

**STATE LAWS
AND
REGULATIONS
AFFECTING THE**

Mentally Retarded

A CHECK-LIST



**U.S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE**
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Foreword

The work of the President's Panel on Mental Retardation signifies not the end but the beginning of a new surge in our national effort to combat mental retardation. State and local leaders must now carry forward the attack to achieve new gains.

This check-list of State laws and regulations was developed by the Subcommittee on State Laws in Mental Retardation of the Advisory Committee to the Office of the Special Assistant to the President for Mental Retardation, Dr. Stafford Warren. It is intended as a tool--not as a pattern or model--for those in the States who have the responsibility to carry out Statewide comprehensive planning in mental retardation under Public Law 88-156.

Our hope is that the check-list will be helpful to State leaders in examining the present substrate of law underlying State programs for, and the State's administration of, justice to the retarded. Such examination will surely lead to reform on many counts designed to assure to the retarded the full responsiveness of the law which is their just due.

Elizabeth M. Boggs, Chairman
Subcommittee on State Laws
in Mental Retardation

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A CHECK-LIST FOR REVIEW OF STATE LAWS AND REGULATIONS
AFFECTING THE MENTALLY RETARDED

Prepared by the Advisory Subcommittee on State Laws in Mental Retardation:
Office of the Special Assistant to the President for Mental Retardation

Introduction

The President's Panel on Mental Retardation recommended that periodic reviews be undertaken of State laws affecting the mentally retarded. Such State laws may relate to the personal status of the retarded or the character of the programs available for his care, training, treatment, and protection. It is clear that any body involved in comprehensive planning at the State level should give attention to the body of laws which form the foundation for existing services. In addition a planning body will certainly recognize that laws which affect the status of the retarded individual in civil or criminal proceedings must be taken into account when the large picture of services is considered and must permit the courts to take advantage of new knowledge and new social provisions which may result from the success of the planning process.

Studies in depth of the laws and their effects on the mentally retarded are not to be undertaken lightly. The selection of areas in need of a high degree of attention might well fall to the planning body. Before such selection can properly be made, however, planning bodies and other groups or agencies interested in the mentally retarded may well find it useful to establish an inventory or compendium of State laws and regulations -- statutory, judicial, and administrative -- which differentially affect the mentally retarded.

The attached outline is designed to be of assistance to the States in preparing an orderly inventory of existing laws. In this connection it should be borne in mind that some of the laws covered in the outline may not be presently implemented in a particular State, and that others may deviate from the apparent written norms because in many instances administrative regulations or judicial interpretations may be more significant than the written statutes themselves.

The kinds of laws to be looked for have been grouped under eleven major headings, each with a brief introductory paragraph. The areas noted in this outline are set forth as guides for search and are not necessarily objectives. In many cases, legislation appropriate in one State will be premature or inapplicable in another.

2.

The common objectives involving health, education, welfare, and legal agencies have been outlined in the Report of the President's Panel. The review and compilation of laws now on the books should be regarded as a step toward determining the extent to which existing laws advance or retard the realization of these objectives within a given State.

Keywords

It is to be expected that the same phrase may be differently defined for different purposes in different statutes. This is not necessarily a disadvantage, provided the definition is in each case clear and functional. An educational program, for example, should be set forth in terms of the special educational needs of the mentally retarded. A program of protection, on the other hand, will relate to aspects of dependency having its base in mental retardation. Neither program is properly defined purely in psychometric terms, or even in terms of clinical classification.

For the purpose of index search the following keywords are suggested:

Specific: mentally retarded, retarded, mentally deficient, mentally defective, defective delinquent, feeble-minded, imbecile, idiot, moron, intellectually handicapped, mentally handicapped, educable (mentally retarded or handicapped), slow learner, subnormal, ament, weak-minded.

Related Specific (keywords describing conditions other than retardation which may also be found in some mentally retarded persons): mentally disturbed, mentally ill, emotionally disturbed, maladjusted, psychotic, incompetent, mentally incompetent, cerebral palsied, epileptic, brain injured or damaged, neurologically impaired, lunatic, insane, of unsound mind, non compos mentis.

Nonspecific: disabled (including mentally disabled), impaired, handicapped, crippled, exceptional, congenitally defective (or malformed), birth defective, dependent, disadvantaged, disordered.

Definitions of the foregoing terms should be examined and compared. It is to be expected that the same term may be differently defined for different purposes.

