant culture of youth abuse and exploitation, including guards extorting the families of confined youth for food and money.<sup>3</sup> After visiting the facility on August 4, 2005, the US Department of Justice (DOJ) noted, "it is no exaggeration to describe HYCF as existing in a state of chaos."<sup>4</sup>

Under the joint authority divested to it by the Civil Rights of Institutionalized Persons Act (CRIPA)<sup>5</sup> and the Violent Crime Control and Law Enforcement Act<sup>6</sup>, the DOJ has investigated conditions of confinement involving juvenile correctional facilities in 20 states and two

U.S. territories in the last 12 years. DOJ's investigative findings reveal a litany of abuses and rights violations that include inadequate health care, youths with broken bones and other injuries that went untreated, a lack of mental health or educational services, unmitigated youth violence, and rampant staff abuse.<sup>7</sup>

DOJ cases are more effective when there is meaningful participation of child advocacy groups representing the interests of those youth suffering the harsh and unconstitutional conditions of confinement referenced in DOJ investigations; yet, such a collaborative approach rarely happens. Some attorneys have abandoned conditions litigation altogether due to restrictions imposed by the Prison Litigation Reform Act (PLRA).<sup>8</sup> Due to a scarcity of resources, some youth advocacy organizations engaging in conditions litigation retreat to other areas or issues when DOJ begins involvement with a case. Even when advocates try to stay involved, DOJ's own processes of investigation and enforcement often have the unfortunate consequence of excluding stakeholders, including individual youth and youth advocates.

Despite the difficulties, it is a missed opportunity if youth advocates and DOJ do not work together in conditions cases. Federal statutes, such as CRIPA, create tremendous opportunities for conditions reform while, at the same time, threaten to leave the safety and well-being of incarcerated youth in the hands of the federal government.

### DOJ and Juvenile Conditions Actions Under CRIPA: An Overview

Since its enactment in 1980, CRIPA has allowed the Civil Rights Division of DOJ to investigate possible civil rights violations pertaining to persons in publicly operated institutions and to bring consequent legal actions against state or local governments. The Violent Crime Control and Law Enforcement Act of 1994 further empowers the DOJ to bring civil action against any governmental agent – including those with "responsibility for the administration of juvenile justice or the incarceration of juveniles" – whose conduct violates Constitutional or statutory rights or privileges.

The DOJ has investigated conditions in more than 100 juvenile facilities and currently monitors more than

1 See Department of Justice (DOJ) Investigation Letter – Hawaii Youth Correctional Facility, 8/4/05, at 13. Unless otherwise specified, all DOJ investigative letters, complaints, and settlement agreements referenced in this article are available online at <http://www.usdoj.gov/crt/split/juveniles.htm> and are on file at the National Center for Youth Law (NCYL).

2 *Id.* at 4. ("Security staff, who have received no training in over five years and have no rules to guide their decisions, routinely use excessive force against youth, confine youth to their cells for days on end, discipline youth without justification or oversight, deny youth access to medical and mental health services, and prevent youth from receiving education.")

3 *Id.* at 19.

4 See *id.* at 3.

5 42 U.S.C. § 1997 – 1997j.

6 42 U.S.C. § 14141.

7 For excellent summary descriptions of many of these abuses discovered during DOJ CRIPA investigations, see Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 Or. L. Rev. 1001 (2005).

8 PLRA's attorney fees provisions create an obstacle in bringing conditions litigation. See 42 U.S.C. § 1997e(d). PLRA's restriction of suits to those involving physical injury further helps to bar bringing suit based on other Constitutional violations (e.g., free exercise of religion, racial discrimination, invasion of privacy) under section 1983. See 42 U.S.C. 1997e(e). See also Allison Cohn, *Can \$1 Buy Constitutionality?: The Effect of Nominal and Punitive Damages on the Prison Litigation Reform Act's Physical Injury Requirement*, 8 U. Pa. J. Const. L. 299, 299 (2006).

