

São Paulo, 13 de January de 2023

To

**The United Nations Special Rapporteur on the Right to Education**

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**Jô Clemente Institute ("IJC")** is a non-profit civil society organization founded in 1961 that is dedicated to the inclusion of persons with intellectual disabilities. In the last years the organization has been expanding its advocacy work at national and international levels, aiming at the defense and guarantee of rights of persons with disabilities, based on the UN Convention on the Rights of Persons with Disabilities ("CRPD"), ratified in Brazil with constitutional status.

In 2021 **IJC** was granted consultative status at the United Nations Economic and Social Council (ECOSOC). The organization integrates the Brazilian Coalition for Ending Violence against Children and Adolescents, the Brazilian Coalition for Inclusive Education, and the Brazilian Network for Inclusion of Persons with Disabilities (Network-IN). It is also a member of Inclusion International.<sup>1</sup> Therefore, we herein present our contribution for the consultation on "*The Right to Education, Advances and Challenges*", with a special focus on the right to education to children and adolescents with disabilities.

#### **I. Assessing the achievements made by the mandate of the Special Rapporteur on the right to education over the last 25 years.**

1. In your country, are education issues approached through the lens of the human right to education, and if so, with what challenges and results? In your view, what is the added value of such an approach in your work?

Brazil has signed and ratified several international human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child<sup>2</sup> and others internalized with constitutional status after Constitutional Amendment 45/2004, such as the Convention on the Rights of Persons with Disabilities (2006) and the Marrakesh Treaty (2018).<sup>3</sup> Therefore, they are parameters of validity for other rules.<sup>4</sup>

<sup>1</sup> Inclusion International is a global network of persons with intellectual disabilities and families representing more than 200 federations in 115 countries across five regions, including the Middle East and North Africa, Europe, Africa, the Americas and Asia-Pacific.

<sup>2</sup> Convention on the Rights of the Child (1990) the International Covenant on Economic, Social and Cultural Rights (1966), the American Convention on Human Rights (1992)

<sup>3</sup> Available in: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2007-2010/2009/decreto/d6949.htm](https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/decreto/d6949.htm). Last access: 27.12.2022

<sup>4</sup> The Federal Constitution of 1988 was amended in 2004 by Constitutional Amendment No. 45, which recognized that international human rights treaties approved in each of the Houses of National Congress, in two shifts and by three-fifths of the votes would become equivalent to constitutional amendments<sup>4</sup>. The treaties ratified before the 2004 Amendment, as established by repeated decisions of the Supreme Court, came to be considered a superlegal status standard. Available in: <https://portal.stf.jus.br/jurisprudencia/sumariosumulas.asp?base=26&sumula=1268>. Last access: 27.12.2022

In addition, the Federal Constitution of 1988 recognized education as a fundamental right, alongside other social rights (Art. 6). Thus, **the Brazilian legislation tackles education under the lens of the human right to education.**<sup>5</sup>

Concerning students with disabilities, in 2008, in the context of the ratification of the Convention on the Rights of Persons with Disabilities (CRPD), a National Plan for Special Education upon an Inclusive Education Perspective, which aimed to increase the number of students with disabilities in regular schools, in addition to defining guidelines on special education, bringing a systematic interpretation of the constitutional text, in light of human rights principles and the CRPD.<sup>6</sup>

With the incorporation of the CRPD, new norms have emerged in the national context, such as the National Policy for the Protection of the Autistic Person (Law 12.764/2012) and the Brazilian Inclusion Law for Persons with Disabilities (Law 13.146/2015)<sup>7</sup>, reaffirming the right to education and to inclusive education as a subjective public right of the child with disability, over which the will of parents or caregivers shall not prevail. In the same direction, policies were created that recognized the intersectionality and interdependence of the right to education with the fulfilling of other rights, such as the right to transport and a minimum income, such as the BPC at School Program.<sup>8</sup>

The human rights approach allows clear identification of those responsible and from whom it can be demand measures for the implementation of the right to education as a fundamental human right to be ensured for all people, with and without disabilities. The human rights approach also allows advocacy work to be developed incorporating the perspective of diversity and the recognition of differences, which is of paramount importance when it comes to the public of students with disabilities.

