**CIVIL APPEAL NO. 152.887.0/1-00 – Justice Tribunal of São Paulo**

**Appellant**: the Municipality of São Paulo and the honorable Judge *ex officio*

**Appellee**: Health Ministry of São Paulo, by the Public Justice Attorneyfor Infants and Youth and forthe Region 1 Court- Santana

**Opinion of the Court for the Minority and Collective Interest**

Esteemed Justice Tribunal

Special Council

Honorable Appeals Judges

The present case relates to a Writ of Mandamus filed by the Health Ministry of the State of São Paulo and later judged by the first instance court with the ruling found on pp. 55-59. It imposes on the Directors of the Municipal Department of Social Assistance and Transportationa a duty to provide the RFN child, diagnosed with progressive muscular dystrophy, specialized transportation in order for the child to access the Brazilian Association of Muscular Dystrophy (ABDIM) and receive necessary medical, physiotherapy and educational treatments.

Dissatisfied with the ruling, the Municipality of São Paulo appealed the decision arguing that the Director of the Municipal Department of Social Assistance was passively at fault in this case and also adding the company, São Paulo Transporte S.A. (“SPTrans”), as a co-defendant.

On the merits, the appellant claims that the free transportation services provided to those who are handicapped by the Municipality of São Paulo (ATENDE program), is not an essential public program. The appellant claims instead that it is a public utility service that must be managed in accordance with the priorities of the Administration, in favor of those who, after proper registration and evaluation, demonstrate a severe physical handicap that precludes such person from accessing common public transportation. By allowing access in this case, the rights of others who are handicapped and who have followed the proper legal procedures to become registered users would be infringed as they would find themselves waiting for access.

Counter arguments presented by the Ministry of Health at pp. 82-86.

This is the brief summary followed by the opinion.

**I- Preliminary considerations related to the Department of Social Assistance and Development's standing and interpleading SPTrans**

In accordance with the facts found in the relevant case documents, with the principles stated in municipal law 11.037/1991, along with the principles in Municipal Decree No. 36.071/96 (see attached documents) and still, in accordance with the facts that have been gathered on the websites for the Municipal Department of Transportation, Municipal Department of Development and Social Assistance and SPTrans, it is possible to verify that joint liability exists among these three entities to provide the RFN child, diagnosed with severe physical handicap, with the special transportation he needs.

Providing a seat in a special ATENDE program vehicle, in order to transport the minor to ABDIM is a complex act that involves the three aforementioned agencies. The Municipal Department of Transportation manages municipal urban transportation systems, including those providing services to handicapped persons (article 1 of law No. 11.037/91 and article 2 of Decree 36.071/96). The Municipal Department of Transportation has delegated to SPTrans, a public and private entity, the authority to execute such services needed and which require those interested in benefitting from such programs to visit a SPTrans branch office, located in the various Neighborhoods of this Capital, to obtain and fill out the necessary registration forms.

SPTrans determines whether a seat is available after the registration process is complete, acting as an agent of the Municipal Department of Transportation and under its responsibility. The actual transport of such handicapped passengers is carried out by third party providers hired by SPTrans.

However, providing a seat in the ATENDE vehicle is not merely a matter of transportation. It also relates to a much broader and comprehensive issue regarding the social inclusion of handicapped people, to the extent that such service provides handicapped people access to public health services they need, and without which their lives may be shortened or their health condition extremely worsened.

For this reason, the Municipal Department of Social Assistance and Development is also directly responsible for providing ATENDE services to all those who need it. In reality, as clarified in its website, the Department of Social Assistance and Development is responsible for implementing social assistance policies for the City of São Paulo, which includes, among others, providing transportation services to the handicapped.

In each of the 31 Neighborhoods of the Capital, Social Assistance Information Centers exist to service the population. Therefore, the Municipal Department of Social Assistance is not able to dodge its duty to assist the RFN minor, since providing social inclusion and assistance to handicapped persons is intrinsic to its authority.

It was also incumbent upon the Municipal Department of Social Assistance to ensure that the RFN minor was not denied service, just as it is also its role to comply with the ruling under appeal *a quo*. In summary, the three entities mentioned herein are under the joint obligation to provide ATENDE services, which indicates that interpleading among them is unnecessary, but rather optional. This is true because the Author will judge the case against one as if it were against all, requiring the same complete satisfaction of such duties by each and by all.

Thus, SPTrans, as a provider of delegated public services, could have been named as a sole defendant in this Writ of Mandamus, (article 5, LXIX along with article 1, § 1, of Law No. 1.533/51), its exclusion is unable to nullify or prejudice the claim in favor or against the minor.

