

# **MENTAL RETARDATION and Developmental Disabilities**

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**JOSEPH WORTIS, M.D., Editor**

# Mental Retardation

AND DEVELOPMENTAL DISABILITIES

An Annual Review

X

*Edited by*

JOSEPH WORTIS M. D.

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BRUNNER/MAZEL, *Publishers* • New York

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*Published by*  
BRUNNER/MAZEL, INC.  
19 Union Square West  
New York, New York 10003

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Library of Congress Catalog Card No. 73-647-002  
SBN 87630-170-7 ISSN: 0091-6315

MANUFACTURED IN THE UNITED STATES OF AMERICA

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CHRONICLE

## Introduction: How Special Are Special Services?

By JOSEPH WORTIS, M.D.

Specialized services for the retarded owe their origin to two historic developments: the protective segregation of the socially incompetent, and the need for separate educational arrangements for the retarded in the community. Cadres of specialized professional people emerged to meet these needs, and professional vested interests tended to perpetuate and enlarge their spheres of responsibility. As the parents' movement grew in many countries, and as specialized governmental agencies were established, all of these factors combined to create a social movement that can be credited with much of the progress in service programs in recent years.

This general trend was particularly seen in the countries of Western Europe, in the U.S. and in Canada, but not in the undeveloped countries, in China or the U.S.S.R. Recent visitors to mainland China have actually had great difficulty discovering any specialized services for the retarded, which was surprising in a country that prided itself on its network of welfare services. But the explanation probably lies in the fact that China by tradition and by political policy is a communal society with sharing of human needs and services on the local (mostly rural) level. In practice this means that most retarded individuals can be easily integrated into the family and farming community where they are expected to participate according to their capacity while all their needs are satisfied without undue burden on their families. An educated Canadian Indian recently told me that this is exactly what happened in his native tribe, and that they did not even have a special word in their language for retardation. This could be characterized as naive or natural normalization.

It is both interesting and significant to note that similar trends are emerging

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# The Right to Education

By LYNDA KATZ-GARRIS, Ph.D.

## INTRODUCTION

In 1971, the United Nations General Assembly adopted as a resolution the comprehensive statement titled "Declaration on the Rights of Mentally Retarded Persons" (1). The seventh and last of these rights stated:

Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities (2).

In the words of Gunnar Dybwad, "a proper reading" of the declaration leads to one conclusion: "Every child, without exception, has the right to education regardless of the degree of his mental or physical disability" (3). How this "right" is exercised is bound up in tradition, in cultural values, and in broad societal beliefs and trends. Exercising this right in the United States has culminated with P.L. 94-142 (4). The process, both historically and legally, has been examined by various writers (5-15).

A review of the right to education movement shows that its historical roots lay in society's attitude towards and attempts to deal with its deviant members, as well as the civil rights movement of the 60s. The right to education movement has also involved the responsibility of the state for its citizenry, the role of litigation under the Constitution of the United States, and the establishment of law by which the society must govern itself. In addition,

such a comprehensive review entails examining parallel litigation occurring with the right to treatment movement in the mental health field. Moreover, the right to education movement is concerned with the exercise of the right by all members of society, including those individuals who are the most socially, economically, and politically deprived.

Since the historical precedents for the social and legal process have been written about in detail by previous authors, this review will cover them in a summary fashion. Greater attention will be focused on the legal mechanisms, especially the procedural safeguards, as they have evolved in the contemporary history of this country. Finally, this review will focus upon the legal mechanisms and their implications for the poor and the cultural minority.

### SOCIETY, THE STATE, AND THE MENTALLY RETARDED

In the words of Robert Woody:

Providing services to deviant or exceptional persons within our society is no easy task. The reasons for this are many. The mere status of being "deviant" or "exceptional" denotes variance from the majority and from the accepted norms. Because of these differences, the "normals" formulate a unique set of attitudes toward these "exceptional" persons. Further, each deviant or exceptional person is idiosyncratic. That is, persons cannot justly be lumped together into nondistinguishing categories; they must be dealt with as individuals with a composite of psychological-social physiological characteristics that is never exactly the same as that maintained by others in a similar category (2).

The legal foundations for the State to become involved with its deviant members lie in the 14th Amendment to the Constitution and in the resulting doctrine of the Compelling Interest of the State. Under this doctrine, the State is "compelled" to involve itself in the protection of individual rights and in matters of suspect classification of its citizens. The powers endowed in the State are those of *parens patriae* and its police power. Under its *parens patriae* function, the State has the responsibility for protecting the individual from injustices imposed on him by society. The State, therefore, must act on behalf of those persons who claim to be a suspect class or are deemed such by the manner in which the society treats them. The Supreme Court in *San Antonio Independent School District v. Rodriguez* (16) set forth the following criteria for determining what constitutes a suspect class:

[a] class . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.



Such a test could certainly be read to include retarded children as a suspect class. Retarded children are precluded from the political process and have been neglected by state legislatures (17). In *Interest of G. H.* (18), the Supreme Court of North Dakota accepted the argument that the handicapped child should be classified as suspect and distinguished *Rodriguez* on this basis.

While the Supreme Court of the United States, using the “traditional” equal protection analysis, held that the Texas system of educational financing, which relied largely upon property taxes, was constitutional, we are confident that the same court would have held that G. H.’s terrible handicaps were just the sort of “immutable characteristics determined solely by the accident of birth” to which the “inherently suspect” classification would be applied, and that depriving her of a meaningful educational opportunity would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy (18).

Mental retardation, as a concept, would be simple enough if it could be viewed and treated solely as an intellectual deficit. However, while it is true that there is typically a significant impairment in one or more intellectual areas, there is also a complex set of behavioral adaptations. Some of these may be directly related to mental retardation per se, while others may be totally unrelated yet erroneously considered to be manifestations of mental retardation.

The legal authorities have long been challenged by the mentally retarded and their advocates in two major areas: 1) the proper consideration of the ramifications of “mental retardation” within the legal processes, and 2) the upholding of rights in spite of the fact that the mentally retarded person has been assigned by society to a special class of citizenry (13). The adverse social consequences of being labeled mentally retarded have been documented in numerous studies, and in addition to the negative social consequences of the label, there are important legal effects, both positive and negative. Friedman writes:

For example, special education services may be available to a child certified as mentally retarded, but the school system may use this same label as the basis for excluding a child from the school system. Vocational-rehabilitation services may be extended to mentally retarded persons, but the same label may be used to prohibit them from securing licenses necessary to practice specific occupations such as barbering or driving a taxi. A mentally retarded person may be excused from responsibility in a criminal suit, but the same label may prevent that same person from serving as a juror or entering into a legal marriage contract, or may be used by authorities as the justification for taking away his or her child (19).