

Chapter 2

Special Education Law in Brazil

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Introduction

Special education in Brazil is a constitutional right as well as a combined obligation of the State and family founded in the 1988 Federal Constitution. In legal terms, the National Education Act – NEA (Law 9.394/1996) defines this right as “a modality of school education, preferably offered in the regular school system to all disabled students. Insofar as being legally considered a “modality of school education,” to identify, evaluate, and place students while defining what is an appropriate education, an extensive interpretation of special education requires seeking rules in the United Nations’ Convention on the Rights of Persons with Disabilities – CRPD (Decree 6.949/2009) as well as in other ordinary laws.

All of these norms, interpreted in the light of the principle of non-discrimination found in Article 5 of the Federal Constitution and the guarantee of equal conditions of access and permanence in school to all identified in Article 206 I of the Federal Constitution, broadened the original legal scope of special education to what is now considered an “inclusive education.” The understanding of “inclusive education,” as a key term in the application of the law, means full inclusion in regular classes for children with special needs, regardless of whether they are disabled, have serious learning difficulties, or are highly gifted.

Under the Brazilian Constitution, access to compulsory, free education from ages six to seventeen, is a right that must be exercised (Article 208, I). In other words, the right to education is more an obligation of parents or guardians on behalf of their children, implying the responsibility of the Government not only in providing free education but also guaranteeing quality and supportive services. According to the

Brazilian Elementary School Education Census of 2008, in a universe of 53 million students in almost 200,000 educational establishments, only 385,000 students with disabilities are enrolled in regular schools. Unfortunately, data are lacking about those who are not included in either special or regular schools.

This chapter examines the law of special education in Brazil in relation to students with disabilities, namely those with “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (CRPD, Article 1).” The chapter offers neither a complete analysis of the legislation nor an exhaustive research of jurisprudence in Brazil, but describes key fundamental principles governing special education and the schooling rights of students with disabilities, keeping in mind that constitutional law and practice continue to change and evolve. Even so, the remainder of this chapter examines constitutional and legal sources of the law of special education in Brazil; the rights of students with disabilities (including matters dealing with identification, assessment, and placement; due process rights; and funding of special education); emerging issues; and a conclusion

Constitutional and Legal Sources of Special Education Law

In addition to the Federal Constitution of Brazil – CF (1998), there are five main legal sources for special education, all but the last of which are discussed in the rest of this section. In chronological order, these sources are the Disabled Persons Protection Act - DPPA (Law 7.853/1989); the Child and Adolescent Statute – ECA (Law 8.069/1990); the National Education Act (1996); the Interamerican Convention for the Elimination of all Forms of Discrimination against Disabled Persons – the Guatemala Convention of 2001 (Decree 3.956/2001), ratified as ordinary law; and the U. N.

Convention on the Rights of Disabled Persons – CRDP (Decree 6.949/2009), approved by the National Congress under a constitutional amendment designed to assure all human rights treaties a hierarchically superior position in the Brazilian legal system (45th Amendment of 2004), meaning that the Convention overrules all applicable ordinary laws. However, the CRDP is not commented on here not only because it consolidates the fundamental principles already expressed by international law in conjunction with Brazilian constitutional and ordinary law but also since it is discussed in the overview chapter. There are other legal sources deriving from international law and ratified by the National government such as the U. N. Declaration on the Rights of the Child (1989) and the UNESCO Convention Against Discrimination in Education (1960).

State Constitutions in Brazil do not deal with special education; neither do laws organizing municipalities (Lei Orgânica do Município, CF Article 29) address special education except for those establishing the obligations of public educational systems, a matter addressed in state statutes. The National Board of Education (CNE), a federal entity that is subordinate to the Ministry of Education, is primarily responsible for the regulation of the NEA. For example, the NEA enacted Resolutions CNE 2/2001 and 1/2002, establishing National Guidelines for Special Education and Teacher Training requirements in Special Education. More recently, Resolution CNE 4/2009 was enacted to establish more concrete details for basic special education.