60 such facilities, all under consent decree or settlement agreement with the federal government. Some agreements cover a single facility (e.g., the Alexander Youth Services Center in Arkansas), while others govern all of the juvenile facilities within the state (e.g., Georgia).

DOJ's settlements often do not lead to court-enforceable relief, but, instead, lead to private settlement or "Rule 41" agreements. DOJ's Rule 41 agreements are usually filed simultaneously with a complaint and provide that the court will immediately dismiss the case without prejudice and place it on an "inactive docket."<sup>9</sup> These Rule 41 settlements explicitly provide that the terms of the agreement are not enforceable and that DOJ has no remedy available for the State's breach of the agreement other than

the reinstatement of the complaint.<sup>10</sup> Like Rule 41 agreements, the terms of DOJ private settlement agreements are not subject to court enforcement.

DOJ activity in the juvenile arena has increased in the past 10 years, although the reasons why are not completely clear. During President George W. Bush's first term, from 2001 to 2005, DOJ more than doubled the number of investigations of juvenile justice facilities over the preceding four years.<sup>11</sup> Amnesty International traced this increase in CRIPA actions to public criticism of DOJ in the mid-1990s for its failure to perform investigations of worsening conditions in juvenile facilities.<sup>12</sup> Others have attributed the upswing in action to a platoon of civil rights lawyers joining the DOJ special litigation section during the later stages of Bill Clinton's presidency and

to the relative political safety involved with attacking conditions affecting children.<sup>13</sup>

The DOJ currently has 13 active settlement agreements:

### Blueprint of a CRIPA Investigation

DOJ follows a procedural pattern in its juvenile justice conditions actions largely dictated by CRIPA, which establishes clear guidelines for investigations into civil rights violations of institutionalized persons.

First, CRIPA prescribes a two-pronged test to determine whether a facility is a "public institution" and thereby under its jurisdiction: 1) if it is "owned, operated, or managed by, or provides services on behalf of, any State or political subdivision of a State" and 2) if it is a jail or pretrial

9 For an example of this reinstatement clause, see HI Agreement at 26. DOJ has shown a proclivity toward these agreements entered under Federal Rules of Civil Procedure 41 and some jurisdictions are unprepared to deal with them. In one recent settlement hearing, the judge said he had no inactive docket. See *US v. HI*, Transcripts of Proceedings 2/9/06 at 6 (available on file at NCYL). According to DOJ attorneys in that case, this is a common response with "each and every court where we brought this" asking similar questions and seemingly being unaware of the process. *Id.* at 7-8.

10 The terms of a Rule 41 agreement could be enforceable if the agreement so provides and the terms of the agreement were incorporated into the order of dismissal. See *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 381 (1994).

11 See DOJ, *Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act Fiscal Year 2004* at 24, available at [http://www.usdoj.gov/crt/split/documents/split\\_cripa04.pdf](http://www.usdoj.gov/crt/split/documents/split_cripa04.pdf).

12 Amnesty International, "Combating Torture: A Manual for Action." ISBN 0-86210-323-1. (2003), available at <http://web.amnesty.org/pages/stoptorture-manual-index-eng>.

13 See Ted Gest, U.S. *Justice Department Cuffs Juvenile Corrections*, Youth Today 2/11/04, available at [http://www.youthtoday.org/youthtoday/Nov04/story2\\_11\\_04.html](http://www.youthtoday.org/youthtoday/Nov04/story2_11_04.html). Of 14 new CRIPA investigations in 2004, five involved juvenile conditions, while only one involved an adult facility. *Supra* note 3. It is not clear if this represents a larger trend away from adult conditions work or merely a spike in juvenile conditions actions. Charles Yeoman, former Chief of Staff of the DOJ's Civil Rights Division, thinks it does: "[E]nforcement of CRIPA regarding prisons and jails appears to have slowed considerably. . . plainly, a policy decision has been made to de-emphasize enforcement focused on jails and prisons." *Statement of William R. Yeomans Regarding the Role of the Civil Rights Division of the United States Department of Justice in Addressing Conditions in Prisons and Jails*, available at [http://www.prisoncommission.org/statements/yeomans\\_william.pdf](http://www.prisoncommission.org/statements/yeomans_william.pdf).