In terms of legislation, based on the protection conferred at the international level, an internal legislative movement was initiated in Brazil to create norms and to make existing ones compatible with the international human rights standards, what lead to continuous advancement in the implementation of the right to education and inclusive education.

However, from 2016 onwards, a series of policies and setbacks have changed the functioning of the educational system. and voices were raised that such measures were hindering the guarantee of the right to education and principles of inclusive education, starting with the High School Reform<sup>9</sup>. More recently, in 2020, Decree 10,502/2020 resumed special education in substitution of regular education, contrary to international human rights standards.<sup>10</sup>

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<sup>5</sup> The Statute of Children and Adolescents – Law 8069/1990 dedicates an exclusive chapter to address the right to education as a subjective public right, affirming the duty of the Brazilian State to ensure that children and adolescents have mandatory and free education, including those who have not accessed it at the appropriate age<sup>5</sup>. For students with disabilities, it guarantees the specialized educational service, that is supplementary or complementary and non-substitutive to regular education.

<sup>6</sup> Available in: <http://portal.mec.gov.br/seesp/arquivos/pdf/politica.pdf>. Last access: 27.12.2022

<sup>7</sup> Available in: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2012/lei/l12764.htm](https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/l12764.htm). Last access: 27.12.2022

<sup>8</sup> The Program BPC at school seeks to ensure access and permanence in school for children and adolescents up to 18 years of age with disabilities and who receive the so-called Benefit of Continued Payment, a monthly benefit paid to persons with disabilities or older people who cannot afford their own livelihood.

<sup>9</sup> Available in: [https://www.planalto.gov.br/ccivil\\_03/\\_Ato2015-2018/2017/Lei/L13415.htm](https://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2017/Lei/L13415.htm). Last access: 27.12.2022

<sup>10</sup> Available in: <https://www.in.gov.br/en/web/dou/-/decreto-n-10.502-de-30-de-setembro-de-2020-280529948>. Last access: 27.12.2022

In terms of challenges, the protection of rights under the human rights lenses is subject to interference by more conservative governments and their political positions. There is a trend to ignore the commitments undertaken by the country in the international context. Moreover, even in view of the relevance of international human rights protection, the applicability of such protective content in judicial decisions is subtle and the recognition of General Comments of treaty bodies as interpretative norms is still far from reality.

**2. The human right to education entails States' obligations to respect, protect and fulfil the right to education in international human rights law. To what extent are these obligations clearly identified in your country's legislation and in practice?**

Although we have committed and compelled to comply with various international human rights treaties, it is noted that we are still far from implementing all obligations to respect, protect and fulfill the right to education accordingly. The Brazilian State took twenty year after ratifying the Convention on the Right of the Child to ensure mandatory and universal access to basic education. In our country the illiteracy rate exceeds 6%, being one of the worst rates in America.<sup>11</sup>

In addition, comprehensive education policies incompatible with the economic reality of Brazil were implemented without solving the historical problem of child labor. Although international obligations have been identified in legislation, there is still an important gap in its practical implementation.

**3. Has the right to free education been progressively implemented at all levels of education in your country, based in particular on article 26 of the Universal Declaration of Human Rights, articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights, and article 28 of the Convention on the Rights of the Child? If yes, please provide examples. If not, please explain why not.**

In Brazil, the Law of Guidelines and Bases of National Education (LDB) reaffirms education as a human right and defines a series of guiding principles for the functioning of the education system in Brazil, among which, the equality of conditions for access is permanence in school.<sup>1213</sup>

Until 2009, this legislation provided for the progressive implementation of free and universal education. In 2010 the legislation was amended recognizing education as a subjective public right of all students to compulsory, free and universal primary education, which in Brazil includes elementary and high schools.

