

The Judiciary and access to the Frequency Modulation System: an analysis of the effectiveness of public policies on hearing health

O Poder Judiciário e o acesso ao Sistema de Frequência Modulada: uma análise sobre a efetivação das políticas públicas em saúde auditiva

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ABSTRACT

Purpose: to know how the process of creating public policies on Hearing Health in Brazil, and the influence of the Judiciary Power for the access by the hearing impaired person and the use in the school environment, concerning the Frequency Modulation (FM) System. **Methods:** an exploratory qualitative study through which a normative survey was initially carried out - on the websites of the Presidency, the Chamber of Deputies and the Ministry of Health - aiming to identify, from October 1988 to October 2019, the existence of norms dealing with the creation of public policies on Hearing Health. Also, a jurisprudential survey was carried out - on the websites of Courts of Justice, Federal Regional Courts, and Superior Court of Justice - to identify the existence of court decisions dealing with access to the FM System via the Unified Health System in the period from January 2000 to October 2019. **Results:** We identified ten normative instruments that dealt specifically with the creation of public policies on Hearing Health, as well as six court decisions whose merits consisted of access to the FM System via the Unified Health System. **Conclusion:** The Judiciary has a fundamental role in achieving access to the FM System for people with hearing impairment since its performance suppresses omissions provided by other Powers and prevents public policies already designed to contemplate restrictions contrary to the Federal Constitution.

Keywords: Hearing loss; Public health policies; Human rights; Handicapped advocacy; Court rulings

RESUMO

Objetivo: conhecer como se deu o processo de criação de políticas públicas em saúde auditiva no Brasil, bem como a influência do Poder Judiciário na concretização do acesso, pela pessoa com deficiência auditiva, ao Sistema de Frequência Modulada (Sistema FM) e para utilização em ambiente escolar. **Métodos:** estudo qualitativo exploratório, por meio do qual foi realizado, inicialmente, um levantamento normativo nos sítios eletrônicos da Presidência da República, Câmara dos Deputados e Ministério da Saúde, visando identificar, no período compreendido entre outubro de 1988 e outubro de 2019, a existência de normas que versassem sobre a criação de políticas públicas em saúde auditiva. Foi realizado, em complemento, levantamento jurisprudencial nos sítios eletrônicos de Tribunais de Justiça, Tribunais Regionais Federais e Tribunais Superiores, visando identificar, no período compreendido entre janeiro de 2000 e outubro de 2019, a existência de decisões judiciais que versassem sobre acesso ao Sistema FM, via Sistema Único de Saúde (SUS). **Resultados:** foi possível identificar dez instrumentos normativos que tratavam, especificamente, da criação de políticas públicas em saúde auditiva, além de seis decisões judiciais, cujos méritos consistiam, propriamente, no acesso ao Sistema FM, via SUS. **Conclusão:** o Poder Judiciário tem papel fundamental na concretização do acesso ao Sistema FM pela pessoa com deficiência auditiva, uma vez que sua atuação suprime omissões dos outros Poderes e impede que políticas públicas já concebidas contemplem restrições contrárias à Constituição Federal.

Descritores: Perda auditiva; Políticas públicas de saúde; Direitos humanos; Defesa das pessoas com deficiência; Decisões judiciais

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INTRODUCTION

The promulgation of the Federal Constitution of 1988 fostered the timeframe for the advent of public policies in hearing health. The Federal Law 8,080/90 determines the incorporation of care service for people with hearing loss into the scope of the *Sistema Único de Saúde* (SUS), initially through the Ordinance SAS/MS number 126, of September 17, 1993, about Cochlear Implant (CI) without guaranteeing, however, all the procedures necessary for hearing health full care and service.

The Ordinance GM/MS number 2073, of September 28, 2004⁽¹⁾, establishes the *Política Nacional de Atenção à Saúde Auditiva* (PNASA), in other words, the first time in the history of Brazil that hearing problems began to be treated specifically and through their policy.

Then, after numerous normative acts, the Ordinance GM/MS 1274⁽²⁾ in 2013 included the Personal Frequency Modulation System (FM System) in the table of procedures offered by SUS. This assistive technology was indicated by SUS to children and adolescents with hearing impairment, users of hearing aids, CI, or Bone Anchored Hearing Aids (BAHA), at school age (from five to 17 years old) and who have oral language as the primary form of communication.

