

**The obligation of child education and the shortage of places in kindergartens and similar establishments<sup>1</sup>**

***A obrigatoriedade da educação infantil e a escassez de vagas em creches e estabelecimentos similares<sup>2</sup>***

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**Abstract:**

There is currently a great demand for places in kindergartens and similar establishments, and inadequate supply causes shortage of places for the care of the rights of children who have not completed four years of age. This study aimed to analyze the legal provisions relating to the right to education, mandatory education, as well as the responsibility of the State as to this requirement, the National System of Education and the National Education Plan, seeking to understand the difficulty faced by society to solve this problem. If the right to education is a duty of the family, the state and the whole of society, what is really necessary for its implementation? We conclude that the Brazilian Legal System would be sufficient to enable education for every child, but there is a considerable gap between what is written in the law and the competence of the state itself to comply with this law, which defines the school reality of a large part of Brazilian children.

**Keywords:** child education, mandatory, access.

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**Resumo:**

*Existe atualmente uma demanda muito grande por vagas em creches e estabelecimentos similares, e a oferta insuficiente acarreta escassez de vagas para o atendimento do direito das crianças que não completaram quatro anos de idade. O presente estudo visou analisar os dispositivos legais, referentes ao direito à educação, à obrigatoriedade do ensino, assim como a responsabilidade do Estado quanto a essa exigência, o sistema nacional de educação e o Plano Nacional de Educação, buscando compreender a dificuldade enfrentada pela sociedade para solucionar esse problema. Se o direito à educação representa um dever da família, do Estado e de toda a sociedade, o que é realmente necessário para concretizá-lo? Concluímos que o ordenamento jurídico brasileiro seria suficiente para viabilizar educação a todas as crianças, mas existe uma distância considerável entre o que está escrito na lei e a possibilidade de o próprio Estado cumprir essa lei, o que define a realidade escolar de boa parte das crianças brasileiras.*

**Palavras-chave:** educação infantil, obrigatoriedade, acesso

## Introduction

Nowadays in Brazil, there is a great demand for places in kindergartens and similar establishments, due to the lack of structure to attend the population in their right to education between the ages of zero and under four years of age. This problem is not new to us and has long been waiting for a solution.

The Brazilian Federal Constitution (FC), 1988, when dealing with the subject, is clear in stating in article 205 that education is a right for all and a duty of the State and family (Brazil, 1988). This will be reinforced in relation to children and adolescents whose rights should be guaranteed by the family, the State and the whole of society, with absolute priority, based on article 227 (Brazil, 1988).

The same FC states in article 208, subsection I, that the duty of the State with education will be implemented by guaranteeing free and basic education from the ages of four to seventeen (Constitutional amendment (CA) 59, 11<sup>th</sup> November, 2009, Brazil, 2009a). The same FC, subsection IV, also guarantees kindergartens and preschool, for children from zero to five years of age (CA 53, 19<sup>th</sup> November, 2006, Brazil, 2006).

As we can see, the FC does not anticipate either the obligation nor free education to care for the population between zero and four years of age, although it is stated in the Law of Directives and Bases of National Education (LDB), in article 4, subsection II, as free care in kindergartens and preschools for children up to five years of age (Brazil, 2013). (Law n. 9.394, 20th December 1996; Law n. 12.796, 4th April 2013).

A projection such as this is perfectly adequate for the Brazilian legal system; however, it is worth reflecting that the obligation, although not expressed in the articles referring to the subject, must be extended to children under four years of age based on the theory of comprehensive protection.

Law 12,796, 4th April, 2013, which amended subsection II, Article 4 of the LDB, and which seeks to adapt the LDB to the Constitutional text, also amended subsection I, to declare that the State's duty towards education will be enforced by ensuring: mandatory and free basic education from the ages of four to seventeen (Brazil, 2013).

Given this, the obligation of education towards children who are already four years of age is clear and it is on this theme that this study deals with. The problem proposed here deals with the population under the age of four. The study seeks to analyze the lack of places in kindergartens, preschools and similar establishments, in order to understand the existing difficulty in complying with the law and to work towards solving this problem. To do so, literature and legal diploma reviews related to the right to education; the Brazilian educational organization; as well as the National Education Plans, were carried out. Work was based on studies by Saviani (2010, 2012), Cury (2008), Cury and Ferreira (2010) and Cury, Horta and Brito (1997), which perfectly place legislation within the school field.

