

Mandates of the Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on the right to education

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights of persons with disabilities and Special Rapporteur on the right to education, pursuant to Human Rights Council resolutions 44/10 et 44/3.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **new national policy on special education, as enshrined in presidential decree No. 10.105, adopted on 30 September 2020, which contains provisions that could restrict the right to inclusive education for children with disabilities in Brazil.**

According to the information received:

On 30 September 2020, presidential decree No. 10.105 (hereinafter 'the decree') was adopted by the Brazilian Government. The General Secretariat of the Presidency, the Ministry of Education, and the Ministry of Women, Family and Human Rights participated in the drafting process. The decree aimed to amend the existing legislation for inclusion of persons with disabilities, adopted in 2015, by introducing a new national policy on special education: equitable, inclusive and lifelong learning (PNEE).

The decree promotes the establishment of a separate system of special education, encouraging states and municipalities to build specialized schools and programmes for persons with disabilities. In particular, it allows authorities to direct some children to special schools if children are considered as not able to "benefit in their development when included in regular inclusive schools and need multiple and continuous support" (article 2, VI). The policy provides for segregation of the latter in special classes, although within mainstream schools (article 2, VII).

The decree also requires the development of criteria to identify "students who do not benefit from inclusive mainstream schools" (article 9, sec III) , which raises serious concerns that authorities may, on this basis, exclude children with disabilities from mainstream schools and require or pressure them to attend special schools or classrooms.

Furthermore, from the 'explanatory memorandum' of the decree, it appears that the Government did not consult with persons with disabilities, including children with disabilities, or their representative organizations, neither during the drafting process of the decree, nor before its formal adoption. While the Government maintained to have conducted an online consultation in regard to the drafts of the policy in 2018, reportedly it did not meaningfully seek out the

views of persons with disabilities (only 0,6 % of the respondents to the consultation were students with disabilities).¹

The new policy on special education has spurred vigorous debate and protests in the country. Non-governmental organizations, experts, educators, organizations of persons with disabilities and students have denounced this policy, arguing that it gravely undermines the access to inclusive, high quality education for persons with disabilities in Brazil.²

In this connection, a number of proposals were presented at both the House of Representatives and the Senate, seeking to repeal the decree.³ Additionally, two separate lawsuits (ADPF 751 and ADI 6590), were submitted before the Supreme Federal Court of Brazil, respectively by the Party Rede Sustentabilidade and the Party Socialista Brasileiro. The lawsuits challenge the constitutionality of the decree and argued that its provisions allow discrimination and exclusion of children with disabilities from the general education system.

On 1 December 2020, in case ADI 6590, a preliminary decision to suspend the decree was adopted by Minister Dias Toffoli. On 11 December 2020, oral arguments took place at the Supreme Court.

On 18 December 2020, the Court delivered a final judgment adopted by majority,⁴ to confirm the suspension of the decree. The other lawsuit (ADPF 751) is still pending.

On 7 January 2021, President Jair Bolsonaro, in a public statement⁵, said that the presence of students with disabilities, in classes of students without disabilities, can harm the entire class.

While we do not wish to pre-judge the accuracy of these allegations, and while acknowledging previous efforts undertaken by the Government towards fulfilling its human rights obligations on the rights of persons with disabilities to inclusive education, we are concerned that the provisions contained in the decree may be contrary to your Excellency's Government international obligations to promote universality and non-discrimination in the enjoyment of the right to education by all.

We wish to express our grave concern about the development of this new national policy on special education and its negative impact on the rights of children with disabilities as well as on society as a whole. We are concerned that, if

¹ See Human Rights Watch (10 Dec 2020) <https://www.hrw.org/news/2020/12/10/brazil-education-risk-children-disabilities>

² "Public prosecutors from the 27 states [expressed](#) themselves publicly, in a joint manner, for the unconstitutionality of the Decree. The coordinated action was an initiative of the Grupo Nacional de Direitos Humanos (GNDH/CNPG). See <https://www.mpam.mp.br/noticias-portal/slides-noticias/13542-promotorias-divulgam-nota-contra-a-nova-politica-nacional-de-educacao-especializada> and <https://surgiu.com.br/2020/10/09/comissoes-do-grupo-nacional-de-direitos-humanos-deflagram-campanha-em-defesa-da-educacao-inclusiva/>".

³ These included, among others, "draft legislative decree (PDL) 437/2020 of the Federal Senate and (PDLs) 427/20, 429/20, 430/2020, 431/2020, 433/20 (with urgent request), 434/2020, 435/2020, 436/2020, 440/2020, 445/2020 and 449/2020 of the House of Representatives. All in progress."