SECTION I. Research, Program Analysis, and Professional Training

The need for research and programs of professional training related to mental retardation have been well documented by the report of the President's Panel on Mental Retardation. The responsibility of State Government in this area has not been fully defined, but it is recognized that a substantial contribution should be made, especially as these topics may relate to service activities which the State itself undertakes, or to the broad functions of university communities in a State and their responsibility to educate persons and personnel to meet the human needs in the State. For these reasons the most important legislation in these areas will not necessarily be identified specifically with the field of mental retardation. Nevertheless, wherever such specific identification does occur it is desirable that it be noted in the framework of a State inventory. (See Chart on Page 4.)

SECTION II. Preventive Measures and Early Detection

Laws pertaining to public health and safety are generally accepted as an essential part of the body of State law. But what is not generally understood is the extent to which many of these may relate to or can contribute to the prevention of mental retardation. There are literally hundreds of causes of mental retardation, and for each cause there probably will be found an optimum procedure for prevention. The role of the law in these processes has yet to be fully explored but the checklist includes reference to some which have already been recognized. (See Chart on Pages 5, 6, and 7.)

4.

I. RESEARCH, PROGRAM ANALYSIS AND PROFESSIONAL TRAINING	LEGAL REFERENCES	REMARKS
a) Authorization for specialized research institute or center		
b) Provision for conduct of research at one or more residential institutions for retarded		
c) Public policy statements covering State interest in research and professional training related to disability		
d) Provisions for professional and sub-professional train- ing with focus on retarded (intra- and extra-university)		
e) Special research or training funds		

II. PREVENTIVE MEASURES AND EARLY DETECTION	LEGAL REFERENCES	REMARKS
<p>1) Registration and reporting</p> <ul style="list-style-type: none"> a) Registration or reporting by physicians and others of persons born with conditions associated with mental retardation or of persons later identified as retarded b) Registration or reporting of retarded person on exclusion from or admission to public school or on admission to private facility c) Reporting between hospitals and follow-up services (such as public health nurse) d) Compulsory reporting of conditions of inherent risk, such as lead poisoning, encephalitis, "battered child" syndrome, etc. e) Authorization for central "risk register" 		
<p>2) Screening</p> <ul style="list-style-type: none"> a) Screening for metabolic disorders, e.g., phenylketonuria, galactosemia b) School screening (physical or psychological) 		

6.

II. PREVENTIVE MEASURES AND EARLY DETECTION (cont'd)	LEGAL REFERENCES	REMARKS
3) Drug control in relation to pregnancy		
4) Radiation protection		
5) Control of infectious disease - e.g., measles		
6) Auto safety and accident prevention - e.g., seatbelts		
7) Control of environmental factors - e.g., housing ordinances in relation to lead poisoning		
8) Eugenic measures a) Genetic counseling b) <u>Sterilization</u> -- voluntary and involuntary; under what circumstances permitted; protections afforded c) <u>Limitations on marriage, intercourse</u> (Items b and c should also be entered in Section IX on Civil Liberties)		

II. PREVENTIVE MEASURES AND EARLY DETECTION (cont'd)	LEGAL REFERENCES	REMARKS
9) Prenatal care a) Special services available to indigent or others at risk b) Protective laws relative to occupational and other hazards in pregnancy c) Screening and treatment for syphilis in mother (mandatory)		

SECTION III. Public Health and Mental Health Services

The Panel Report recognized that, as far as possible, the retarded should have access to those general medical and other community services for which other members of the population are also eligible. In the past, State laws or practices have frequently discriminated against a mentally retarded person who sought service (or for whom service was sought) for his vision problems, his emotional problems, his social problems, and others. Therefore, no State law review is complete which does not review exclusions from such services, whether by statute, judicial determination, regulation, or actual practice.

In addition, the Panel recognized the need for certain kinds of specialized service adapted to the peculiar needs of the retarded. The existence of these services should be checked.

III. PUBLIC HEALTH AND MENTAL HEALTH SERVICES	LEGAL REFERENCES	REMARKS
<p>1) Eligibility of retarded for care and treatment in general programs under public administration or subsidy:</p> <ul style="list-style-type: none"> a) Children's health services (direct or purchase or care) b) Crippled children's services (including surgery for hydrocephaly, etc.) c) Services for blind and deaf, or partially seeing and hearing d) Community mental health services e) Child guidance clinics and family counseling f) Comprehensive rehabilitation centers g) Other diagnostic and treatment centers h) Convalescent homes 		
<p>2) Provisions for specialized health services to the retarded</p> <ul style="list-style-type: none"> a) Special clinics for evaluation and parent counseling b) Special dental services c) Special treatment services, diets, physical therapy, etc. 		