The conception and implementation of policies to fulfill children's needs leaves much to be desired, due to the fact that palliative measures and legislative changes are no longer sufficient in fulfilling these children's rights to education. Even though the Brazilian education organization has sought to implement a National Education System, it has not yet been fully achieved, above all, due to the regional characteristics marked by the diversity of initiatives, as per the normative provisions consulted. The National Education Plan itself has proved to be insufficient in addressing the problem of places, even though it expressly guarantees the child's right to education and reinforces the legal command to attend this right.

Having outlined educational responsibility, why are we not moving towards reducing the shortage of vacancies in Child education? What is really needed for us to improve this direction?

## The right to education

The responsibility for guaranteeing and offering education, which is everyone's right, is shared with the State, the family and the whole of society. This responsibility is set out in Article 205 of the FC, which must be interpreted together with Article 227 of the same Magna Carta which, with slight textual variations, by reversing the order (family and State) by adding society as co-responsible for guaranteeing this right, does not detract from it. This right must be guaranteed with absolute priority, according to the FC. (Brazil, 1988).

To understand the representation of this priority, we use the legal definition, where it is possible to read *verbatim* in the sole paragraph of article 4 of the Child and Adolescent Statute (CAS) that the guarantee of priority includes:

- a)** the priority of receiving protection and help under any circumstances; **b)** precedence of attendance in public services or of public relevance; **c)** preference of public social policy formulation and implementation; **d)** privileged allocation of public resources in areas related to the protection of childhood and youth (Law n 8.069, 13<sup>th</sup> July, 1990) (Brazil, 1990).

It is not a matter of special rights, but of considering the peculiar condition of a developing person and thus, deserving special care, given the Theory of the Comprehensive Protection adopted by the Brazilian FC whose expression is embodied in the CAS (Brazil, 1990). According to this guideline in more than one provision, the question is: How is the lack of places in kindergartens and similar establishments justified?

Some stagnation in this aspect can be seen, embodied in the repetition of the text of the law when dealing with the principles that will guide the teaching to be given in the official establishments. For example: the FC in Article 206, subsection I states: equal conditions for access and permanence in school<sup>3</sup> (Brasil, 1988), which was literally reproduced in 1990, in Article 53, subsection I of the CAS (Brasil, 1990), and in 1996, Article 3, subsection I of the

<sup>3</sup> Translated from Portuguese: "igualdade de condições para acesso e permanência na escola"

LDB, (Brazil, 1996b), also contained in Resolution number 04, July 13<sup>th</sup>, 2010, which defines the General National Curriculum Directives for Basic Education, in Article 4, I, with the following wording: equal conditions for access, inclusion, permanence and success in school<sup>4</sup> (Brazil, 2010).

It is worth mentioning that after 22 years of the proclamation of this right by the FC in 1988, until the enactment of the guidelines in 2010, until today, we are close to 30 years without this principle being fully met, since in relation to Child education, the presence of queues waiting for a hypothetical possibility of enrolling in early childhood education is an accepted fact, which violates the legal dictate.

Among the principles, according to which education must be given, listed in Article 206 of the FC, are the equal conditions for access and permanence in school (Brazil, 1988). The question to ask is: according to the legal mechanisms mentioned, is there room for non-compliance with this principle in the Brazilian legal system?

Despite textual reproduction in various legal charters, reality suggests that such mechanisms have been shown to be ineffective, as the distance between them is great and the access to (and the existence of) places in kindergartens and preschools goes a long way. If we fulfilled the mechanisms, we would already have advanced in that direction.

Regarding the right to education, the stated intentions were to achieve the Objectives and Goals of the National Education Plan (NEP), approved for the decade of 2001/2011, based on law n. 10.172, 9<sup>th</sup> January, 2001, (Brazil, 2001), which is to achieve the goal of attending 50% of children from zero to three years of age and attend 80% of children between four and five years of age by 2011. Obviously, this goal has not been reached, as can be seen in the text of the NEP, approved for the decade of 2014/2024 (Law n. 13.005, 25<sup>th</sup> June, 2014), (Brazil, 2014) that came into force with a delay of more than three and a half years, and which presented exactly the same provision for 50% of children under three years of age, extended until 2016, which was certainly not achieved, as can be seen from the deficit situation that affects the whole structure of Child education in our country.

