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**INCLUSIVE EDUCATION
(EDUCACIÓN INCLUSIVA)**

CASE: *Amparo en Revisión 714/2017*

REPORTING JUDGE: Alberto Pérez Dayán

DECISION ISSUED BY: Second Chamber of Mexico's Supreme Court of Justice

DATE: October 3, 2018

KEY WORDS: right to inclusive education, right to non-discrimination, right to equality, right to close consultation, rights of children and adolescents, rights of disabled persons, autism, integration, inclusion.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 714/2017*, Second Chamber, Alberto Pérez Dayán, j. Decision of October 3, 2018, Mexico.

The full text of the decision can be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/AR%20714-2017.pdf>

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SUMMARY OF AMPARO EN REVISIÓN 714/2017

BACKGROUND: FO and another 137 persons of the organization CAIPP filed a *juicio de amparo* against various articles of the General Law for the Care and Protection of Persons on the Autism Spectrum [Ley General para la Atención y Protección a Personas con la Condición del Espectro Autista] (LGAPPCEA) and the General Education Law [Ley General de Educación] (LGE). A district judge in Mexico City dismissed the proceeding in part and denied the *amparo* in part. Both the petitioners and the president of the United Mexican States filed a *recurso de revisión*. A collegiate court in Mexico City sent the case to this Court, which declared its Second Chamber with jurisdiction to hear the matter.

ISSUE PRESENTED TO THE COURT: Whether the Congress of the Union is competent to legislate on the care and protection of persons on the autism spectrum, whether the duty to hold consultations with those persons was fulfilled when issuing the LGAPPCEA, whether the regulation of special education is contrary to the principle of equality, generates a stigmatizing effect and violates the right to inclusive education, and whether the assistance of guardians or parents for decision making violates the right of persons with disabilities to full recognition of their legal capacity.

HOLDING: The *amparo* was granted on some aspects and denied on others, essentially for the following reasons. The Congress of the Union is competent to legislate on the rights of persons with disabilities since, although the Constitution does not expressly enumerate this authority, it is implicit in the power recognized in article 1 to issue regulatory laws on the human rights contained in the Constitution. To issue the LGAPPCEA, organizations representing persons on the autism spectrum were consulted, they had adequate and significant participation in its drafting and issuance, and they even supported its approval and promulgation. Thus, the duty to consult these persons was met. Moreover, inclusive education recognizes the importance of all children and adolescents learning together, not emphasizing the deficit, but instead recognizing the characteristics, interests, capacities and needs of each one and the

establishment of reasonable adjustments that contribute to their development and inclusion in the community. Thus, the provision of the LGE that establishes the strengthening of special education as a means for fully exercising the right to education and the achievement of equality generates separate educational systems and, therefore, is inconsistent with the inclusive educational model and unconstitutional. The rule that establishes the possibility of persons with disabilities accessing special education is not unconstitutional because it favors their attention in the basic educational institutions and establishes additional tools to eliminate the barriers that limit learning. The provision that regulates the training for families and teachers of persons on the autism spectrum is not discriminatory; rather it indicates the duty of the State to take the measures that transform the educational system and make it really inclusive, for which the participation of the community is essential. Finally, the provision that establishes that persons on the autism spectrum can make decisions for themselves or through parents or guardians is constitutional since it allows for the exercise of legal capacity of such persons under equal conditions, by permitting them to express their will to make decisions, which must be respected and abided by, but if they wish, they can be assisted in doing so.

VOTE: The Second Chamber decided this matter unanimously in the four votes of the judges Margarita Beatriz Luna Ramos, Alberto Pérez Dayán, Javier Laynez Potisek and Eduardo Medina Mora I. (reserved the right to draft a concurring vote).

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=219784>

EXTRACT OF AMPARO EN REVISIÓN 714/2017

p.1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in the session of October 3, 2018, issues the following decision.