14 Both facilities in Mississippi are under both types of agreements: the consent decree covers "life threatening" areas and the Rule 41 Agreement covers other areas such as education and mental health.

State	Type of Agreement	# of Facilities Under Agreement
Arkansas	Consent Decree	1
Saipan (Northern Mariana Islands)	Consent Decree	1
Mississippi	Consent Decree + Rule 41 Agreement <sup>14</sup>	2
New Jersey	Consent Decree	1
Puerto Rico	Consent Decree	15
Arizona	Rule 41 Agreement	3
Georgia	Rule 41 Agreement	29
Hawaii	Rule 41 Agreement	1
Indiana	Rule 41 Agreement	2
Maryland	Rule 41 Agreement	2
Los Angeles	Private Agreement	3
Michigan	Private Agreement	1
Nevada	Private Agreement	1

### THE DOJ ALSO HAS EIGHT ACTIVE AND ONGOING INVESTIGATIONS:

State	Facility
California	CHAD (state facility)
California	Santa Clara juvenile detention halls (county facilities)
Maryland	Baltimore City juvenile detention halls
New Jersey	Hurlick Juvenile Detention Center
Ohio	Marion and Scioto Juvenile Detention Centers
Oklahoma	Raider Juvenile Detention
Texas	Evans Juvenile Detention
Indiana	Marion County Juvenile Detention Center

detention facility or if it is used for the mentally ill or for juveniles, or to provide nursing or custodial care.<sup>15</sup> To be covered under the Act, juvenile facilities can be pre-trial detention facilities, residential facilities, or facilities which are not solely schools where juveniles reside for a State purpose.<sup>16</sup> To act under CRIPA, the DOJ must reasonably believe that there are “egregious or flagrant” conditions leading to a “pattern or practice” of civil rights violations.<sup>17</sup>

Nearly all of DOJ’s actions involving juvenile facilities have followed CRIPA’s four stages of federal involvement: 1) investigation; 2) letter of findings; 3) court action (when appropriate); and 4) relief.

### 1) Investigation<sup>18</sup>

After receiving sufficient complaints from parents, advocates, news reports, prisoners, and/or facility employees, and determining that the facility in question is one covered under CRIPA, the DOJ gives the State or subdivision of the State one week’s notice of its intent to investigate.<sup>19</sup> DOJ then investigates the juvenile facilities, usually with the assistance of “juvenile justice experts,” which may include professionals in the field of mental health, education, medical care, and prison safety. The State may, but does not always, cooperate with the DOJ’s investigations. A State’s lack of cooperation may be noted and reflect negatively in the investigation.<sup>20</sup>

### 2) Findings letter

If DOJ finds constitutional or statutory violations during the course of its investigation, it issues a findings

letter to the State describing these violations and detailing steps needed for amelioration. The average time between the notice of investigation and the issuance of a findings letter is one year, although the investigation may take up to two years or more to complete depending on intervening factors (e.g., change in state administration, closure of facilities and transfer of population, intervention of private litigation). After issuing the findings letter, the DOJ meets with the State to determine how to proceed. By the time the DOJ and the State agree and begin remedial measures, up to four years may have passed.<sup>21</sup>

CRIPA emphasizes and encourages settlement. CRIPA mandates a “good faith effort” to consult with and encourage the State to make “minimum corrective measures” to avoid any legal action.<sup>22</sup> Only after all “reasonable efforts at voluntary correction” have been exhausted can DOJ commence an action under CRIPA.<sup>23</sup>

### 3) Court action and settlement

CRIPA regulates when and how DOJ may file suit. Forty-nine days after DOJ investigates and issues a findings letter, the DOJ may, at its discretion, file suit against the state. In practice, when the DOJ files suit with the court, it often files a settlement agreement simultaneously.<sup>24</sup> In theory, if the settlement agreement provides for an enforcement mechanism, the DOJ can return to court to seek enforcement of a consent decree or to obtain further relief.<sup>25</sup> While this does occur,<sup>26</sup> such action is rare – in part because most DOJ agreements are not subject to court enforcement.