Therefore, it will be 18 years of projection for the guarantee of the right to education, according to the Constitution and 15 years of specific projection in terms of regulation to

<sup>4</sup> Translated from Portuguese: “igualdade de condições para o acesso, inclusão, permanência e sucesso na escola”.

address the problem, aiming to serve only 50% of the population in this age group, which allows us to infer that this is an express declaration of denial of the right of the other half of this population.

In denying the right to education, the principle of equal conditions for access and permanence in the educational establishment as a consequence, is violated. If responsibility for school education is clearly defined in the law, how long will this affront to children's rights be borne?

It is important to note that legally, all children, regardless of age, have the right to education and, consequently, have the right to attend kindergartens or similar establishments even before their fourth birthday. In such cases, parents or guardians have the choice of enrolling the child and ensuring their attendance at an educational establishment, which could justify the absence of mandatory Child education.

However, the FC states, in Article 208, subsection IV, the care in kindergarten and preschool for children up to five years of age, without mentioning either the obligation or free education for such care. (CA 53/2006). (Brazil, 2006).

In the case of basic education, which encompasses not only Child education, but also elementary and secondary education, the obligation and free tuition is foreseen from the ages of four to seventeen, according to Article 208, subsection I of the FC (Brazil, 2009a) and Article 4, subsection I of the LDB. (Brazil, 1996b).

As can be seen, the constitutional legislator opted for the age criterion, raising doubts about the recipient of the right to education who is not yet four years of age. The corresponding duty of the State is to comply with the right to education of children under four years of age, this right will be enforced based on the guarantee of Child education in kindergartens and preschools as per the FC (Brazil, 1988), which allows us to claim that, from the legal stand point, the offering of places is a duty and responsibility of the State, which has not been fully fulfilled.

On the other hand, the LDB, when dealing with the issue of mandatory and free education, repeats the age criterion, limiting it to between four and seventeen years of age. However, the LDB brings new organization to the educational stages, excluding Child education as a comprehensive part of basic education, blatantly conflicting with the provision, in article 21, which presents three stages, comprising Basic Education, namely: Early Childhood

Education, which includes day care and preschool; Elementary School; and High School (Brazil, 1996b).

However, the same LDB, as amended by Law 12,796/2013, states free Child education - maintaining the age criteria - for children up to five years of age. It should be noted that this amendment does not include the obligation for Child education (Brazil, 2013).

Thus, this reform did not solve the recurring doubt as to the right to education of the group of children under four years of age, because even if the law does not mention the obligation to comply with this right, it is already substantiated in the systematic interpretation of articles 205, 208 and 227 of the FC. (Brazil, 1988).

Apart from this, Article 21 of the LDB eliminates any justification for the free and non-compulsory provision of Child education, as it integrates basic education along with elementary and secondary education (Brasil, 1996b).

The withdrawal of the term mandatory for the attendance at kindergartens and preschools does not exempt the State from offering places. These, according to the legal provisions, must be guaranteed, with absolute priority, since all children, without exception, must have their rights met, among them, undoubtedly, the right to education, as per the provisions mentioned, especially in Article 227 of the FC (Brazil, 1988).

As already analyzed by Cury (2008), the initial text of Article 208, subsection I of the FC, as amended by the CA n. 14, 12<sup>th</sup> September, 1996, puts aside the obligation of elementary education for those who did not have access to it at the right age (Brazil, 1996a). Subsequently, the same subsection I of Article 208 of the FC is amended by CA n. CA 59/2009, prevailing since 12/11/2009, thus guaranteeing free and compulsory basic education from four to seventeen years of age. (Brazil, 2009a).

As can be seen, the Constituent legislator did not extend the obligation guarantee to children from zero to six years of age, as set forth in subsection IV of that same Article 208. Later, the CA No. 53/2006, prevailing since December 20, 2006 (Brazil, 2006), changed this item, reducing the limit from six to five years of age. However, even with the CA 59/2009, there is no mention of the mandatory nor free education for this age group (Brazil, 2009a).