According to *DataSUS* information, from July 2013 to October 2019, an amount of 15,291 FM System kits was granted throughout Brazil.

The FM System is considered a remote microphone and the kit consists of a microphone, a transmitter, and a receiver. The microphone captures the speech signal and sends it to the transmitter, which converts the speech signal into an electrical waveform and transmits it, using FM radio waves, to a receiver used by the user of the hearing device. The receiver transforms the waveform back into acoustic energy and delivers it directly to the user's ears⁽³⁾.

The system aims to minimize the acoustic problem of distance, background noise, and reverberation, and its benefits in the school environment are already strongly proven by national and international literature⁽³⁻⁹⁾.

Article 25 of the United Nations Convention on the Rights of People with Disabilities - Federal Resolution 6949 of 25 August 2009 - establishes that people with disabilities have the right to enjoy the highest attainable standard of health, without discrimination based on disabilities. However, it is well known that there is a mismatch between the range of actual social problems and the ability of the states, including Brazil, to face them through effective public policies.

Factors such as growing social inequality, the omissions of the legislators, as well as the inefficient political practices of the public administration have stimulated the phenomenon of judicialization of public policies (aiming at the performance of social rights - including the right to health - as recommended in the Federal Constitution of 1988). This does not exclude the distribution of the FM System to those who need it, either before or after the edition of Ordinance GM/MS 1274/2013⁽²⁾.

Because of this scenario, we question what has been the influence of the Brazilian Judiciary in the implementation of public policies in hearing health, especially regarding access to the FM System, by people with hearing impairment, and its use in the school environment.

Therefore, to measure the stage of implementation of this public policy in hearing health in the country, this study aimed

at knowing, initially, and through a chronological normative survey, how the creation of hearing health public policies was carried out in Brazil. Also, it was also sought to infer what has been the influence of the Judiciary, through statements (jurisprudence), in the effective access of the person with hearing impairment to the FM System.

METHODS

Search strategy

It is an exploratory qualitative study. We elaborated the following question to guide the search, which supported this research: "what has been the influence of the Brazilian Judiciary in the implementation of public policies in hearing health, especially regarding access to the FM System, by the person with hearing impairment, and its use in the school environment?"

We conducted a chronological normative survey in October 2019 to obtain data on the process of creation and improvement of public health policies in Brazil, with emphasis on public policies in hearing health. We searched the websites of *Presidência da República*, *Câmara dos Deputados* and *Ministério da Saúde* (MS). The following keywords were used: "hearing health", "person with disabilities", "person with hearing impairment" and "frequency modulation system". The legislation published from October 1988 to October 2019 was selected.

Also, we also carried out a jurisprudential survey for the collections of the *Justiça Estadual* and *Justiça Federal*, as well as the *Tribunais Superiores*, to demonstrate how much the phenomenon of public policies judicialization in Brazil has influenced the implementation of public policies in hearing health, especially regarding access to the FM System, identifying judicial decisions, in which the interested person with hearing loss was to obtain the FM System free from the SUS.

We searched in October 2019 and used the following keywords for this research: "public policies", "fundamental rights", "social rights", "hearing health", "person with disabilities", "person with hearing impairment" and "frequency modulation system". The period defined for the survey was from January 2000 to October 2019.

Selection criteria

The criterion of the normative survey was restricted to national rules, therefore applicable in any of the states and municipalities of the Federation and the *Distrito Federal*.

For the jurisprudential survey, and to cover the understandings of *Justiças Estadual e Federal* and *Tribunais Superiores*, the following rules were set: for each Region of the country, the jurisprudence of the *Tribunal de Justiça* of the most populous state was checked, in addition to the jurisprudence of the *Tribunal de Justiça do Distrito Federal e Territórios*; within the *Justiça Federal*, it was checked the jurisprudence of the *Tribunais Regionais Federais* of the five Administrative Regions and, within the scope of the *Tribunais Superiores*, the jurisprudence of the *Superior Tribunal de Justiça* and *Supremo Tribunal Federal*.