The DPPA, the ECA, and the NEA are regulated to a large extent by decrees, resolutions, and administrative rules. Decrees and resolutions permit flexibility in updating ordinary laws, adapting them to the alterations required by internally ratified international conventions. Added to this are other ordinary laws enacted to guarantee rights for individuals with disabilities: Law 10.048/2000, demands governmental and

private priority in ensuring services and activities such as transportation, education, law enforcement, and calls for judicial involvement; Law no. 10.098/2000, which established the norms for physical access to public places, including schools; Law no. 10.436/2002, which introduced the Brazilian Language, LIBRAS as an official means of communication and a compulsory subject in teacher training courses, among others, which increases the complexity of guaranteeing special education to all. This myriad of provisions, while contributing to the development of special education, creates a legal jungle requiring legal experts to enforce the law. Paradoxically, the more legislation that is enacted, the more complex it is to understand and implement rights to special education that is to be enforced by the Public Ministry.

As a preliminary matter, it is important to keep in mind that in Brazil, Constitutional provisions as well as federal and state regulations are generally self-executing. This means that government agencies, including educational systems, are immediately bound by the juridical amalgam that guarantees special education. If statutes or regulations are unclear, Brazilian courts have the authority to intervene based on the initiative of the injured parties or the Public Ministry.

The Federal Constitution

The guidelines in the Federal Constitution of Brazil protect and promote special education based on the right to equality before the law (Article 5) and the right to be different, which implies the right not to be discriminated against (Article 208, III). This is a reflection of the principle of the dignity of the human person as enshrined in Article 1. This cornerstone is further reinforced in Article 206, I under the fundamental right to equality of access and permanence in school and guaranteed in Article 205, which

characterizes education as “a right for all and the duty of the State and family, promoted and fostered with the cooperation of society, with a view to the full development of the person, his preparation for the exercise of citizenship and his qualification for work.” These provisions are interpreted in connection with Article 227, which demands priority in assuring the rights of children and adolescents.

Article 208 of the Federal Constitution also entitles all children, regardless of whether they are disabled, in elementary schools from ages six to fourteen, and at no cost to their parents, to be assisted by means of complementary programs providing school materials, food, and health care. Under this article, government authorities and school officials cannot refuse to provide these services, under the penalty of the law.

Explicit guarantees of the education rights of the students with disabilities are described in the NEA (Article 23, XXIV). Further, the principles by which the State ought to be guided in this field are part of the Decennial National Education Plan (Article 214). The actual Plan is not being analyzed here because of its vague and imprecise provisions (Law 10.172/2001) that are subject to forthcoming modifications.

The Disabled Persons Protection Act – DPPA (Law 7.853/1989)

The objectives of The Disabled Persons Protection Act are to prevent and eliminate all forms of discrimination against persons with disabilities while promoting their full integration into society. In order to ensure that these aims are met, the law addresses such practical measures as institutional and personal responsibilities, criminalizing acts that could harm or jeopardize the disabled, and establishing the

possibility of using class action lawsuits and public interest actions in order to guarantee equity.

The DPPA is further implemented by Federal Decree 3.298/1999 which affords state and municipal governments the opportunity to enforce the DPPA by carrying it out to its full effect. Under this law, special education is qualified as a right in education (Article 2), formally protected by the Public Ministry, which has the duty to assure the full implementation of the law. In other words, the enforcement of this right is not a decision of the parents, guardians, or students: the prosecutors of the Public Ministry are obliged to take all the legal measures to implement the law.

At this point it is worth noting that the Public Ministry is an independent governmental institution, both on the federal and state levels, whose function is to protect of the rule of law, the National democracy, public interests, and fundamental rights (CF, Article 127). The members of the Public Ministry, public prosecutors, represent society against the Union, States, and Municipalities demanding the implementation of statutes laws and Nationally ratified international treaties (CF, Articles 127 e 129, III, CF), acting on behalf of citizens whose rights have been or could be jeopardized.

In this complex context of judicial activities it is important to remember that the prosecutors do not protect individual rights directly but do so collectively. In other words, the prosecutors usually deal with the representatives of civil society such as union leaders, community leaders, Non-Governmental Organizations, and the media. In the fledgling Brazilian democracy, which was installed in 1988 under the Federal Constitution, the role of the Public Ministry is crucial in all spheres that impact society, including education and the rights of the disabled.