⁴ Ministers Dias Toffoli, Alexandre de Moraes, Luiz Edson Fachin, Cármen Lúcia, Rosa Weber, Luiz Fux, Ricardo Lewandowski and Gilmar Mendes. Minister Roberto Barroso voted in favour but with reservations.

⁵ See <https://brasil.estadao.com.br/blogs/vencer-limites/bolsonaro-afirma-que-educacao-inclusiva-nivela-por-baixo/>

implemented, the new policy would violate a number of human rights obligations as outlined below.

In view of the above mentioned concerns, we respectfully urge your Excellency's Government to take necessary measures, in accordance with international human rights norms, to ensure the right of children with disabilities to access inclusive, quality education on an equal basis with others.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to this case.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.
2. Please indicate measures taken in order to consult closely with organization of persons with disabilities, including children with disabilities, when developing, adopting and implementing the new national policy on special education; and
3. Please indicate what other measures can be taken to ensure compliance with Brazil's obligations under international human rights law and standards, particularly with regards to the right to inclusive education for children with disabilities.

We strongly encourage your Excellency's Government to urgently amend or repeal the provisions of Decree No. 10.105 as we consider this decree incompatible with the provisions of the Convention on the Rights of Persons with Disabilities and other human rights standards with regard the right to inclusive education.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

Gerard Quinn
Special Rapporteur on the rights of persons with disabilities

Koumbou Boly Barry
Special Rapporteur on the right to education

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your Excellency's Government's attention to the applicable international human rights norms and standards outlined below.

The right to education is enshrined in article 26 (2) of the Universal Declaration of Human Rights (UDHR), as well as article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Brazil on 24 January 1992; article 23 (3) of the Convention of the Rights of the Child (CRC), ratified by Brazil on 24 September 1990, and article 24 of the Convention of the Rights of Persons with Disabilities (CRPD), ratified on 1 August 2008, affirm the core principles of universality and non-discrimination in the enjoyment of the right to education.

We wish to recall that article 13 of the ICESCR recognizing the right of everyone to education states that education must be oriented towards the full development of the human personality and the sense of its dignity, and strengthen respect for human rights and fundamental freedoms. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 13 (1999)⁶ on the right to education highlighted that education is an intrinsic human right and an indispensable means of realizing other human rights. As indicated in a 2007 report of the Special Rapporteur on the right to education, on the right to education of persons with disabilities⁷, article 13 of the ICESCR implicitly promotes the concept of inclusive education by stressing the role of education in enabling "all persons to participate effectively in a free society".

We would like to also underline that under the UNESCO Convention against Discrimination in Education, which Brazil ratified on 19 April 1968, governments undertake to eliminate and prevent any form of discrimination, whether in law, policy or practice, which could affect the realization of the right to education, including "depriving any person or group of persons of access to education of any type or at any level; limiting any person or group of persons to education of an inferior standard; or establishing or maintaining separate educational systems or institutions for persons or groups of persons".

In relation to the establishment of a parallel system of special schools for children with disabilities, we note with concern that the decree contains a number of provisions that discriminate against children with disabilities and exclude them from the general education system⁸. These include provisions in article 2 (VI and VII), and article 9 (III), which are inconsistent with the right of children with disabilities to be included on an equal basis with others in the system of general education. By establishing separate schools and classrooms and providing criteria to determine which children may not access or benefit from mainstream education, the new policy encourages the effective segregation of children with disabilities.

⁶ [E/C.12/1999/10](#)

⁷ [A/HRC/4/29](#)

⁸ [CRPD/C/GC/4](#) (2016) para. 11

Additionally, we wish to highlight that all forms of segregation and exclusion of students with disabilities from the general education system may also contribute to an environment which may expose them to further discrimination.

We are concerned that the decree is inconsistent with the rights of children with disabilities to access to an inclusive, quality and free education on an equal basis with others in the community. We are alarmed that, if fully implemented, the parallel and segregated system of special education would pose serious threats to the right to inclusive education of children with disabilities and may constitute a major obstacle to their effective inclusion into the mainstream education system.

In this regard, we would like to recall that international human rights law prohibits any form of discrimination on the basis of disability and guarantees the right to an inclusive education. In particular, the CRPD explicitly recognizes the right of persons with disabilities to education and obliges States to realize this right without discrimination and on the basis on equal opportunity, and that States Parties shall ensure an inclusive education system. Article 24 (2) contains the obligation for States to ensure that persons with disabilities can access inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live; to provide reasonable accommodations so that students with disabilities can have access to education on equal terms with others; and to ensure that persons with disabilities receive the support required, within the general education system, to facilitate their effective education.