Data analysis

The data found was descriptively analyzed, generating two synthesis tables. Chart 1 listed ten normative instruments that were specifically about the creation of public policies in hearing health and, Chart 2, six judicial decisions, whose merits consisted, specifically, in access to the FM System via SUS.

RESULTS

Public policies on hearing health

It was possible to observe that, only from the 1990s, Brazil began to specifically create actions of hearing health public policies. This occurred in the face of the emblematic influence of the Federal Constitution of 1988, which defined health as “the right of all and the duty of the State” – a fundamental social right that gives the individuals the right to perceive material benefits, through a national health service with free and universal access (SUS).

Thus, from 1993, we located the following and most relevant normative instruments that particularly encourage actions of hearing health public policies, as shown in Chart 1.

Judicial decisions

It could also measure from the set of judicial decisions studied (given before and after the Ordinance GM/MS No. 1274/2013)⁽²⁾ that, once sufficiently proven the medical

indication of assistive technology (given the evidence that its use implies effective health benefits), the person with hearing impairment has been able to obtain the court order that made the FM System available, by the SUS and at the expense of some federated entity.

Thus, illustrating the jurisprudence scenario mentioned, Chart 2 shows the synthesis of judicial decisions, in which the interested “person with hearing impairment” intended object was to obtain the FM System, from the SUS and free of charge:

Many of the decisions found did not even link granting the FM System to the educational criterion, or even to the economic capacity of the applicant. Such judgments understood that the right to this assistive technology access by people with hearing impairment comes from the simple precept, according to which, such people live up to the best possible health care condition.

DISCUSSION

Given the results presented in this study, it was possible to recognize that the implementation of public policies in Hearing Health-related to people with hearing loss, whether in the present or the near future, demands and will continue to depend on the Judiciary, increasing the scenario of health judicialization in Brazil.

This is due to the omissions of legislators and administrators, as well as the practice of public policies that do not observe, in a reliable way, the constitutional norms for granting the FM system and other resources.

Moreover, only after the Judiciary started acting firmly, the Executive Branch began to integrate regulations to distribute

Chart 1. Legislation on hearing health in chronological order

Legislation	Actions
Ordinance GM/MS No. 1278 of October 20, 1999 ⁽¹⁰⁾	It approved the criteria for indication and contraindication of the cochlear implant (CI) and established the standards for the registration of centers/nuclei to carry out CI.
Ordinance GM/MS No. 2073 of September 28, 2004 ⁽¹¹⁾	It established the <i>Política Nacional de Atenção à Saúde Auditiva</i> (PNASA), which aimed, among other objectives, to structure a regionalized and hierarchical network of services, able to establish an integral and integrated care line in the management of hearing impairment main causes, for minimizing the damage of hearing loss in the population.
Ordinance No. 587 of April 6, 2004 ⁽¹¹⁾	It standardized the organization and implementation of <i>Redes Estaduais de Atenção à Saúde Auditiva</i> .
Ordinance SAS/MS No. 589, of October 8, 2004 ⁽¹²⁾	Determined the organization and implementation of <i>Redes Estaduais de Atenção à Saúde Auditiva</i> .
Ordinance GM/MS No. 626 of March 23, 2006 ⁽¹³⁾	It defined the Hearing Health Care Services and the physical and financial limits of the states, Federal District and municipalities, aiming to ensure comprehensive patient care, comprising evaluation for diagnosis, follow-up, reassessment of hearing loss, speech therapy, selection, adaptation and supply of hearing aids and replacement of ear mold and hearing aids (including all procedures and respective parameters provided in Ordinance SAS/MS No. 589 of October 8, 2004, for patients with prostheses comprehensive care and for those who, after diagnostic evaluation, did not need aids).
Federal Decree No. 7612 of November 17, 2011 ⁽¹⁴⁾	It launched the Plano Nacional dos <i>Direitos da Pessoa com Deficiência – Viver sem Limites</i> , which seeks to promote, through the integration and articulation of policies, programs, and actions, the full and equitable exercise of the rights of people with disabilities, with health care as one of the pillars.
Ordinance SAS/MS No. 971 of September 13, 2012 ⁽¹⁵⁾	It included maintenance and adaptation procedures of orthotics, prostheses, and special materials in the SUS procedure table.
Ordinance GM/MS No. 1274 of June 25, 2013 ⁽²⁾	It included in the SUS procedure table the Personal Frequency Modulation System (FM System), an adaptation complement of the hearing aid and/or CI that aims to improve the speech signal understanding in noisy, reverberant environments and when the sound source is distant.
Ordinance GM/MS No. 2776 of December 18, 2014 ⁽¹⁶⁾	It approved general guidelines, expanded and incorporated procedures for <i>Atenção Especializada às Pessoas com Deficiência Auditiva</i> in SUS. It stated the criteria of indication and contraindication to CI surgery and bone-anchored hearing aids.
Ordinance GM/MS No. 2,161 of July 17, 2018 ⁽¹⁷⁾	It included a procedure and established a criterion for speech processor exchanging in the Table of Procedures, Medications, Orthotics/Prostheses, and Special Materials of the SUS.