### 4) Relief

In order to remedy a widespread pattern of constitutional violations in juvenile facilities, DOJ’s mandates for reform are often broad, encompassing safety, education, mental health, health care, and suicide risk prevention. However, DOJ settlements leave the particulars of remediation largely in the hands of the states. Often, the agreements merely call for “developing and implementing policies” to correct X.<sup>27</sup> This lack of specificity in the terms of settlement agreements makes compliance and enforcement, if the settlement is enforceable, difficult and leaves much room for the states responsible for the egregious conditions to define the actual relief.

DOJ agreements also often have termination clauses, which allow for the agreement to be satisfied and the case closed if the state can demonstrate substantial compliance for only a short period of time, usually between 12 and 18 months. In situations where there are many constitutional violations and the State is unwilling to cooperate, continued compliance requirements can be lengthened, but only by as much as two years.<sup>28</sup>

The corrective measures DOJ can pursue are further restrained by CRIPA to “appropriate” equitable relief that leads to the “minimum corrective measures necessary.” Any civil action resulting in enforceable court-ordered relief are additionally governed by restrictions on prospective relief delineated in the Prison Litigation Reform Act, 18 U.S.C. § 3626, which specifies that such relief should extend “no further than necessary,” should be “narrowly drawn,” and must be the

15 42 U.S.C. § 1997(1)(A)-(B)(v).

16 42 U.S.C.A. § 1997(1)(B)(iv)(I-III).

17 42 U.S.C. § 1997a(a). Compare this standard with the one found in the Violent Crime Control and Law Enforcement Act (42 U.S.C. § 14141): “a pattern or practice of conduct . . . that deprives persons of rights, privileges, or immunities.” The lack of an “egregious” or “flagrant” standard may make it an easier threshold for the DOJ to meet in conditions cases. For a discussion of the differing burden standards, see Michael Bochenek, *Human Rights Report: The Detention of Children in Adult Jails*, November 1999 at 4, available at <http://www.hrw.org/reports/1999/maryland/>.

18 To file a complaint with the DOJ, advocates can send a detailed letter outlining the conditions and potential constitutional violations by any state or local government run facility to Special Litigation Section, U.S. Department of Justice, Civil Rights Division, 950 Pennsylvania Avenue, NW, Washington D.C. 20530.

19 42 U.S.C. § 1997b(a)(C)(2).

20 See Investigation of the L.E. Rader Center, Sand Springs, Oklahoma, June 8, 2005, available at [http://www.usdoj.gov/crt/split/documents/split\\_rader\\_findlet\\_6-15-05.pdf](http://www.usdoj.gov/crt/split/documents/split_rader_findlet_6-15-05.pdf). (“Such non-cooperation is a factor that may be considered adversely when drawing conclusions about a facility.”).

21 For example, DOJ investigation of Los Angeles juvenile justice facilities began in 2000. A settlement agreement was not signed until 2004. A three year time period seems closer to the norm. There were three years between investigation and settlement in Maryland, Michigan, Mississippi, Nevada, and others.

22 42 U.S.C. 1997b(a)(2)(A-B).

23 *Id.*

24 For example, DOJ filed its complaint simultaneously with a settlement agreement in Arizona (2004), Georgia (1998), Hawaii (2006), Indiana (2006), and Maryland (2005).

25 See Patricia Puritz and Mary Ann Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention Report, (January 1998) at 4, available at <http://www.ncjrs.gov/pdffiles/164727.pdf>. (“If the facility does not comply with the consent decree requirements or other court orders, DOJ will return to court to seek enforcement of the decree or further relief.”).