Although the FC does not textually mention free education or mandatory, for kindergarten and preschool attendance, Law 12.796 /2013, altered the LDB, stating, in

subsection II, Article 4: free Child education for children up to five years of age”<sup>5</sup>, which is justified based on the theory of comprehensive protection and the consequent fulfillment of children's rights with absolute priority.

Brazilian law expressly guarantees free school education for all children. As for the obligation, it should be analyzed through a systematic interpretation of the provisions related to the subject, because it is not written that Child education is mandatory, either in Article 208, subsection IV of the FC (Brazil, 2006), nor in Article 4, subsection II of the LDB law 12,796/2013 (Brazil, 2013).

However, this does not allow us to state that the provision of places is not mandatory either, because if that were the case, children under the age of four would be denied their rights, thus voiding the content of full protection, which is directed towards every child - and towards every teenager - indistinctly.

In terms of home education, this is only allowed in Brazil until the child is four years of age. After that, the child must be part of an official educational establishment. But reiterating: access to a kindergarten cannot be denied.

It needs to be made clear, once and for all, that the State's duty in offering places bears no relation to the lack of mandatory Child education. The theory of comprehensive protection aimed at every child - and every teenager, admittedly vulnerable and, therefore, deserving special attention from the legislator, guarantees with absolute priority the fulfillment of their rights, including the right to education.

Therefore, based on the legislation, we must conclude that there is no denying a child his/her enrollment in kindergartens and preschools, as the legislation clearly defines the State's responsibility for the fulfillment of this right, and specifically so in the Federal Constitution, in Articles 205 and 227 of the FC (Brazil, 1988). However, school reality remains far from the legal provision, as there are not enough places to meet school demand regarding Child education.

There is a lack of schools, a lack of resources for hiring, a lack of teachers, which most often causes many of them to exceed their normal working hours, generating an additional cost of overtime. There are also difficulties in the physical structure of many public schools and

<sup>5</sup> Translated from Portuguese: “educação infantil gratuita às crianças até cinco anos de idade”

addressing the problem becomes more difficult as there are no solutions to improve this scenario.

But if there are no places, if the physical space can no longer accommodate another child, will the final court decision that orders the child to be enrolled, and theoretically fulfills the right, guarantee this right, or on the contrary, will it endanger not only the right of the recipient of the legal right but also all the other children there? What is the use of enrollment, by means of a judicial process, if there are no great possibilities of adequate support to their age group?

Caution is required for the correct interpretation of mandatory Child education. This is because the aforementioned obligation must be considered a two-way street: on the one hand, it is the parents' obligation to enroll their children and to ensure their presence at school; on the other hand, the State is obliged to make places available to attend this portion of the population, which does not actually occur.

This point deserves special attention. The exclusion of pre-school from the obligation of education, in articles 208, subsection I of the FC and article 4, subsection I of the LDB, does not imply that the State is free from the provision of places for kindergarten. This obligation results from the systematic interpretation of the entire legal framework and cannot be used as an alibi for maintaining an inadequate number of places.

In addition to not serving this purpose, it is still detrimental because any judicial decision, be it morally sound, legally adequate and fundamentally cohesive, can frustrate its ultimate goal in the exercise of jurisdiction that is the distribution of justice. If there are not enough places for student demand, the appropriate court order does not solve the problem satisfactorily, on the contrary, it creates another.

The granting of court orders, forcing enrollment, intensifies the deficient situation of the entire pre-school educational structure and does not guarantee the adequate care of the children. Teachers, through daily planning of the contents to be worked on, even when using individual portfolio elaboration as a way of assessing learning, need time to look at the child, talk privately, listen to the child, thus ensuring proper care.

Certainly, determining enrollment in the strict observance of the law, without regarding these causal issues, infringes the right of those children, who are unaware of all this discussion,

and who under no circumstances whatsoever can continue being deprived of their constitutionally guaranteed rights.