Chart 2. Summary of lawsuits

Number of the Lawsuit	Year of judgment	Origin	Interested	Result
0007197-51.2011.4.02.5101	2012	<i>Justiça Federal da Seção Judiciária do Rio de Janeiro</i>	<i>Defensoria Pública da União</i>	It obliged the Ministry of Health to start the procedure to analyze the inclusion of the FM System in SUS (which resulted in the edition of Ordinance SAS No. 1274/2013).
0043140-85.2011.8.26.0071	2013	<i>Justiça Estadual de São Paulo</i>	<i>Ministério Público Estadual</i>	It obliged the state of São Paulo to provide the FM System to a group of children and adolescents from Bauru/SP with hearing impairment (with medical indication).
0005104-64.2011.8.07.0018	2014	<i>Justiça of Distrito Federal and territories</i>	<i>T. F. A. (minor)</i>	It obliged Distrito Federal to provide the FM System to the minor with hearing impairment (with medical indication).
1011701-88.2014.8.26.0053	2016	<i>Justiça Estadual de São Paulo</i>	<i>R. V. P.</i>	It obliged the state of São Paulo to provide the FM System to the author with hearing impairment (with medical indication).
0002784-61.2015.8.14.0000	2018	<i>Justiça Estadual do Pará</i>	<i>Ministério Público Estadual</i>	It obliged the state of Pará to provide the FM System to a group of children from Belém Pará(PA) with hearing impairment (with medical indication).
1015762-90.2018.4.01.3800	2019	<i>Justiça Federal de Minas Gerais</i>	<i>Ministério Público Federal</i>	It obliged the Union to provide the FM System to all students in Brazil with hearing impairment (with medical indication), at any educational level (public or private institution).

medicines, procedures, and products that were not included before, an attitude that undoubtedly contributed to improving the granting system of these health items.

Thus, without prejudice to the necessary adoption of measures for the accountability of the Executive and Legislative Branches, it is up to the Judiciary, as already stated, to reaffirm its role accomplishing the purposes of the Federal Constitution of 1988.

Besides, to adequately deal with topics such as the one under examination, it is necessary an effective interdisciplinary effort, based on the dialogue of the sciences involved, since judicialization of health contains a set of technical and sanitary themes that require specific knowledge that is not familiar for the Judiciary.

The jurisprudence of the higher courts demonstrates to find a pathway, while setting premises to be mandatorily considered in the courts, a whose intended object consists of health benefits offered by the SUS, and that, at least in theory, do not represent a backward step in the citizens' rights.

As an example, the decision is given by the *Justiça Federal de Minas Gerais*, which ordered the Executive to distribute the FM System to students with hearing impairment who need it, regardless of the educational level in which they are (Preschool, Elementary, Middle, Higher and Post-graduation) and not only to students with hearing impairment from five to 17 years of age, as provided in Ordinance GM/MS No. 1274/13⁽²⁾.

The premise that underlies the understanding contained in this decision is based on the unfair restriction imposed by that Ordinance, which is not following the normative system that guarantees rights to the person with disabilities. This normative system assures them, by the *Lei Brasileira de Inclusão da Pessoa com Deficiência* (Federal Law No. 13146/15), the "right to enjoy the highest attainable state of health" and the access to "inclusive education system at all levels and lifelong learning, to achieve the maximum attainable development of their physical, sensory, intellectual and social talents and abilities, according to their characteristics, interests and learning needs".