III. PUBLIC HEALTH AND MENTAL HEALTH SERVICES (cont'd)	LEGAL REFERENCES	REMARKS
3) Regulation of professions as related to cause and treatment of mental retardation a) Malpractice b) Protection against unqualified practitioners or false claims (quackery in mental retardation)		

SECTION IV. Education

The first State laws requiring special educational provisions for mentally retarded children in the public schools were enacted in 1911. At the present time every State has some legislation in this field. The kinds of funds available, the requirements for special personnel, the authority for enforcement and many other factors affect whether or not the law will be translated into practice in the most efficacious manner.

Many States specifically mention the mentally retarded (or some equivalent term) and a majority distinguish two classes of mentally retarded corresponding to the educable (mildly retarded) and trainable (moderately - severely retarded). In some States, programs are conducted only under general legislation pertaining to exceptional or handicapped children.

IV. EDUCATION (Special Education of the Mentally Retarded (nonresidential))	LEGAL REFERENCES	REMARKS
1) Public education		
I a) Constitutional guarantees and basic responsibility		???, ?
b) Application of compulsory attendance laws to retarded		
c) Laws permitting or mandating and setting standards for programs for "educable," "trainable," "exceptional," or "handicapped," including public "preschool" programs		
d) Eligibility requirements and procedure for review or appeal or exclusion		
e) Provisions for home or hospital training or remedial instruction		
f) State aid for (1) evaluation (2) instruction (3) other educational services		
g) Transportation to and from school:		
i. Mandate under what circumstances		
ii. State aid		
iii. State standards		
h) Qualifications for special teachers and supervisory personnel		

IV. EDUCATION (cont'd)	LEGAL REFERENCES	REMARKS
<ul style="list-style-type: none"> i) Salary differentials for special certification j) Specialized school facilities -- construction aid and standards k) Eligibility for vocational education l) School-work or school-supervised, on-job training programs -- wages, liability, etc. 		
<ul style="list-style-type: none"> 2) Education in nonpublic facilities <ul style="list-style-type: none"> a) Provisions for preschool training b) Laws permitting or mandating public subsidy or purchase of nonpublic instruction (State or local) c) Transportation, if any d) Licensing and inspection of nonpublic facility 		

SECTION V. Rehabilitation and Employment

Provisions concerning vocational rehabilitation are in the majority of States part of the education code. However, provisions are specialized placement in employment may be authorized in the statutes pertaining to State employment services.

12.

In general neither group of statutes will refer to the mentally retarded as such. Until a decade ago most such statutes were interpreted to apply only to the physically handicapped. However, today, the entire body of such legislation is relevant to the mentally retarded in most States.

V. REHABILITATION AND EMPLOYMENT	LEGAL REFERENCES	REMARKS
1) Eligibility for State vocational rehabilitation services (including residence requirements) and remedy, if any, in event of exclusion		
2) Type of rehabilitative services available a) Medical diagnostic work-up b) Counseling c) Training d) Placement (including special service in State employment agency)		
3) Workshops and centers a) State aid, if any, for nonpublic workshops and centers b) Authorization for publicly administered workshops or rehabilitation centers		

V. REHABILITATION AND EMPLOYMENT (cont'd)	LEGAL REFERENCES	REMARKS
4) Eligibility of retarded under State civil service rules		
5) "Independent Living" statutes affecting the retarded		
6) Eligibility for manpower retraining		
7) Effect of work history on eligibility of retardate for disability assistance		

SECTION VI. Insurance and Maintenance of Private Income

Legislation regarding insurance and income maintenance may be scattered in the statutes and therefore is not easily identified. Special attention should be given to any laws which confer the equivalent of minority status on the adult dependent retarded person.

14.

VI. INSURANCE AND MAINTENANCE OR PRIVATE INCOME	LEGAL REFERENCES	REMARKS
1) Continuance of coverage of the dependent mentally retarded adult under family health and hospital insurance		
2) Regulation of group insurance and trust funds -- as facilitating provision for life income for retarded son or daughter		
3) "Second injury" compensation for retarded		
* 4) State tax exemptions for the mentally retarded or their families		<i>One one else will look at this but in -</i>
* 5) Appointment of guardian of estate (or conservator) (See Section IX)		<i>Don</i>

SECTION VII. Public Welfare and Protective Services

At the Federal level the largest amounts of money spent for the mentally retarded are those made available under social security or disability assistance programs to retarded persons who qualify as "dependent" and unable to undertake substantial gainful employment. This fact points up the importance of identifying the provisions at the State level for income maintenance for such people. Contrary to what is generally supposed, a substantial portion of moderately and severely retarded adults are maintained in the community with the aid of such funds.