<sup>11</sup> Available in: <https://educa.ibge.gov.br/jovens/conheca-o-brasil/populacao/18317-educacao.html#:~:text=No%20Brasil%2C%20segundo%20a%20Pesquisa,havia%20sido%206%2C8%25>. Last access: 11.01.2023.

<sup>12</sup> Art. 3. From the Law of Guidelines and Bases of National Education, Law 9.394/1996

<sup>13</sup> Other principles of LDB are: Freedom to learn, teach, research and disseminate culture, thought, art and knowledge; Pluralism of ideas and pedagogical conceptions; Respect for freedom and appreciation of tolerance; Coexistence of public and private educational institutions; Free public education in official establishments; Valuing the school education professional; Democratic management of public education; Quality standard assurance; Valorization of the out-of-school experience; Link between school education, work and social practices; Consideration for ethnic-racial diversity; Ensuring the right to education and lifelong learning; I respect the human, linguistic, cultural and identity diversity of deaf, deaf, blind and hearing impaired people.

The norms on the right to education in Brazil observes the provisions of the *International Covenant on Economic, Social and Cultural Rights*. The LDB recognizes that education is developed in family life, with human coexistence, in the work, in educational and research institutions, in social movements and through civil society organizations and cultural manifestations. Inspired by the principles of freedom and the ideals of human solidarity, is aimed at the full development of the student, his preparation for exercising citizenship and his qualification for work.

There is also *observance of the Convention on the Rights of the Child* in LDB's text, when it provides for that all students from 4 to 17 years old have the right to enroll free of charge in any official school in the state and affirm that education is linked to the world of work and social practices.<sup>14</sup>

**4.** Is the right to education considered a justiciable right in your country and if so which aspects of that right? If so, please provide a short summary of emblematic cases.

According to the LDB (art. 5) any citizen, group of citizens, community association, trade union organization, class entity or others legally constituted and the Public Prosecutor's Office, within the limits of its competence, have the power to claim authorities to demand the fulfilment of the right to education. Therefore, and in light of the whole normative set governing the right to education, it is a right that can be legally demanded.

In addition to the discussion about homeschooling which is important in the context of the right to education, in Brazil there are two emblematic cases concerning the right to education of children and adolescents with disabilities: ADI 5357-DF, 2015<sup>1516</sup>, in which the constitutionality of articles of the Brazilian Inclusion Law that imposed to private and public education institutions the obligation to provide all necessary support and measures to ensure inclusive education without charging additional amounts from families of children and adolescents with disabilities. On this occasion, the Supreme Federal Court recognized the constitutionality of the text of the Brazilian Inclusion Law, forbidding extra charging.

In 2020, Decree 10.502/2020 instituted the return of specialized schools and substitute educational learning to regular education. A coalition of civil society organizations, including IJC, joined as *amicus curiae* in ADI 6590-DF. The legal proceeding is still pending final decision, but the Decree was repealed on January 1, 2023, as one of the first acts of the newly elected government.<sup>17 18 19</sup>

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<sup>14</sup> Art. 1st, art. 1, §2, art. 2º and art. 4th, inc. I of the Law of Guidelines and Bases of National Education.

<sup>15</sup> In 2018 the Supreme Federal Court (STF) dismissed the Extraordinary Appeal (RE) 888815 with recognized general repercussion in which the possibility of home education was discussed (homeschooling) opportunity was not authorized home education due to lack of legislation relevant to the theme.

<sup>16</sup> Available in: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=4818214>. Last access: 29.12.2022

<sup>17</sup> Available in: <https://www.in.gov.br/en/web/dou/-/decreto-n-10.502-de-30-de-setembro-de-2020-280529948>. Last access: 29.12.2022

<sup>18</sup> Available in: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=6036507>. Last access: 29.12.2022

<sup>19</sup> As part of this collective advocacy initiative was published the book "For inclusion" with several authors of civil society Organized, where the IJC had the opportunity to talk about the experience of the transition from special school to the Specialized Educational Service in the article: "The challenges of inclusive education from the perspective of education for all". Available at : [https://alana.org.br/wp-content/uploads/2022/09/PelaInclusao\\_PDFAccessivel.pdf](https://alana.org.br/wp-content/uploads/2022/09/PelaInclusao_PDFAccessivel.pdf)

5. In countries to which the Special Rapporteur has sent communications (allegation letters, urgent appeals and other letters)<sup>2</sup>, have measures been adopted to address the issues raised and ensure their non-recurrence? Please provide specifics.