BACKGROUND

- p.1,2 FO, in his own right and as common representative of 137 persons of the organization CAIPP, filed an *amparo* proceeding against the General Law for the Care and Protection of Persons on the Autism Spectrum [Ley General para la Atención y Protección a Personas con la Condición del Espectro Autista] (LGAPPCEA), published in the Official Federal Gazette on April 30, 2015, articles 33, section IV Bis and 41 of the General Education Law [Ley General de Educación] (LGE), reformed on September 11, 2013.
- p.2,3 A district judge in Mexico City requested the Federal Public Defenders Institute to assign a legal adviser as special representative of these persons due to their condition of disability. The petitioners filed a recourse of complaint (*recurso de queja*) against this.
- p.3,4 A collegiate court in Mexico City heard this *recurso* and asked this Court to exercise its authority to assert jurisdiction and decide it. The Second Chamber of this Court exercised that authority and determined that the petitioners that manifested to be persons with a disability could continue the *amparo* proceeding in their own right and only if it was objectively seen that they needed support for its processing would a special representative be involved.
- p.5 The district judge admitted the claim and issued a decision that dismiss the proceeding for one party and denied the *amparo* requested for another. Both the petitioners and the president of the United Mexican States filed an appeal (*recurso de revision*). A collegiate court in Mexico City sent the case to this Court to decide on the unconstitutionality of articles 10, sections IX, X and XIX, of the LGAPPCEA; 33, section IV Bis and 41, first, second and fifth paragraphs of the LGE.
- p.6 The president of this Court registered the matter with the number 714/2017 and decided to assume original jurisdiction to hear the appeals and sent them to the First Chamber of

this Court. The president of that Chamber sent the matter to the Second Chamber of this Court since it had previously handled matters related to the *amparo* that resulted in the appeal (*recurso de revision*) now under consideration, which was declared to have jurisdiction.

STUDY OF THE MERITS

- P.15 The dispute consists of determining: 1) Whether the Congress of the Union has the power to legislate in matters of care and protection of persons on the autism spectrum; 2) Whether the duty to hold consultations, pursuant to article 4.3. of the Convention on the Rights of Persons with Disabilities (CRPD), was fulfilled when the LGAPPCEA was issued; 3) Whether articles 33, section IV Bis and 41, first, second and fifth paragraphs of the LGAPPCEA, in regulating the characteristics of special education, are contrary to the principle of equality, generate a stigmatizing effect and violate the right to inclusive education; and, 4) Whether article 10, section XIX of the LGAPPCEA denies the right of persons with disabilities to full recognition of legal capacity under equal conditions and the principle of equality.

I. Authority of the Congress to legislate on protection of persons on the autism spectrum

- p.16, 17 The petitioners argue that no provision expressly establishes the power of the Congress to regulate disability matters. This reason for dissent is groundless.

Article 124 of the Constitution establishes that everything that is not expressly granted to the federal authorities is granted to the states.

From this fundamental principle, the Constitution protects a system of assignment of powers that includes: (I) powers expressly attributed to the Federal Government; (II) powers implicitly granted to the Federal Government; (III) powers expressly attributed to the states; (IV) powers prohibited for the Federal Government; and (V) powers prohibited for the states.

There are concurrent powers in certain matters.

p.18 Thus, the Federal Government does not need the express power to legislate on a subject matter. It is necessary to take into account that powers implicitly granted to the Federal Government derived from the exercise of a power explicitly granted to the branches of government, as indicated in article 73, section XXX of the Federal Constitution.

That power includes the issuance of general norms necessary for implementing the powers expressly set forth in the other sections of that article and includes any other power granted to the branches of government in the Constitution.

p.19, 20 In *Acción de Inconstitucionalidad 75/2015*, this Court recognized that, by virtue of article 1 of the Constitution, the Congress of the Union has the power to issue regulatory laws of the human rights contained in the Constitution in order to ensure their effectiveness and operability.

Therefore, the Congress of the Union does have powers to legislate on matters of disability, since the issuance of the regulatory laws is strictly related to the effectiveness and full observance of the rights to equality of all persons and the prohibition of discrimination based on disability.