26 Contempt actions have been filed in Puerto Rico and New Jersey. For a discussion of DOJ involvement in New Jersey, including the filing of a contempt motion, see *id.* at 4.

27 See Michigan’s Memorandum of Understanding, where the Mental Health remedies are written predominately in this format.

28 Mississippi’s consent decree, which details countless deplorable conditions, such as forcing children to eat their own vomit and pervasive staff-youth violence and sexual assault, calls for a three-year compliance period. Nevada has provisions for a two-year status meeting between the State and DOJ to determine compliance.

“least restrictive means necessary” to correct violations of federal rights.<sup>29</sup> Further, § 3626 mandates that civil relief with respect to prison conditions expires after two years or after one more year by court extension.<sup>30</sup>

Since they are not subject to court enforcement, however, DOJ’s private settlement and Rule 41 agreements do not fall under the prospective relief provisions of PLRA. PRLA explicitly provides that it does not preclude parties from entering into a private settlement agreement that does not comply with the [prospective relief] limitations . . . if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.<sup>31</sup>

But DOJ appears to voluntarily impose PRLA prospective relief restrictions on all agreements entered in juvenile conditions cases – including private settlements – going well beyond the parameters of CRIPA limitations on relief.<sup>32</sup>

## DOJ Action and Class Litigation

DOJ action under CRIPA and the Violent Crime Act is not brought on behalf of individuals or classes of confined juveniles. Instead, DOJ represents the interests of the federal government in monitoring state and local government run institutions. Confined youth seeking to enforce their rights in facilities that are the subject of DOJ CRIPA actions must still file separate litigation that either parallels or

intervenes the CRIPA<sup>33</sup> case. By law, DOJ action is not intended to preclude or restrict private juvenile conditions litigation: “the fact that the Attorney General may be conducting an investigation or contemplating litigation pursuant to this subchapter shall not be grounds for delay of or prejudice to any litigation on behalf of parties other than the United States.”<sup>34</sup> Some of the DOJ settlement agreements use similar language to explicitly assert this.<sup>35</sup>

A pending DOJ action may, however, radically alter advocates’ ability to bring litigation on behalf of confined youth. In some instances, DOJ advocacy may deter related action on behalf of the youth in the facilities. For example, the ACLU in Hawaii brought a comprehensive conditions case on behalf of a class of plaintiffs, but stayed the litigation once the DOJ began investigations of the same facilities. When DOJ filed a Rule 41 settlement agreement simultaneously with its conditions complaint related to the same conditions at issue in the ACLU case, lawyers for DOJ argued against consolidating the DOJ action with the ACLU’s case, and did not include the ACLU in settlement discussions, ostensibly viewing the two obviously related cases as distinct.<sup>36</sup> The ACLU then later brought a second juvenile conditions case but focused solely on the treatment of lesbian, gay, bisexual, and transsexual (LGBT) incarcerated youth.<sup>37</sup> Importantly, the court in *Koller* admitted into evidence the findings of the earlier DOJ CRIPA investigation.<sup>38</sup>

Collaborations between DOJ and child advocates pursuing enforceable class-wide relief may also be deterred by the prohibition against third-party beneficiary enforcement actions in recent CRIPA settlements. Beginning with the Los Angeles County agreement in August of 2004,<sup>39</sup> all subsequent DOJ agreements have explicit language denying third-party beneficiaries and allowing for enforcement only among parties to the action.<sup>40</sup> If, by contrast, DOJ negotiated settlements that explicitly permitted enforcement by parties who have a clear stake in the litigation, more meaningful relief and monitoring might be achieved.<sup>41</sup>

Because DOJ CRIPA actions do not have the procedural safeguards characteristic of class actions which ensure that the individuals intended to benefit from the agreement will indeed benefit, collaboration with juvenile advocates is critical.<sup>42</sup> DOJ is not required to comply with Rule 23(e) mandates governing the settlement or compromise of class claims when settling CRIPA conditions cases. The court, therefore, does not conduct a hearing after providing notice to interested parties to determine the fairness of DOJ settlements as would be required to settle a class action pursuant to Rule 23(e). The lack of these important safeguards makes the involvement of interested parties much less likely and the necessity of collaboration all the more essential.