Persons who are dependent in this sense are usually Also dependent in the sense that they may be exploited, abused, or merely unable to take care of themselves without direction and supervision. For such persons there is a need for "protective services" which parallels the need of children. In most States such provisions are scant, especially on behalf of those who have no private income or estate.

16.

VII. PUBLIC WELFARE AND PROTECTIVE SERVICES	LEGAL REFERENCES	REMARKS
1) Eligibility of retarded for permanent and total disability, old age or similar assistance		
2) Specialized foster home programs for retarded		
3) Day Care a) Authorization for State, county, or municipal operation or subsidy of day care facilities for mentally retarded not eligible for public school or for rehabilitation or employment programs b) Provisions for transportation, if any		<i>Over to look at for enabling legislation - on statutory changes is present under the project</i>
4) Licensing and inspection of private boarding or foster homes or care institutions caring for mentally retarded and for nonpublic day care (See also VIII-19)		
* 5) Role of Juvenile Court vis-a-vis retarded juveniles		<i>Over, but court tracks</i>

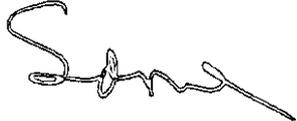
VII. PUBLIC WELFARE AND PROTECTIVE SERVICES (cont'd)	LEGAL REFERENCES	REMARKS
6) Provisions for assuring exercise of guardianship or co-custody of retarded children who are not adjudicated dependent and/or neglected		<i>Own</i>
7) Protective services for adults (See also IX-2) a) Consultation and referral service b) Provision for public guardianship of person c) Supervision of private guardians of the person		<i>Own</i>

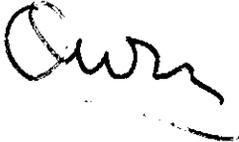
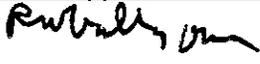
SECTION VIII. Residential Care

Since residential care in publicly administered institutions has been a traditional responsibility of the States, a large body of law will be found in most jurisdictions covering the subjects itemized and possibly other related topics. These statutes are usually relatively visible and will be readily detected through a keyword search.

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VIII. RESIDENTIAL CARE	LEGAL REFERENCES	REMARKS
1) Basic authority for providing facilities		<i>Over but w/ Res care -</i>
2) Non-compulsory Admission (without court order) a) Voluntary i. minors ii. adults b) Nonprotesting i. minors ii. adults		
3) Eligibility for Noncompulsory a) Admission b) Transfer c) Release d) Discharge		
4) Requirements for Professional Evaluation Before a) Admission b) Transfer c) Release d) Discharge		

VIII. RESIDENTIAL CARE (cont'd)	LEGAL REFERENCES	REMARKS
5) Designated Authority for <ul style="list-style-type: none"> a) Admission b) Transfer <ul style="list-style-type: none"> i. to another institution for retarded ii. to a general or mental hospital iii. to correctional facility c) Release d) Discharge 		
6) Court commitment <ul style="list-style-type: none"> a) Circumstances (basis for action) b) Procedures (notice, who may petition, etc.) c) Professional evaluation required d) Authority to admit, release, transfer, discharge 		
7) Periodic review of status and classification of resident (whether voluntary or committed)		

VIII. RESIDENTIAL CARE (cont'd)	LEGAL REFERENCES	REMARKS
8) Number, character, and designation of authorized facilities and their place in departmental structure		
9) Authority to county or local bodies to provide facilities		
10) Statutory requirements for education, sanitation, and minimum standards of care in public institutions; restrictions on restraints and corporal punishment		
11) Role of the superintendent as legal custodian, guardian, etc., in relation to residents admitted under various procedures (voluntary, under court order, etc.)		
12) Duties of board of visitors, trustees, advisors, etc., if any		
13) Rights of the mentally retarded residents (to communicate, receive visitors, etc.)		

VIII. RESIDENTIAL CARE (cont'd)	LEGAL REFERENCES	REMARKS
14) Rights of parents and legal guardians		<i>Over</i>
15) Provisions relating to payment of cost of care, limitations, if any, persons liable and procedures for appeal from determination		<i>W/ly Dept</i>
16) Compensation for work performed by mentally retarded residents		. . .
17) Eligibility of residents or released residents for child health, crippled children's services, old age assistance, and permanent total disability assistance, medical aid to aged and comparable benefits		
18) Former patients a) Eligibility for public employment b) Restrictions on rights (vote, marry, etc.)		
19) Authority for purchase of care from nonpublic facilities		

SECTION IX. Civil Status

The Task Force on the Law of the President's Panel noted that "usually the law takes for granted a minimum 'normal' set of personal characteristics in the population. But it must have means for recognizing when and where such an assumption is invalid. It must also say what is to be done in a case where the departure from the norm is very great. It is in these areas that mental disability presents its greatest difficulties for the law." These "difficulties" are the subject of this section on Civil Status.