II. Duty to make consultations in matters of disability

p.22 The petitioners argue incorrectly that the district judge has given binding effect to *Acción de Inconstitucionalidad 33/2015*, with respect to compliance with article 4.3. of the la CRPD.

p.23-24 In that decision, the Plenary of this Court indicated that the LGAPPCEA complied with the mandate of that article because the organizations representing persons with disabilities, specifically persons on the autism spectrum, had an adequate and significant participation in its drafting and issuance, and they even supported its adoption and promulgation considering that it is conducive for complying with the human rights of persons with disabilities and constitutes an important step to harmonize the legislative framework and rationalize the effort of the different agencies and levels of government in matters of autism.

p.24 Given this involvement of the organizations, the duty of article 4.3 of the CRPD to hold close consultations with persons with disabilities has been met. Furthermore, this Court does not find any reason for deviating from such considerations.

III. Constitutional regularity of “special education”

p.25-26 The petitioners argue that articles 33, section IV bis and 41, first, second and sixth paragraphs of the LGE and article 10, sections IX and X, of the LGAPPCEA, when regulating the characteristics of special education, violate the principle of equality, generate a stigmatizing effect and violate the right to an inclusive education.

p.27 This reason for dissent is partially grounded.

a) The right to inclusive education

p.27, 28 The human right to education is a global objective in the International Law of Human Rights, as it is crucial for human development since it is essential for the exercise of other rights.

p.28-29 Its interdependence with other human rights is strongly enhanced if it is considered that its ultimate purpose is to dignify life in all aspects. In effect, it should be oriented to fully developing human potential and a sense of dignity and self-esteem and reinforcing respect for human rights and diversity.

p.29 It is also fundamental to guarantee everyone equality of opportunity to unleash the full potential of the personality of each person.

p.30 The right to inclusive education can be understood as the possibility that all children and adolescents, regardless of their conditions or differences, learn together. The paradigm of inclusive education arises as a response to the limitations of traditional education, qualified as utilitarian and segregating, and to the resulting insufficiencies of special education and the policies to integrate students with special needs into the regular education system.

Inclusive education recognizes that every child has particular characteristics, interests, capacities and learning needs and that students with special educational needs must have

access to the general educational system and find accommodation in it through a pedagogy centered on the child.

This right implies a change in the educational paradigm, so the respective systems cease to consider persons with disabilities as problems, and puts in question the appropriateness of segregated education, from the point of view of both its effectiveness and with respect to human rights.

p.31 For this purpose, the ordinary schools with this orientation represent the most effective means for combating discriminatory attitudes, creating host communities, constructing an integrated society and achieving education for all, since children that are educated with their peers are more likely to become productive members of society and to be included in their community. For this reason, inclusive education is fundamental for the construction of inclusive societies.

Inclusive education is the primary means for persons with disabilities to get out of poverty and obtain the resources to fully participate in their communities and be protected from exploitation. In that regard, it demands not only equality, but equity in treatment and access for all children and adolescents.

p.31-32 Equity is the state obligation of ensuring that personal or social circumstances, like gender, ethnic origin or economic situation, are not obstacles to accessing education, and that all persons reach at least a minimum level of skills and abilities.

p.33 Thus, the educational system must offer a personalized educational response, instead of expecting that students fit into the system. The right to non-discrimination includes the right not to be segregated and to have reasonable adjustments made.

Unfortunately, the education of persons with disabilities centers too often on a perspective of deficit. Therefore, it must be prohibited to exclude persons with disabilities from the general educational system and ordinary teaching, among other things through legislative or regulatory provisions that limit their inclusion because of their deficiency.

p.34 Furthermore, the States must make reasonable adjustments to ensure that students have access to education in equal conditions with the others. Those adjustments refer to a person and are complementary to the obligation relative to accessibility. There is no single focus for the reasonable adjustments since different students with the same deficiency can require different adjustments.