Let us return to the absolute priority that guarantees the protection, the preference in both the formulation and implementation of public social policies and the privileged allocation of public resources in the areas related to child protection. Why is there still no compliance with these normative commands regarding children? It is also the responsibility and duty of the State to offer enough places to fulfill the demand, which has been frustrated by flagrantly disregarding the reglementary ruling.

## **Of the State in education**

To better understand the State's responsibility in relation to education, it is necessary to reflect on this judicial body - the State - as a personalized legal entity. Darcy Azambuja's definition is very welcome, when it says that the "The State is the political-legal organization of a society to fulfill public good, with its own government and determined territory." (Azambuja, 1988, p. 6).

The State should not therefore be taken as a government, which is only one of its elements. The attendance of the public good is possible through a sovereign power, which guarantees the governability, thus "[...] the State is only a true State when its governing power is sovereign." (Ferreira Filho, 2011, p. 76).

It is noteworthy that sovereign power, whose function it is to make governability viable, is one and indivisible. Thus, what we have is the distribution of functions for the good and faithful performance of this power. The result is the coexistence of the powers: Legislative, Executive and Judiciary, interdependent and harmonious among themselves, adopted by the Brazilian legal system, since the first republican Constitution, enacted on 24<sup>th</sup> February, 1891 (Brazil, 1891).

In this sense, when speaking of the State, it is of the utmost importance that one understands among all the functions of power, which entity is responsible for the duty to guarantee the right to education. Thus, all powers representing State sovereignty have their share

of responsibility in fulfilling the right to education, as a manifestation of sovereign power conferred to the State.

Another issue related to the State is within the sphere of the federative entity responsibility: the Federal Union, the States, the Federal District and the Municipalities, listed in the FC guaranteeing the form of the State.

## **National Education System**

The State is a politically organized nation that takes a federative form, characterized by political and administrative decentralization. Hence, the distribution of responsibility between the Federal Union, the States and the Federal District and the Municipalities, as a result of the State organization.

Saviani (2012) suggests the absence of a “national education system” in his studies, stating that although the standardization of national education indicates the intention of systematization, it has not yet been implemented at a national level in the country. Regarding this statement, the author points out that the LDB refers, sometimes to education systems, sometimes to teaching systems, besides attributing organization to distinct systems at the State and Municipal levels.

Saviani, in a previous study (2010), already defended the idea that a National Education System in Brazil was not actually established. Even after the FC of 1988 and the subsequent re-elaboration of the LDB, establishing this system became unfeasible due to government intervention, which apparently preferred a minimalist law, releasing the Federal Government from responsibility in certain aspects of education.

Cury (2008) and Saviani (2010) complete each other on the topic. Incidentally, Cury explains that there is currently a “cooperative federalism under the name of a decentralized reciprocal collaboration regime, with functions shared between the federative entities [...]” (CURY, 2008, p. 1201). And asks: “Why not establish a national education system for quality education to take place?” (Cury, 2008, p. 1205).

This reflection on the federative question had already been proposed by Cury, Horta and Brito (1997), considering the division of responsibility, a striking feature of the federal State,

which does not show itself to be uniform and centralizing. As a consequence, the authors argue that State and Municipal systems would affront the national aspect and if not, centralization “would override the federative character” (Cury; Horta; Brito, 1997).

The National Education System integrates and articulates all levels and modalities of education with all the corresponding organized and managed resources and services to which they agree, which are organized and managed together with all the federative entities, under the coordination of the Federal Union. (Saviani, 2010, p. 780). This aspect is substantiated by LDB in article 8, which establishes the organization of collaborative education systems between the Federal Union, the States, the Federal District and the Municipalities.

Further on, in articles 16, 17 and 18, the LDB defines the systems: Federal, State and Federal District, and Municipalities, respectively (Cury, 2008). In this sense, both Cury (2008) and Saviani (2010) refer to the priority of legal entities when analyzing the content of article 211, paragraph 1, of the FC, which establishes this system of collaboration, designating the State with “a redistributive and supplementary role, so as to ensure the equalization of educational opportunities and a minimum standard of quality of education through technical and financial assistance to the States, the Federal District and the Municipalities” (Brazil, 1988). The authors point out that the State and Municipal education systems act in reciprocal collaboration with the Federal Union.