The DOJ’s increasing reliance on private settlement agreements and Rule 41 dismissals filed simultaneous-

29 18 U.S.C. § 3626(a)(1)(A). “Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.”

30 18 U.S.C. § 3626(b)(1).

31 18 U.S.C. § 3626(c)(2).

32 The private settlement agreement related to Georgia’s juvenile facilities, for example, specifies that its relief provisions are “narrowly drawn to provide the least intrusive means necessary.” The Georgia agreement is available at <http://www.usdoj.gov/crt/split/documents/gasettle.htm>. See also *Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act*, Fiscal Year 2003, at p. 7, available at [http://www.usdoj.gov/crt/split/documents/split\\_crpa03.pdf](http://www.usdoj.gov/crt/split/documents/split_crpa03.pdf) (DOJ settlement agreements compliant with PLRA).

33 See *U.S. v. State of Oregon*, 839 F.2d 635 (9th Cir. 1988) (residents of institution allowed to intervene as a matter of right because their interests were not represented by the United States in a CRIPA action).

34 42 U.S.C. § 1997j.

35 See Arizona “Memorandum of Agreement,” 9/15/04. “This agreement is not intended to have any preclusive effect except between the parties.”

36 See *U.S. v. State of Hawaii*, Status Conference Regarding Motion for Conditional Dismissal: Transcript of Proceedings, 2/9/06 at 6. (“The United States has a different interest . . . than the private plaintiffs in the case in front of Judge Seabright [the ACLU’s case], and it is not necessary to at this point consolidate the cases.”).

37 See *R.G. v. Koller*, 415 F.Supp. 2d 1129 (D. Ha. 2006).

38 *Id.* at 1133. The court admitted the DOJ’s report under Federal Rules of Evidence 803(8).

39 Los Angeles County Court Settlement Agreement, 8/24/04, (“There are no intended third-party beneficiaries and “is enforceable only by the parties.”).

40 Some scholars have suggested other routes to third-party enforcement. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Right*, 100 Colum. L. Rev. 1384 (2000) (arguing third-party enforcement under the Violent Crimes Act through deputization similar to mechanisms already operative in environmental legislation and practice). But considering the ambiguousness and boilerplate nature of some of DOJ’s settlement agreements, it is questionable whether third-party enforcement is a good strategy.

41 Such explicit indication may be the determinate factor in questions of third-party enforceability. See *Hudges by Hudges v. Public Bldg. Com’n. of Chicago*, 864 F.Supp. 1493, 1509 (1994) (minority students of a high school were denied their attempt to bring action to enforce a consent decree between the U.S. and the Board of Education. (The court reasoned that, had the government intended to create intended third-party beneficiary status for the students, they could have done so in the consent decree itself.).

42 See Eugene Kim, *Vindicating Civil Rights Under 42 U.S.C. § 14141: Guidance from Procedures in Complex Litigation*, 29 Hastings Const. L.Q. 767, 796-797. Kim’s discussion of the additional requirements for DOJ consent decrees under the Antitrust Procedures and Penalties Act (the Tunney Act) are especially apposite.

43 Attorneys for the DOJ reasoned, circularly or not, that, if the case was conditionally dismissed, then it was no longer pending and thus could not be related to other pending cases. “There would be nothing and no role for the court, if the court signed the conditional dismissal, unless and until the case were revived . . . were that ever to that happen [sic] and were there actually a role for the court, at that time the court could evaluate whether there were pending cases that are related that ought to go forward – so that this case ought to be transferred at that point to a related case.” *US v. HI*, Transcript of Proceedings, 2/9/06 at 4.