In its General Comment No. 4 (2016) on the right to inclusive education, the Committee on the Rights of Persons with Disabilities noted that article 24 of the CRPD prohibits the exclusion of persons with disabilities from the general education system, including any legislative or regulatory provisions that limit their inclusion on the basis of their impairment or the “degree” of impairment⁹ and that the right to access education on an equal basis with others, meaning without discrimination, extends to the provision of both private and public education¹⁰. It concluded that the obligation on States to realize the right to education for persons with disabilities is not compatible with sustaining two systems of education: a mainstream education system and a special/segregated education system¹¹.

In order to realize the right to inclusive education, article 2 of the CRPD requires states to ensure reasonable accommodation, defined as the ‘necessary and appropriate modification and adjustments’ that would ensure persons with disabilities the enjoyment of all human rights and freedoms on an equal basis with others. Denial of reasonable accommodation to meet their individual requirements would constitute discrimination.

In its General Comment No.4 (2016), the Committee on the Rights of Persons with Disabilities stated that reasonable accommodations need to be designed to strengthen opportunities for students with disabilities to participate in the classroom and in out-of-school activities alongside their peers¹² and that provision of reasonable

⁹ Ibid., para. 18.

¹⁰ Ibid., para. 23.

¹¹ Ibid., para. 39.

¹² Ibid., para. 33.

accommodation may not be conditional on a medical diagnosis of impairment¹³. Accommodations may include changing the location of a class, providing different forms of communication and learning materials in alternative/accessible formats, providing students with a note-taker, or a language interpreter or allowing students to use assistive technology in learning and assessment. Provision of non-material accommodations, such as allowing a student more time, reducing levels of background noise, sensitivity to sensory overload, alternative evaluation methods or replacing an element of curriculum by an alternative element, should also be considered. Support can also consist of a qualified learning support assistant, either shared or on a one-to-one basis, depending on the requirements of the student¹⁴.

We note with concern that persons with disabilities, including children with disabilities, did not closely and meaningfully participate in consultations for the development of the new policy on special education. Participation is a core human rights principle that is firmly rooted in international law, and it is a basic condition for democratic societies as it allows individuals to play a central role in their own development, as well as in the development of their communities. The active and informed participation of different groups, including persons with disabilities, is a requisite of a human rights-based approach that ensures active citizenship, good governance and social accountability.

We would like to recall your Excellency's Government's obligations under article 4 (3) of the CRPD, incorporated in its legal system as constitutional rights since 2009,¹⁵ which provides that in the development and implementation of legislation and policies to implement the Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

In its General Comment No.7 (2018), the Committee on the Rights of Persons with Disabilities, stated that governments should systematically and openly approach, consult, and involve persons with disabilities. In particular, public authorities should give due consideration and priority to the opinions and views of organizations of persons with disabilities, including preferences of children with disabilities, when addressing issues directly related to persons with disabilities, and that consultation should be timely, broad, and accessible¹⁶. Such participation can have a significant impact on policy and law affecting persons with disabilities, since persons with disabilities are best positioned to identify their own needs and the most suitable policies for meeting them. Their participation ensures that policies and programmes are devised on the basis of their needs and preferences. In addition, such involvement promotes agency and empowerment, a sense of ownership and responsibility vis-à-vis public decisions and may contribute to enhanced public trust¹⁷.

Additionally, article 12 of the CRC provides that States shall assure to the child who is capable of forming his or her own views the right to express those views freely

¹³ Ibid., para. 29.

¹⁴ Ibid., paras. 29 -30 and 32.

¹⁵ Article 5, (3) of the Brazilian Constitution establishes that "International human rights treaties and covenants that are approved, in each chamber of Congress, by two thirds of Congress members, should be equivalent to a constitutional amendment."

¹⁶ CRPD/C/GC/7 (2018), paras. 22-23.

¹⁷ A/HRC/31/62

in all matters affecting them, the views of the child being given due weight in accordance with the age and maturity of the child. To this purpose, article 12 (2) states that the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In its General Comment No.12 (2009), the Committee on the Rights of the Child stated that participation needs to be interpreted broadly in order to establish procedures not only for individual children and clearly defined groups of children, but also for groups of children, such as indigenous children, children with disabilities, or children in general, who are affected directly or indirectly by social, economic or cultural conditions of living in their society¹⁸.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org and can be provided upon request.

¹⁸ CRC/C/GC/12 (2009), para. 87.