However, it should be noted that paragraph 2, article 211 of the FC, as amended by the CA n. 14/1996 (Brazil, 1996a), established that the Municipalities should act primarily in elementary and Child education. The LDB on the other hand, in Article 11, subsection V, assigns a priority offer only for elementary education (Brazil, 1996b), to the Municipality, apart from the system of collaboration between States and Municipalities for the provision of elementary education, as seen in Article 10, subsection II. (Brazil, 1996b).

This situation overloads the Municipalities, because as can be seen, the repetition of the goals of the National Education Plans for a ten year period, but maintains the same goal of attending only 50% of the population from zero to under four years of age until today, after fourteen years of a specific forecast for compliance with these rights upon the enactment of Law 10,172, January 9, 2001, which established the NEP for the 2001/2011 period (Brazil, 2001).

The deadline to guarantee the offer of places in kindergarten for children up to three years of age was 2011, which was not fulfilled, as can be seen by the repetition of the goal in Law 13.005, June 25, 2014, which established the NPE for the 2014/2024 period (Brazil, 2014). In this plan, the deadline set for meeting the target is 2016, which will certainly not be fulfilled.

It can be stated that there have been advances in the provision of Child education, which however are insignificant compared to the stated goal, which is far from being achieved.

The PNE/2014 (The National Plan of Education) (Brazil, 2014), implemented approximately more than three and a half years late - especially with regard to Child education, suggests a lack of attention by the legislator or contempt in dealing with the right to education for the population between zero and under four years of age, as it ignores the right of 50% of this portion of the population.

The LDB, which was enacted on 23<sup>rd</sup> December, 1996, by establishing in Article 11, subsection V, the priority of the Municipality to provide elementary education (Brazil, 1996b), underprivileged Child education, which contradicts the FC in Article 211, paragraphs 2, as amended by the CA n. 14/1996 (Brazil, 1996a), which assigned to the Municipalities, a priority role also in early childhood education, coming into effect on January 1, 1997, therefore nine days after the LDB came into effect.

This is due to the period of *vacatio legis*, that is, to the period in which CA n. 14 was waiting to come into effect. This CA was drawn up on 07/12/1996 and only came into effect on 01/01/1997. During this time, the LDB was published and came into effect, restricting the Municipality's priority for the provision of elementary education. Thus, the LDB foresees the priority action of the Municipality in elementary education, discriminating kindergarten, contrary to the text of the Constitution, with the wording given by Constitutional Amendment 14/96, determining the priority action of the Municipality for both Child education and elementary education. (Brazil, 1996b).

The Brazilian legislation foresees the coexistence of education systems and, according to Cury (2008), in a coordinated and decentralized manner, under reciprocal collaboration; the systems must act with unity, common principles, directives and bases of national education and the National Education Plan, among others.

This author highlights the difficulty of Brazilian education administration, suggesting the need for an articulated national education system, due to the reciprocal collaboration between Federative entities, in view of the Sole Paragraph of article 11 of the LDB, which enables a single system of basic education, as well as the National Education Plan, the National Education Council and the Basic Education Maintenance and Development Fund (FUNDEB), which point in this direction. (Cury, 2008).

However, the legislator's difficulty in assigning the responsibility as a priority to Municipalities has a direct impact on the difficulty encountered when facing the problems of places that afflict child education. What are the priorities regarding Child education? How is the forecast of reaching only 50% of the population between zero and three years of age justified when all these children have this right? Is the adoption of a National Education System enough to guarantee the rights denied to children of this age group, or is this possible through the monitoring and effective compliance of the goals of the PNE?

## **Subjective public rights in basic education**

Access to compulsory and free education is a subjective public right, according to Article 208, paragraph 1 of the FC (Brazil, 1988), reinforced by the LDB in Article 5, which states: "Access to compulsory basic education is a subjective public right." (Brazil, 1996b). Subjective right is the ability or option that anyone has so as to invoke the regulation in their favor. That is, it is the possibility given to the individual to activate the State, demanding the provision of schooling from it. This power "[...] would constitute an authentic subjective right to education" (Guazzeli, 1979, p. 6).