Most provisions affecting the right of the mentally retarded individual to manage himself and his affairs and to exercise his civil rights are subsumed under broader legislation covering "soundness of mind" or some comparable context. However, it is not uncommon to find laws which prohibit voting by "idiots" or marriage with a "feeble-minded" person. The laws referred to in this section will be quite scattered in different parts of the statutes and it is to be expected that practice will not adhere closely to the letter of the law.

It is considered by many that the area of competency and guardianship is among the most neglected and little understood among statutory provisions affecting the mentally retarded. Appropriate forward-looking legislation in this area will probably be of considerable importance in facilitating community care for mentally retarded adults in the future.

IX. CIVIL STATUS	LEGAL REFERENCES	REMARKS
<p>1) Civil liberties (including persons in residential care)</p> <ul style="list-style-type: none"> a) Laws relating to marriage, divorce, annulment, custody of children b) Voting c) Adoption (of retarded) d) Driving license e) Fishing license 		<p><i>All Over</i></p>
<p>2) Competency and guardianship</p> <ul style="list-style-type: none"> a) Criteria of incompetency b) Procedures for determination (initiation, notice, professional opinion, provision of counsel, appointment of guardian ad litem, etc.) c) Implication of admission to institution d) Provision for separating guardianship of estate and of person if indicated e) Qualifications of guardian of estate, and of person f) Provisions for periodic or other review of status of ward 		

IX. CIVIL STATUS (cont'd)	LEGAL REFERENCES	REMARKS
<ul style="list-style-type: none"> g) Duties and powers of guardians, conservators, committees, etc., also guardian ad litem h) Supervision and accountability of guardians i) Removal of guardian j) Restoration to competence k) Other provisions, e.g., testamentary guardianship, access to records (See also sterilization, Section II-8) 		<p><i>Call over</i></p>
<ul style="list-style-type: none"> 3) Migration <ul style="list-style-type: none"> a) Legal barriers to interstate migration (cf. Interstate Compact on Mental Health) b) Effect of laws on eligibility for services as disabled, crippled, or for residential care, special education; also with respect to the child or migrant worker c) Provisions for retarded children of military personnel 		

SECTION X. Criminal Law

The reader is referred to the Report of the Task Force on the Law of the President's Panel on Mental Retardation for specific discussion of the issues which should be looked for in this area. In most States this subject is covered under the same heading as laws pertaining to the mentally ill. There has been relatively little study of the statutory and case law in criminal cases as they affect the mentally retarded specifically.

X. CRIMINAL LAW (For this section, rules of court and case law as well as statutes should be reviewed)	LEGAL REFERENCES	REMARKS <i>allow</i>
1) Procedures for identifying defendant as retarded		
2) Provision of counsel		
3) Protection of "right to trial" and fitness of the retarded to stand trial; determination of "facts" without trial, where such facts would acquit or quash		
4) Validity of confession		
5) "Test" of mental retardation as a defense		
6) Consequences of a finding of "not guilty but retarded"		
7) Discretion of court as to disposition of case		
8) Provision for review or appeal		
9) Provisions affecting juvenile or youthful retarded offenders (See also Section VII)		

SECTION XI. Statutory Bases for Study, Planning, and Coordination

The complexities of the problems of mental retardation make inter-departmental and interagency cooperation and coordination essential. The planning process must include representatives from the fields of medicine, education, rehabilitation, social work, community organization, and the law. In order to accomplish this, various States have experimented in different ways with interagency committees, coordinating councils, advisory bodies, legislative commissions and the like. A review of the law in any particular State would not be complete without reference to whatever statutory provisions there may be for such activities.

XI. STATUTORY BASIS FOR STUDY PLANNING, AND COORDINATION	LEGAL REFERENCES	REMARKS
a) Interdepartmental or interagency body		
b) Advisory body or bodies (includes lay and professional persons not in government employ)		
c) Legislative committee or commission		
d) State planning department or permanent agency with primary planning duty		
e) Special ad hoc committee or commission		

SECTION XII. Other

The eleven preceding headings may well not cover all laws in a particular State. For example, one State is known to have a law which makes it an offense to ridicule the mentally retarded. Another has laws which authorize the county governing bodies to grant the use of county-owned property to association for retarded children. Provisions of this type should not be overlooked when surveying the laws of a particular State.

XII. OTHER	LEGAL REFERENCES	REMARKS

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