The Child and Adolescent Statute – ECA (Law 8.069/1990)

This law governs the rights of children and adolescents up to the age of eighteen, providing them with “full protection” (Article 4) in their best interest. The spirit of the law is to assure the priority of the rights of children in any circumstances with clear obligations with regard to supporting, caring for, raising, and educating the young (articles 53 to 55). Under this law, although parents and guardians are the main actors, the ultimate responsibility of guaranteeing an education for children still lies with the State. As with the other statutes, it is the responsibility of the Public Ministry to guarantee its enforcement.

In Brazil home schooling is forbidden as a result of the strict provisions of this law which views school attendance as a fundamental right of the child in order to ensure intellectual and social development. However, a resolution that was adopted pursuant to the ECA makes a significant legal exception in the case of children and adolescents with extreme disabilities or who need hospital or domestic environments in addition to special education and specialized services (CNE Resolution 4/2009, Article 6).

The National Education Act – NEA (Law 9.394/1996)

In the light of Articles 58 and 59 on the NEA, special education ensures the delivery of assistance to students through such approaches as special curricula, methods, resources, and teacher preparation affording children the opportunity to achieve their maximum potential while developing skills for possible professional careers. Besides covering pre-school, basic and higher education, work-based training, and adult education or life-long learning, the provisions of the NEA create an

obligation on the part of the State to provide adequate opportunities for all students, in light of their singular and specific needs.

The Guatemala Convention (Decree 3.956/2001)

The Guatemala Convention of 2001 is by far the most important single source for special education law in Brazil. First, thanks to the framework of the Guatemala Convention, the original concept of special education, as enacted by NEA, now allows for a broader interpretation of the benefit based on the singular needs of students with disabilities. Second, this Convention defines all measures creating physical or moral obstacles to the exercise of the rights of the disabled as discrimination based on disabilities. Third, the Convention declares that distinctions or preferences adopted to promote the social integration and personal development of students with disabilities does not constitute discrimination.

The Rights of Students with Disabilities

The educational rights of students with disabilities in Brazil are primarily governed by the Constitution and federal acts mentioned above. Even so, states and municipalities retain the authority to enact additional laws and regulations under the general clause of cooperative federalism (Federal Constitution, Articles 19 and 211). As such, state and municipal laws and regulations are subject to the same constitutional and legal limitations as their federal counterparts.

As a Federal State, Brazil has twenty-six State education systems in addition to those of the Union and of the Federal District in Brasilia (NEA, Articles 9, 10, 11). Although the NEA allows municipalities to create their own educational systems, they

are also free to use the State system in educating their children (Article 11). Yet, considering that there are 5,561 Brazilian municipalities, the total number of educational systems in the country could, potentially, reach the amazing total of 5,589 units. At present, though, there are about 2,500 municipal systems but only 56% of them operate due to lack of funds or specialized human resources.

In short, students with disabilities in Brazil are entitled to the following four basic rights. First, students have a right to a free and inclusive public education, preferably in regular educational systems, whether private or public (CF, Article 205). Second, students have a guarantee to equal conditions of access and permanence in school, giving all children an adequate opportunity depending on their individualized singular needs (CF, Article 206, I). Third, the law requires governmental authorities to grant students priorities in fulfilling their right to education (CF, Article 227). Fourth, students have the right to be protected from all forms of negligence, discrimination, exploitation, violence, cruelty, and oppression (CF, Article 227).

The recent adoption of the CRDP further enhances the rights of students with disabilities in Brazil in two ways. First, the CRDP calls for the eradication of discrimination against students with disabilities. Second, the CRDP mandates the adoption of appropriate measures to guarantee that children adapt reasonably in schools as educational officials must take all measures necessary to speed up the adaptation process or to provide non-discriminatory equality to students with disabilities.

Five primary legal consequences result from these statutory rights. First, the State has to the duty to assure the rights of children and adolescents with disabilities before safeguarding the rights of other groups of disabled including the elderly who also have a legal priority (Law 10.741/2003). Legal priority rights in Brazil create

rights to immediate and differential treatment of individuals who are so protected (Article 6 of the Decree 5.296/2004, regulating Laws 10.048 and 10.098/2000).

Second, as stated in the ECA, “full protection,” is a corollary of the guarantee of protection from all forms of negligence, discrimination, exploitation, violence, cruelty, and oppression. This includes the obligation of the State to assure the means of rehabilitation for mental and physical impairments when obstacles are present to integration in regular schools (Decree 3.298, Article 17, §§ 1 and 2); rehabilitation also implies that the State has the duty to provide necessary medical and psychological support for students with disabilities.