In dealing with mandatory education, Cury and Ferreira (2010), state that: the positivization of rights is an instrument that ensures the offer<sup>6</sup> (Cury; Ferreira, 2010, p. 125). Now, if the FC states that access to mandatory and free education is a subjective right and the LDB asserts that access to basic education, which includes Child education - is an comprehensive part and a subjective public right, this means that it can be demanded from the State if not spontaneously attended.

<sup>6</sup> Translation from Portuguese of "a positivação dos direitos é um instrumento para assegurar a sua oferta"

Thus, if access to education is not guaranteed, the interested party may legally require the State to comply with this guarantee of access. However, it should be emphasized that the duty of the State in offering places is mandatory for all children whoever they may be. In fact, basic education, which includes Child education as its first stage, can already substantiate any judicial request for equality of access. However, it should be remembered that the reality faced by public child education shows that judicial measures, if not accompanied by other measures, do not suffice to fulfill the rights of children between zero and four years of age. It is necessary to consider the small number of kindergartens, the insufficient number of teachers in kindergarten to attend the demand, inadequate spaces to shelter children, and finally, the whole deficient infrastructure that contributes to aggravate the problem, which deserves more attention from the Government.

Guazzelli (1979) has well defined what happens when he says that educational systems in developing countries are endowed with good philosophical foundations, good education laws, and beautiful administrative formulas, yet there is a lack of harmony between law and practice, between theory and application, between educational myth and school reality<sup>7</sup>. (Guazzeli, 1979, p. 7).

The author highlights the gulf that exists between legal prediction and the reality of Brazilian education, stating that educational legislation describes and predicts situations which are ideal, therefore, utopic, but the praxis is disastrous<sup>8</sup> (Guazzelli, 1979, p. 8), which remains to this day if we consider the problem of shortage of places for Child education.

In addition to the obligation of the State to offer places and the possibility of judicial requirement to comply with this offer, the law also provides for the liability of the authorities in the event of non-compliance, as seen in Article 54, paragraph 2 of the Statute of the Child and Adolescent (Brazil, 1990) and yet the problem persists.

We can infer from Saviani (2010) that facing the problem of insufficient places in kindergartens and similar establishments is caused on the one hand by the discontinuity of

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<sup>7</sup> Translation from Portuguese of “de boas bases filosóficas, boas leis de educação e belas fórmulas administrativas, contudo há falta de harmonia entre a lei e a prática, entre a teoria e a aplicação, entre o mito educacional e realidade escolar”

<sup>8</sup> Translation from Portuguese of “ideais, por isso, utópicas, mas a práxis é desastrosa”

public policies, which makes it impossible to proceed towards solutions. With the National Education Council (CNE) creation, the aims was:

The permanence of a permanent representation panel of civil society to share formulation, monitoring and evaluation of national policy with the government. [...] The intention was to avoid the discontinuity that has marked educational policy, which leads to the failure when attempting changes, as everything returns to square one with each change of government team (Saviani, 2010, p. 773-774).

Even with the establishment of the National Education Plan (PNE), there are still difficulties in monitoring, supervising and accomplishing goals and strategies established, including the enactment of Law 13,005, 25<sup>th</sup> June, 2014 that regulated the current PNE (Brazil, 2014), which took place with more than a three year delay.

The question to ask again: If there is no doubt about who is responsible for the obligation of guaranteeing education, where is the difficulty in effecting the much-needed transformation regarding the problem of shortage of places in kindergartens, preschools and similar establishments? It must be recognized that there is a huge gap between the letter of the law and its compliance.

There is little doubt that the whole of society strives to fulfill every child's right to education, regardless of age, as it is also responsible for the duty related to this right. Therefore, it is up to society to monitor, oversee and demand the law. As stated before, judicial measures determining enrollment do not solve the problem of access and permanence in school, on the contrary, it even disrespects the principle of guaranteeing quality standard, as set forth in Article 206, VII of the Federal Constitution (Brazil, 1988).

## **Final considerations**

As can be seen, the Brazilian Judicial system would be sufficient in itself to enable the fulfillment of the right to education for the population who is not yet four years old. The right to education is guaranteed by the FC to all children and adolescents, regardless of age. According to the letter of the law, this should be substantiated in practical reality, which we know has not been the case.