These measures must be adopted up to the maximum resources available to achieve, progressively, the full exercise of those rights.

b) Constitutional regularity of the provisions of the LGE

p.36 Article 33, section IV Bis, of the LGE indicates that the educational authorities will strengthen special education including persons with disabilities. For its part, article 41 of the LGE establishes various guidelines that regulate special education.

p.37 To elucidate if those articles generate segregation, discrimination or stigmatization of persons with disability, by permitting the establishment of “separate but equal” educational systems, it should be specified that this regulation generates a hybrid educational system, in which segregated environments converge with inclusive prospects, which generates inconsistencies that must be reformed.

p.38 It is inconsistent with the model of inclusive education that the LGE establishes that the educational authorities will strengthen special education for the full exercise of the right to education and the achievement of equality.

This is so since, to achieve de facto or substantive educational equity, the state authorities must strengthen inclusive education within the regular system, and not reinforce special education. This implies that the State, instead of contemplating parallel and separate systems, must progressively adopt the concrete and deliberate measures to ensure that all children and adolescents, regardless of their conditions or differences, learn together.

In this regard, special education should not be nor can be the strategy under which access to an inclusive education can be achieved.

p.40 Therefore, article 33, section IV bis, of the LGE is unconstitutional for violating the right to inclusive education. In contrast, article 41, first, second and sixth paragraphs of the LGE is constitutional, for the reasons explained below.

p.41 The second paragraph of the article indicates that persons with disabilities will be attended in basic educational establishments, without thereby eliminating the possibility of access to special modes of education addressing their needs.

In the judgment of this Court, the fact that the provision leaves clear that persons with disabilities should be attended in the basic educational establishments, with the possibility of accessing additional support tools outside of the basic educational classrooms, is consistent with the right to inclusive education.

But it is not sufficient that special education be optional; its understanding, function, principles, purposes and focuses must be consistent with an inclusive education orientation.

This article indicates that the focus of special education is inclusion and substantive equality, and that its principles are respect, equity, non-discrimination, substantive equality and a perspective of gender. Furthermore, it is established that its purpose is to identify, prevent and eliminate the barriers that limit learning and full and effective participation in society of persons with disabilities.

p.42 In the judgment of this Court, such tools for specialized attention cannot be nor should be conceived as a parallel educational system for persons with disabilities or other special needs, but rather as tools for additional support to promote the right to an inclusive education and to maximize the academic and social development of those being educated; in other words, to identify, prevent and eliminate the barriers that limit the learning and full and effective participation in society of persons with disabilities and other students that have special needs.

p.43 Therefore, every student with a disability must be admitted in the regular educational system and any exclusion based on that condition is discriminatory.

p.44 Although those tools are optional, this characteristic cannot be a pretext for excluding students from the regular system or for renouncing the duty to adopt reasonable adjustments that permit not only the integration but also the inclusion of persons with disabilities in the school system.

p.45 In this regard the reasonableness of an adjustment refers to its relevance, appropriateness and effectiveness for the person with a disability. Therefore, an adjustment is reasonable if it achieves the objective (or objectives) for which it is carried out and if it is designed to satisfy the needs of the person with disability.

p.46 This reinforces that persons with disabilities must have the opportunity to live independently in the community and make choices and have control of their daily life.

In that regard, persons that for any reason exercise guardianship over persons with disabilities cannot substitute their will and decision whether or not to use the mentioned specialized attention tools, since they enjoy the indivisible right to manifest their will, which must be respected and abided by.

p.46, 47 In addition, according to the article, the tools will cover the training and guidance of parents or guardians, teachers and personnel of regular basic education and middle schools that have students with disabilities enrolled. Thus, the States must consider the family, the community and civil society as active participants in inclusive education and encourage that participation.

p.48 According to the Committee on the Rights of Persons with Disabilities, one of the characteristics of inclusive education is the “support of teaching staff”, which means that the teachers and other staff receive the education and training necessary to acquire the values and basic competencies to adapt to inclusive learning environments. An inclusive culture offers an accessible and enabling environment that promotes collaborative work, interaction and the resolving of problems.