Third, authorities risk legal liability if they failure to provide compulsory education or providing it irregularly for students with disabilities (CF, Article 208, § 2). The ultimate responsibility for enforcing these provisions rests with the Federal Government which can take steps in when there are local or regional failures in this regard.

Forth, all the school procedures, including individual assessments, must be consistent with the idea of “inclusive education.” This implies that officials must adapt their schools to the specific needs of each student with disabilities, regardless of their number. The law further dictates that academic assessment, based on the NEA’s general requirement of school competency evaluation in light of earlier schooling (Article 24, IV, c) is a means used to identify individual needs. As such, school officials have some latitude in deciding how to organize and implement assessments. Educators also have freedom to establish class groupings based on such characteristics as students’ ages or actual or intended skill levels in reading, writing, and mathematics by the end of their fundamental schooling of nine years. Students with special needs are

also entitled to regression-recoupment and to alternative assessments aligned to alternate achievement standards (NEA, Article 24, V).

Fifth, since the ratification of the Guatemala Convention in 2001, although schooling is compulsory for students with disabilities, they are not obliged to accept the distinctions or preferences related to inclusive education. Yet, as noted earlier, nothing is required to be individually eligible for special education apart from having special needs since requirements such as age limitations or parental consent are unnecessary.

Identification, Assessment and Placement Issues

Identifying persons in need of special education requires responsible authorities to base their assessment on Decree 5.296/2004 (Article 5, §1, I) which implements Laws 10.048 and 10.098, in the light of the new CRPD. As noted, these definitions of disability status are not strictly related to the concept of “incapacity;” rather, these classifications are grounded in the “special needs” of students who are disabled, have serious learning difficulties, or are highly gifted.

Once identified, special needs students are entitled to be enrolled in regular education as well as in units of Specialized Services for Special Education (AEEs) pursuant to Federal Decree 6.571/2008, and CNE Resolution 4/2009 that are financed by local authorities with federal and state support if necessary. The role of the AEEs parallels that of regular schools by helping to help promote the inclusion process. As such, AEE services can also be provided to students in hospitals or domestic environments if needed. Residential placements for regular education are provided only for students with disabilities who are homebound.

Under the provisions of the DPPA, ECA and NEA, federal, state, and municipal authorities have duty to identify and assure the full exercise of fundamental rights to

students with disabilities regardless of whether they attend public or private schools. In locations where there is a lack of free specialized education, disputes have arisen over whether authorities are obliged to place children in private schools at no costs to their family. In such a recent case, the São Paulo State Court, TJSP, extended this right further than the Supreme Court of Brazil. In fact, the Supreme Court of Brazil had refused to interpret the Constitution in favor of the tuition reimbursement to private schools for a student who was deaf (Brazilian Supreme Court - RE nº 241.757/MA, 06/29/1999). The opinion of the Court was that private schools cannot receive public funds if they had not fulfilled all of the legal requirements to receive public funds, even if they had already been classified as social assistance schools where special education services were to be delivered. To the contrary, the São Paulo State Court ruled that the rights to education and to equal access, as well as the best interests of children, guaranteed the immediate enrollment of children with special needs (TJSP, Civil Appeal n. 279.484-5/7-00, 01/19/2006; Civil Appeal n. 752.718.5/4-00, 05/21/2008; Civil Appeal n. 564.314.5/5-00, 01/24/2007).

A noteworthy point, in terms of special education, is the novelty of the judicial discussion of general educational rights in the face of due process guarantees in the Federal Constitution and statutes. Perhaps this is due to societal needs of liberties and basic democratic rights that emerged soon after 1988. Yet, it is only after 2000 that there has been an increase on Brazilian Supreme Court cases relating to education rights. Still, most disputes involving education are resolved by State Courts but can be appealed to the Supreme Court if they concern constitutional rights.