ly with a complaint further undercuts the ability of incarcerated juveniles and their advocates to become meaningfully involved in shaping necessary relief in conditions cases as well as in the enforcement process. In Hawaii, the conditional dismissal of the DOJ case under Rule 41 was used by the DOJ as one of the rationales for asking the judge to refuse consolidation with a pending and related juvenile conditions case.<sup>43</sup>

There is obvious danger in allowing DOJ to subsume juvenile conditions work. This is not to question the quality of DOJ's investigations. Rather, aspects inherent to CRIPA actions and current DOJ policies present real difficulties in ensuring the well-being of juveniles if the juveniles themselves are not represented. With no one responsible for zealously representing the interests of youth as a plaintiff class, the relief often ends up being a combination of vague requirements that are under-enforced. Consequently, the youth subjected to the horrible conditions – who should be at the center of the case – have no voice at the table.

When advocates work in concert with DOJ in helping to investigate, bring claims, and enforce compliance with juvenile conditions reform, the results have been positive. Louisiana and Mississippi are two of the only states where local legal organizations have been able to actively partner with the DOJ, and juveniles in custody have become parties to the settlement with enforcement rights. According to David Utter of the Juvenile Justice Project of Louisiana (JJPL), in 1998 JJPL brought a class action against an individual juvenile facility in Louisiana. At that time, JJPL knew the DOJ was becoming involved in juvenile

conditions work in the state through CRIPA and made a “conscious decision” to file separately and file first. As JJPL hoped, the judge consolidated all of the actions once DOJ filed. JJPL was appointed to represent all of the children in all of the facilities. As a result, JJPL was able to actively shape the settlement and monitor and enforce the agreement on behalf of the confined youth.

The benefit of such local involvement in shaping a settlement agreement and the subsequent enforcement and monitoring is not questioned. The National Council on Disability urges the DOJ to make better use of local protection and advocacy agencies charged with investigating abuse and neglect in institutions, and other nonprofit advocacy organizations with well-established records of protecting the rights of people in institutions.<sup>44</sup>

In a state where the children are represented by attorneys, such as in Louisiana, the child can contact their attorneys directly to report abuses and noncompliance, making monitoring the consent decree much more accurate, timely, and direct.

### Recommendations

Collaboration with juveniles and their advocates can strengthen juvenile conditions reform through CRIPA. Working in isolation, DOJ involvement in juvenile conditions cases is far from a panacea; however, it does provide a number of opportunities to improve confined youth conditions on multiple levels. DOJ investigative findings are an excellent resource to be used by advocates on behalf of clients and may be admitted into evidence in separate but related cases.<sup>45</sup> Intervening in DOJ actions allows the represented class to take part in settlement formulation

and enforcement.<sup>46</sup> Third-party monitors provide further enforcement mechanisms, allowing the DOJ to more closely supervise day-to-day compliance with settlement agreements.

Opportunities for reform could be maximized in the following ways:

1. Encourage DOJ to enter only enforceable settlements;
2. Encourage DOJ to no longer prohibit, but explicitly allow, third party enforcement of its consent decrees;
3. Use DOJ investigative reports as evidence in bringing related cases on behalf of individual or class plaintiffs;
4. Intervene in ongoing cases on behalf of individual or class plaintiffs;
5. Encourage DOJ to file its complaint and settlement agreement separately to allow for proper intervention of potential tandem cases, and to allow more time for broad-based input in settlement formulation;
6. Work in concert with DOJ in monitoring settlement agreements, providing oversight within facilities to ensure states comply with reform mandates.

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44 National Council on Disability, *The Civil Rights of Institutionalized Persons Act: Has It Fulfilled Its Promise?*, Aug. 8, 2005, available at <http://www.ncd.gov/newsroom/publications/2005/personsact.htm>.

45 See *R.G. v. Koller*, 415 F.Supp. 2d 1129 (D. Ha. 2006).

46 This has occurred in at least two states: Louisiana and Mississippi. In both cases, the Juvenile Justice Project and the Southern Poverty Law Center, respectively, represented parties to related cases filed before official DOJ involvement.