In this regard, the advising of and support of parents and caregivers for the professors “can perform a fundamental role in the support activities of the students”, as long as it is

not taken to the extreme of being required for them to be admitted in the educational system.

c) Constitutional regularity of the articles of the LGAPPCEA

- p.49 Article 10, sections IX and X of such law are not discriminatory or contrary to the right to inclusive education, for the reasons explained below.
- p.49-50 Section IX of the article establishes that it is a fundamental right of persons on the autism spectrum or their families to receive an education or training based on criteria of integration and inclusion, taking into account their capacities and potential, through pedagogical evaluations, in order to strengthen the possibility of an independent life.
- p.50 The above, far from generating discriminatory treatment, reinforces the conventional and constitutional obligation the state authorities have to respect, protect, complement and promote the fundamental right persons with disabilities have to inclusive education.
- p.51 Thus, section IX of the article is not discriminatory. Rather it carries specific duties for the educational authorities with respect to the form in which teaching should be used for persons with disabilities in the regular educational system, in order to make it truly inclusive.
- p.52 Now, while the provision in question establishes the right of persons on the autism spectrum to receive an education or training based on criteria of integration and inclusion, this should not be interpreted as ambiguity or confusion with respect to the type of education that must be given, but rather as the simple restatement and reinforcement that it is not enough to integrate the students with disabilities in the regular system, but that the regular education must also be inclusive.

However, integration and inclusion must be differentiated. Integration is the process by which persons with disabilities attend the general educational institutions, with the conviction that they can adapt to the normalized requirements of those institutions. For its part, inclusion implies a process of systemic reform that requires changes and modifications in the content, methods of teaching, focuses, structures and strategies of

education to overcome obstacles with a vision that all students of the relevant age groups have an equitable and participative learning experience and the environment that best corresponds to their needs and preferences.

Thus, the integration of students with disabilities in the conventional classes without the ensuing structural changes, such as in the organization, the studies plans and the teaching and learning strategies, does not constitute inclusion. In addition, integration does not automatically guarantee the transition from segregation to inclusion.

p.53 Therefore, the educational authorities not only must permit the entry of persons on the autism spectrum into the regular educational system –integration–, but they also must take the measures to transform it in order to eliminate barriers or obstacles for persons with disabilities in the educational environment –inclusion–.

Finally, section X of the legal provision also is not discriminatory, since it only establishes that persons on the autism spectrum have the right to have, in the framework of special education the LGE refers to, elements that facilitate their process of integration into regular educational schools.

p.54 This is so because, as was indicated, those persons have the right to be educated within the regular system and their exclusion, based on their condition, is discriminatory and prohibited by the fundamental right to inclusive education.

p.55 Therefore, it is emphasized that the educational tools contained in the mentioned legal provision must have an auxiliary or supporting role for inclusive education, and never substitute regular education.

IV. Constitutional regularity of article 10, section XIX of the LGAPPCEA

p.55 When deciding *Acción de Inconstitucionalidad* 33/2015, the Plenary of this Court had already decided on the constitutional regularity of the cited provision.

p.56 In that precedent it was determined that the fact of recognizing for persons on the autism spectrum the right to make decisions for themselves or through their parents or guardians for the exercise of their legitimate rights, cannot be interpreted to mean that the persons

who under the legal system exercise the guardianship over the person on the autism spectrum, can substitute their decision, but rather those persons enjoy the indivisible right to manifest their will, which must be respected and followed. In other words, the person on the autism spectrum can be assisted in making decisions, but it is that person who in the end makes the decisions.

p.57 In this regard, article 10, section XIX, of the LGAPPCEA does not violate the rights of persons with disabilities to the full recognition of legal capacity under equal conditions nor is discriminatory.

DECISION

p.59 The appealed decision is amended. The dismissal is affirmed, with the exception of the claims relative to articles 33, section IV bis and 41, first, second and fifth paragraphs of the LGE. The Justice of the Union does not protect petitioners from articles 41, first, second and sixth paragraphs of the LGE, and 10, sections IX, X and XIX of the LGAPPCEA. The Justice of the Union protects petitioners from article 33, section IV bis of the LGE.