As mentioned, the FC states that education will be carried out based on the principles of equal access and permanence in school, guaranteeing the quality standard, which translates into obligation as the duty of the State to offer places to as many children who may possibly need them.

The lack of places to attend children up to four years of age is not justified due to the guarantee of priority, because the preference in the elaboration of public policies and the privileged allocation of public resources are enough to guarantee places for all children. This stems from the principle of full protection adopted by our Constitution, regulated by the Statute of the Child and Adolescent.

The Brazilian public education policy has not observed the legal mandate arising from this protection that is to be implemented with absolute priority, providing privileged allocation of resources to offer places, not allowing questions and any actions that deviate from it. Despite the well defined responsibility for education and the duty of the State, we are not moving towards reducing the shortage of places in the provision of Child education, at least as shown in the National Education Plan/2014, which repeats what was stated by the previous National Education Plan/2001.

The principle of comprehensive protection is not being effectively respected when addressing the controversial absence of places for Child education. The same can be said for the principles of guarantee, of equality for access and of permanence in school and the guarantee of the quality standard.

The lack of obligation expressed in the legal provisions cannot be mistaken for the non-mandatory provision of education, since education is everybody's right and must be offered by the State, regardless of the age group.

The same State that does not offer enough places is the State that obliges enrollment in establishments, which are already full, unable to accommodate another child. In this sense, there is a large mismatch between the functions of the State Power regarding the fulfillment of the duty related to places in kindergartens and similar establishments.

There are still few advances in the care of the population between zero and under four years of age, regarding their right to education. There is a lack of kindergartens, a lack of teachers, many of whom are under qualified, the spaces are generally inadequate, all of which

demands urgency in the complete reorganization of the entire structure of Child education, which results in undermining the constitutionally guaranteed right of children.

It is necessary to clarify once and for all that the exclusion of compulsory Child education in the articles that determine mandatory and free education and that adopt the age criterion, which is established between four and seventeen years of age, is not enough to remove the responsibility and the duty from the State of guaranteeing children the access to and permanence in education.

The parents or guardians are the reason for this exclusion as they are not required to enroll their children in school if they understand and ensure that such education takes place in the family environment in a similar way. What is unfounded is to use this absence of express obligation to justify the absence of the State in fulfilling its duty to guarantee access to all children in Child education. In fact, this responsibility translated into the obligation to offer places, set in other mechanisms, as can be seen, cannot be forgotten by the State, removing any and all justifications for the impediment of this goal.

Decentralization and organization of the Federative State also do not imply in an impediment for the fulfillment of these rights, either with a national education system or through the PNE. Children cannot be denied their rights, on the grounds of shortage of places. The forecast in the National Education Plan is of no use if its implementation is not effective. It is necessary to provide the means for the effective accomplishment of the established goals and a coordinated follow-up for the attainment of these goals, or we will face deceit that results in the repetition of goals that are never achieved.

Faced with the breach of the State's duty to offer places, a devastating conclusion is reached, in which compliance with the law does not perform justice, which we believe is directly related to the breach of the principles related to teaching in our country, namely: Absolute Protection Principle, which refers to the guarantee of priority, provided for the privileged allocation of public resources for the care of children and adolescents. The Principle of guarantee of access and permanence in school, which establishes that all children are entitled to a place and the Principle of guarantee of the quality standard of education, which suggests the minimum condition for the attendance of children, preventing the overcrowding of kindergartens and similar establishments above their capacity.

However, the structure of Child education in Brazil is deficient and urgently needs to be revised and expanded through the construction of new kindergartens; the adequacy of the spaces; the hiring of well-trained teachers; and the carefully established planning; all in order to make the implementation of a system that guarantees adequate training for children in this segment, possible.

In addition to the access to kindergarten, it is also necessary to guarantee that the child has all the necessary care for their education, which in this age group requires a lot of attention from the teacher, individualized care which would surely be harmed when an establishment is forced by court order to receive more children than their capacity to absorb them.

It is not difficult to make positive progress to eliminate the problem of shortage of places in kindergarten. To do so, it is necessary to demand public policy, in which the resources are efficiently used, towards the construction of new establishments that promote better conditions for Child education in the whole country.

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