Due Process Rights

The Federal Constitution of Brazil generally provides due process standards of fairness and justice (Article 5, XXXVI, LIII, LIV, LV, LVI, LVII, LVIII, LIX). These standards guarantee that the government is limited to exercising power pursuant to the settled maxims of law and under safeguards for the protection of individual rights as prescribed by the Constitution and pertinent ordinary laws. Protected rights include constitutional and legal remedies such as injunctions, popular actions, and civil and criminal actions under the general constitutional clause relating to the access of all to protections afforded under article addressing Judicial Power (Article 5, XXXV).

Insofar as providing special education is a governmental function, the Public Ministry, both at the federal and state levels, can initiate civil and/ or criminal law suits against public or private authorities who are either not implementing the DPPA or ECA properly or at all as they relate to students with disabilities. The DPPA and ECA also authorize the Public Ministries to initiate class action suits to have these laws implemented by the responsible authorities. As reasoned by the Federal Courts, the Public Ministries have the legal competence to represent and protect individual needs against the State (Superior Tribunal of Justice – STJ, EREsp n. 466.861/SP, 03/28/2007; EREsp n.684.594/RS, 12/09/2007, EREsp n. 684.162, 10/ 24/2007). Moreover, the NEA authorizes the prosecutors of the Public Ministries to sue the State to guarantee places in compulsory schooling, individually or collectively for students with disabilities (Article 5).

In protecting the rights of the disabled, the Public Ministries can convene public hearings before suing the State and/ or private educational authorities to ensure that they comply with the due process provisions of the Federal Constitution and the various statutes. When acting on behalf of public interests, the Public Ministries ordinarily

carry out civil investigations (FC, Article 129, III); criminal investigations are under the jurisdiction of police officials. In sum, the Public Ministries carry out the task of due diligence in order to ensure that students with disabilities are afforded their full rights in public schools.

In its official capacity, the Public Ministries investigate programs for students with disabilities; their transitions from special schools and classes to regular schools and classes; the results of the transitions; and the manner in which public authorities encourage their enrollment in regular schools. In the event that school officials refused to admit students with disabilities or cancel their enrollments due to a lack of facilities and human resources, the attitude of the school with regard to the problem is investigated since school authorities could be sued under criminal law (Lei n. 7.853/89, art. 8º).

The Public Ministries can also sue public authorities if they do not adequately use technical and financial support for inclusion programs in local education systems; this includes the allocation of public funds to private social schools for students with disabilities. Under these circumstances, prosecutors can verify whether officials are providing appropriate schooling; if there is an increase in enrollments; whether there are school plans for adapting buildings, classrooms, and access to the needs of students with special needs; if they have hired teachers to provide instruction in the LIBRAS sign language; whether there is pedagogical material in Braille and other resources for the visually impaired; and how academic assessments are carried out. In relation to teacher education, the Public Ministries also verifies whether courses in Pedagogy includes training in special education and classes addressing diversity. Additionally, the Public Ministries controls how the AEEs serve the needs of students with disabilities; how effectively the administration of AEEs operate; and how public nursery schools are

prepared to receive babies with special needs with the aim of providing early education (Law 7.853/89, art. 2º, I, a). Since, unfortunately, there are no quasi-judicial dispute resolution processes available in the Brazilian educational system, the parents and guardians of students with disabilities have priority in filing litigation on their behalf in disputes over whether their needs are being met.

Funding and Cost Issues

The constitutional framework for funding education in Brazil guarantees public resources as a binding percentage of tax revenue (Article 212 of the Constitution). According to this provision, the Union, or federal government, shall apply no less than 18%, while the States, the Federal District, and the Municipalities are required to supply at least 25% of the tax revenues annually for education.

There is a further obligatory allocation of 60% of the above mentioned resources for the universalization of basic education, through the temporary Fund for Maintenance and Development of Basic Education, more commonly referred to as the FUNDEB. The resources of this fund are distributed based on the number of students enrolled annually in the public schools maintained by each government entity and premised on a minimum value per student as established by the federal government. Under this plan, the enrollment of each special needs student is considered a “double enrollment” due to the compulsory enrollment in the AEEs as well as regular schools. As such the local government receives twice the amount from the FUNDEB for children with disabilities when compared with their peers who are not disabled (Decree 6.571/2008 and CNE Resolution 4/2009).