The communications of the Special Rapporteur on the Right to Education to the Brazilian State dealt with three topics that guided the Brazilian public debate in recent years. In 2016 the right to education was addressed together with the UN Special Rapporteurs on extreme poverty and human rights and on adequate minimum standard of living. At that time they pointed out about the risks that a proposed constitutional amendment - PEC 55/2016 (known as "The PEC of death") represented to Brazilian society. The referred PEC limited public spending in Brazil for 20 years, creating a very radical austerity policy, and consequently, making a series of public policies and investments in education unfeasible.

The Special Rapporteur on extreme poverty, Philip Alston, told the newspaper Carta Capital that the PEC condemned an entire generation. Although very criticized, including for the lack of social participation in its elaboration, the text PEC was approved becoming the Constitutional Amendment No. 95. After the 2022 election, a transition PEC was approved that relativized the limits imposed. By 2023 the elected government promises the elaboration of a new fiscal anchor to replace the "spending ceiling".<sup>20</sup>

Another concern of the Rapporteur was the Program School without Party, which aimed to end supposed "communist indoctrination" in Brazilian schools and combat the so-called "gender ideology", two theories that sought to censor the right of teachers to express their opinions on gender issues and other debated in the classroom, seeking to limit the school's role as of an environment of criticism and debates. Until the submission of the communication there were two bills projects on the subject, one in the Federal Senate (PLS 193/2016) and another in the House of Representatives (PL 867/2015). The first project was archived, and the second remains but with no prospects of advancement until now.

Finally, concerning inclusive education, the Special Rapporteur on the Right of Persons with Disabilities, together with this Special Rapporteur on the Right to Education criticized the promulgation of Decree 10.502/2020, which established a National Policy of Special Education clearly segregationist, without the participation of persons with disabilities and without the observance of human rights principles and pedagogical literature. The Decree was suspended by the Supreme Court in 2020, but the process is still pending final decision. However, in 2023 the Decree was repealed as one of the first acts of the new elected government.

## II. Main challenges and crucial issues for the future

6. In your view, what are the main challenges in your country in implementing the right to education?

The challenges related to the implementation of education in Brazil involve other social problems. It is necessary to recognize that obstacles such as poverty, lack of access to transportation, intersectionalities such as disability and race, and other factors are not isolated phenomena, that reveal the failure of the Brazilian State to guarantee an inclusive and quality education. It is necessary to consider the

<sup>20</sup> Available in: <https://www.cartacapital.com.br/politica/pec-55-e-erro-historico-que-provocara-retrocesso-social-diz-onu/>. Last access: 11.01.2023

interrelationship between this set of socioeconomic, historical and cultural factors that place certain groups at an unnatural disadvantage and result in a social structure that does not recognize differences, which excludes and segregates.

Even though we have incorporated international human rights norms and replicated these commandments in domestic law, in practice education has not been guaranteed to everyone for several reasons, among which two concern us in particular.

The high rates of dropout in Brazil especially when it comes to students with disabilities, racialized and/or peripheral, which demonstrate that the State is not effectively and efficiently building the conditions for these people to study. In 2019, PNAD Continuous conducted research to identify the reasons for school dropout in Brazil and found some aspects that we would like to discuss.<sup>21</sup>

a) **39.1% of the young people said they dropped out of school to work:** in 2019 in Brazil, there were 38.3 million people between 5 and 17 years old (school age) who were working, of which 1.8 million were in child labor (4.6%). Of this total, 706,000 were occupied in the worst forms of work.

b) **29.2% of evasive young people do not go to school because they have no interest in the content presented:** a sign that there is a gap between the contents presented in the classroom and the subjects of interest to the students.

c) **Among women and girls, 23.8% dropped out of school after they became pregnant:** 14.7% of children born alive in Brazil in 2019 were children of adolescent mothers.

d) **11.5% of the women and girls stopped studying to perform household duties:** a rate that reproduces a cultural and structural reality that still imposes on girls and women the responsibility for home care, motherhood and the care of others around them.