In this sense, moreover, several studies have proven that the FM System allows the student with hearing impairment to

have consistent and good quality access to the teacher's voice, regardless of the level of background noise, or the distance between the speaker and the listener⁽¹⁸⁻²⁰⁾.

Furthermore, as recommended by some authors⁽²¹⁻²⁵⁾, the benefits of the FM System are already proven in an off-school environment. This inference promotes the idea of re-evaluating the scope of the public health policy in question, based on the size and density of the fundamental right to health, added to the evidence of the health benefits that this device provides to people with hearing impairment.

However, as presented in Report No. 58 of the *Comissão Nacional de Incorporação de Tecnologias* (CONITEC) of SUS, the budgetary impact resulting from the incorporation of this assistive technology took into account the target audience originally susceptible to this type of intervention, and its quantity is measured based on data from the 2010 Census.

Thus, distribution/year from 2013 of FM System was of 9,738 and from 2017, the number of distributions would be doubled, since such assistive technologies have a useful life of four years, thus requiring periodic replacements. However, two years after the said forecast of doubling the quantity, any FM systems were replaced or revised.

Studies evaluating the outcomes of this public policy⁽²⁶⁻²⁸⁾ indicated the majority of the public, comprising of children and adolescents that received the FM System were effectively using it, however, the most reported causes for not using the FM System were the device broken and the lack of support by teachers. In another study⁽²⁹⁾, the authors found a lower number of adherence to the use of the FM System, this indicates that actions are needed in the area of health and education to make the use of this device successful and, therefore, it is essential the participation of the school, the health service, and parents for treatment adherence.

In this sense, another study⁽³⁰⁾ sought to verify whether the current Brazilian legislation guarantees the effective school inclusion of individuals with communication disorders and, among them, those with hearing impairment. The findings of the

study pointed out that, although there is a significant number of regulations, their implementation is not an established reality, which makes it impossible for actual school inclusion.

The financial resources initially provided for the distribution of the FM System would not be enough to contemplate the extension of the scope of public hearing health policy, a divergence that, of course, could have been avoided in its genesis, if the public policy had been conceived in line with that advocated by the current constitutional guarantees.

Moreover, budgetary constraints (based on the theory of the reserve of the possible and usually supported by the Executive Branch) fatally impact the institution of public policies in general, hurting the constitutional guarantee of protection for life and dignity, which is why it has not been supported by our best jurisprudence.

Therefore, the present study brought important contributions, mainly showing the importance of the Judiciary intervention for the effective performance of fundamental rights. However, a limitation was the scarcity of studies that promoted multidisciplinary analyses, involving Medicine and Law, so necessary to enable a better understanding of themes such as the one under analysis.

The exponential judicialization of health, added to the national scenario of public resources containment, show it is important that judicial statement, in this area, adopt solutions guided by the best scientific knowledge, currently made possible by Evidence-Based Medicine (EBM). This is the case of the therapeutic option of the FM System, which also enables the maximum expected effectiveness in the use of public resources.

Therefore, the Judiciary has indelegable responsibilities in equalizing this theme and needs to keep acting for the implementation of public health policies.

Thus, the FM System facilitation in the area of hearing health public policy in Brazil and, as verified with the cochlear implant, certainly does not find the final chapter in the current Ordinance GM/MS No. 1274/13⁽²⁾. This was evident in the recent public consultation, conducted by the CONITEC of SUS, which aimed to discuss the expansion of the use of the FM System for individuals with hearing impairment of any age, at any academic level, as well as scientific subsidies that also prove the benefits of the FM System in an off-school environment.

Such situations, shortly, may cause the reevaluation of this public health policy (either by administrative means or judicial means), considering the size and density of the fundamental right to health.

CONCLUSION

The normative and jurisprudential surveys carried out indicate, in no doubt, that the Judiciary has a fundamental role in the access to the FM System by the person with hearing impairment since it overcomes omissions of other authorities and prevents that public policies already conceived restrict rights in the Federal Constitution, taking the maximum expected effectiveness in the use of public resources.

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