At the same time, in order to guarantee social inclusion, municipalities are obliged to allocate public funds first to regular schools and only then to the AEEs and

other private social and charitable entities or schools that work with students with disabilities. Otherwise, paradoxically, public funds would stimulate discrimination and not inclusion by maintaining students with disabilities in separate environments, a situation still prevalent in the majority of school systems in Brazil.

In any event, the Union has the duty to supplement the fund in each State and in the Federal District whenever the governmental entities fail to provide support that reaches the nationally set minimum per student. The distribution of resources prioritizes enrolments from the first to eighth grades of basic schooling. This synergy is clearly a consequence of the cooperative fiscal federalism which applies to special education. A further example of this cooperation, in addition to FUNDEB, that directly and substantially impacts special education is the availability of federal funds for state and local governments conditioned on their observing specified rules established by Law 10.845/2004 and by Federal Decree 6.571/2008.

Private schools can also receive public funds (Federal Constitution, Article 213), if they are non-profit-making and reinvest their financial excesses in education only; from the point of view of the law for the purpose of receiving public funds, it does not matter whether these schools are religious, communal or philanthropic in nature. The NEA (Article 77) adds other conditions for public funding of private schools such that in the case of closures, the funds revert to other non-profit-making religious, communal, or philanthropic schools or the government. The Public Ministry controls the allocation and expenditure of these resources to these schools.

Emerging Issues

In 2009, about 14.5% of Brazilians were identified as having disabilities. This percentage continues to increase due to longer life expectancies. Yet, the barriers to

inclusion have increased. The most critical issues that need to be addressed when seeking to serve students with disabilities are difficulty of access to most places, the lack of adequate instructional materials, the lack of teacher support in classes, and lack of suitable public transportation are some of the most critical problems. These barriers affect individuals and students with disabilities of all classes regardless of economic or social backgrounds. Even so, these challenges are especially dire in situations as applied to individuals who are social-economically vulnerable.

If in the last decade public policy has focused on the rights of the disabled, today it is directed to policies of inclusion through affirmative action such as distance learning at all levels of education, community centers for sports and recreations, and helping the disabled to live as independently as possible.

In the judicial sphere, Brazilian Courts are engaged in activism in education by engaging in more flexible and ample interpretations of education law. This is particularly true on the part of the Supreme Court. Since the beginning of 2000, the Court's decisions have been in favor of the effectiveness of the guarantees related to education, especially at the basic level.

A paradigmatic decision from the Supreme Court of Brazil was the vote of Justice Celso de Mello, in a case on enrollment in a pre-school in the city of Santo Andre in São Paulo State. The case was initiated by the Public Ministry against the municipality over the priority of practical and financial measures in education by the involved government authorities. The fact which provoked the suit was the partial fulfillment of the municipality's obligation in guaranteeing education to all local children at a level well below what was expected (STF, RE n. 410.715/SP, 11/22/2005). The constitutional fundamentals of the decision were based on Article 227 which

demands priority in assuring the rights of children, **including those with disabilities, and called on the municipality to fund education adequately.**

Conclusion

Special education in Brazil began in the Nineteenth century. Yet, it was only in the second half of the Twentieth Century that education laws governing special education were enacted. An important factor in the development of special education law in Brazil was the fact that it became a signatory to many international covenants on the rights of the disabled persons. In the beginning of the Twenty-First Century, Brazil is one of the relatively few nations in the world with specific legislation on special education. However, Brazilian law has yet to produced the desired results due to reasons such as the relative newness of the laws as well as the fact that many in the population are simply unaware of their rights. Unfortunately, then, exclusion of individuals with disabilities continues to be a grave problem in Brazil.

One of the reasons why the rights of students with disabilities are not complied with in Brazil is the broad spectrum of criteria in the identification of needs for special education, whether on the part of the governmental authorities or school officials. Another challenge is to assure all of these rights in public schools in light of the lack of funding, adequately prepared teachers, and well-defined assessment plans for students. This is why the domain of the Public Ministry includes the protection of public interest, through litigation and public hearings, the repercussion of which go beyond the limits of class and individual actions.

Neither access to schooling nor compulsory fundamental education necessarily answer the constitutional principle of equality in education. The right to special education is only assured if schooling aims to prepare students with disabilities as both

persons and productive members of society. In the Brazilian system, special education is a constitutional means of promote equality that is designed to make the disabled full members of the society.

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