In 2022, a survey conducted by Datafolha at the request of Itaú Social, dealing with education during the pandemic, found that students with disabilities are more likely to drop out of school. According to the data obtained, 28% of parents of students with disabilities were afraid that they would give up at some point in school life, which is a fear that only reached 19% of the parents of students without disabilities.<sup>22</sup>

The second aspect of concern is about the implementation of inclusive education, which despite the efforts made in the last 30 years, have not yet been sufficient to ensure inclusive policies regardless of the positioning of governments.

There is also no consensus between the Brazilian movement of people with disabilities and some families of children and adolescents with disabilities. Part of the families of persons with disabilities who need more support to access school and the right to education tend to demand the strengthening of special education, an education that excludes and segregates, either because they believe that these segregated environments bring some benefit, and especially because they have had negative experiences with regular and inclusive education, sometimes resulting from the lack of investments and improvement of the inclusive education policy in force in the country.<sup>23</sup>

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<sup>21</sup> Available in: <https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-de-noticias/releases/28285-pnad-educacao-2019-mais-da-metade-das-pessoas-de-25-anos-ou-mais-nao-completaram-o-ensino-medio>. Last access: 29.12.2022

<sup>22</sup> Available in: <https://www.itausocial.org.br/noticias/estudantes-com-deficiencia-correm-mais-risco-de-evasao-escolar-segundo-pesquisa/>. Last access: 29.12.2022.

<sup>23</sup> From 2020 to 2021 the Ministerium of Education did not spend R\$1 on inclusive education. Available in: <https://educacao.uol.com.br/noticias/2021/12/04/ministerio-educacao-verba-educacao-inclusiva.htm>. Last access: 29.12.2022.

Similarly, it cannot also be said that Brazilian society, more broadly, understands the need to consider education a subjective and inalienable public right of all students. The result is that there is a growing social demand (part of families) and politics (which meets these demands) for segregated schools - which already become a reality in some regions of Brazil, including the provision of incentive from the federal government (2018-2022) for the construction of non-inclusive environments.<sup>242526</sup>

**7. What are the crucial issues to address, nationally as well as internationally, to ensure the realization of the right to education**

Specifically in relation to students with disabilities, to ensure the realization of the right to education, it is necessary to recognize human diversity and the multiplicity of experiences recognizes those that there are structural and intersectional factors that interfere in the way students with disabilities have access and can stay in school.

The inclusion of students with disabilities depends on the guarantee of support and accessibility resources, throughout their school career and all teaching and learning processes, from daycare to higher education, from technical education to training of young people and adults with disabilities.

The allocation of budgetary resources to strengthen the educational system from an inclusive perspective, as well as the development of public policies to ensure the permanence of the most vulnerable students in the classroom, for example, social assistance programs that condition their implementation with the school attendance of children under 18 years of age and the sealing of investments in strengthening structures that segregate and exclude students with disabilities from the regular education system.

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<sup>24</sup> An example of segregating standard of special education is the Decree Municipal 15.239/2020 that stipulates the so-called CETEA - Clinic School For People com Disorder of the Autistic Spectrum within the scope of of the Municipality of Cascavél, in the south of Brazil going to go.

<sup>25</sup> Available in: <https://tangua.rj.gov.br/home/index.php/2022/04/13/clinica-escola-do-autista-e-inaugurada-em-tangua/>. Last access: 29.12.2022

<sup>26</sup> Available in: <https://tvprefeito.com/clinica-escola-do-autista-e-inaugurada-em-tangua-com-presencas-de-claudio-castro-e-michelle-bolsonaro/>. Last access: 11.01.2023