As a public private entity controlled by the Department of Municipal Transportation, SPTrans is required to implement and coordinate the orders of the Director of the Department of Municipal Transportation. The Director of the Department of Social Assistance and Development, as seen for the reasons stated herein, should remain as a defendant in this case, in order to guarantee compliance with such orders, and to assume its responsibility.

## **II- Merit**

As proven in the case documents, the RFN child who is only 7 years old (p. 09), has been diagnosed with a very severe physical handicap, progressive muscular dystrophy, an incurable genetic disorder that slowly and irreversibly weakens the muscles and skeleton. Muscular dystrophy requires medical, physiotherapy, respiratory and other treatments. Without such treatments twice weekly at ABDIM, an association specializing in muscular dystrophy that provides services at no cost (p. 19), the condition will inevitably rapidly worsen the child's clinical status (pp. 10-22).

Contrary to what has been alleged, RFN attempted to obtain ATENDE transportation services, but was denied access because he did not meet the required profile (p. 10 and 13). As informed by the minor's parents and by the ABDIM doctor, RFN does not have the necessary conditions to use public transportation, due to the risk of serious trauma that may be caused since he does not have the muscular strength needed to board a bus and to maintain himself secure during sudden brakes and closed curves (p. 22). RFN walks with difficulty, feels tired, experiences foot pains, is unable to board the bus and when taken to the supermarket by his parents, requests to return in their arms (p.19).

As reported by the ABDIM doctor, the patient will soon require the use of a wheelchair since the disease is progressive (p. 22).

Due to the lack of transportation, until the injunction was granted, RFN had been unable to receive the medical treatment that he needs to survive with minimum dignity. He belongs to a poor family and his parents do not have the means to otherwise take him to such treatments (pp. 10, 12-14 and 20).

Even worse, RFN has a brother with the same condition that has been taken by the ATENDE service to ABDIM, due to the fact that the brother already uses a wheelchair (pp. 12-21).Also, ABDIM has agreed to provide RFN with treatment

during the same times as reserved for his brother. This means that the Government vehicle would not have to initiate a new trajectory to take RFN to ABDIM and would be able to provide service in an economical manner on the same date and time as those arranged by his brother.

But, this is not all.

When the contracted ATENDE vehicle goes to pick-up RFN's brother, it is usually empty or with a single passenger, thus offering space for RFN to board (p. 20).

For this reason, the Municipal Public Authority, in this case, is blatantly not in compliance with the Federal Constitution and the applicable judicial order, including Municipal Decree 36.071, which instituted the ATENDE services in this Municipality.

Such Decree determined that ATENDE service users should be "physically handicapped people that do not have the autonomy or mobility to access conventional means of transportation or that manifest great restrictions to access urban equipment" (article 5, annexed).

Now, the RFN minor, as he demonstrated, has the conditions mentioned and cannot board or hold himself secure inside a common bus. He manifests great restrictions in accessing urban equipment, which is made worse by the fact that the child is only 7 years old and always needs the help and escort of an adult.

By failing to provide the RFN minor a seat in the special vehicle, basing its decision on the allegation that such minor is in a physical state that permits him to walk, when it is certain that he does not have the conditions to utilize conventional municipal public transport, a right guaranteed by the Municipal Decree itself, the Public Municipal Power is adopting negligent and discriminatory behavior and failing to carry out its express constitutional and legal duties. Such duties require it to guarantee, with absolute priority, the right to life, to health and respect for the children

(a comprehensive protection), and to keep such children save from all forms of negligence, discrimination in order to guaranteeing them all the opportunities and access to obtain physical, mental, moral and social development in free and dignified conditions (article 227, header of the Federal Constitution and article 4 of the Statute of the Child and the Adolescent).

Further, the Municipality is not in compliance with its constitutional duty imposed by article 227, § II of the Federal Constitution, to provide specialized assistance to handicapped people though facilitating their access to public goods and services.

Now, in this case, the Municipality is behaving in a manner diametrically opposed to such constitutional and legal mandates since it is not only not facilitating a minor's access to health services, but it is also barring such access, when it had both the opportunity and the legal duty to provide access.

The Municipality is also not in compliance to the principles of article 196 of the Federal Constitution, under which the right to health is a right granted to all and is the state's duty, guaranteeing through social and economic policies that aim to reduce the risk of diseases and other conditions the universal and equal access to acts and services for the promotion, protection and rehabilitation of its citizens."

The following articles of the Federal Constitution have also been violated: a) 198, II, which states that "public health acts and services should guarantee comprehensive assistance, prioritizing preventative measures, without prejudicing assistance services"; b) 23, I, which states that the Union, the States, the Federal District and the Municipalities shall concurrently "care for the public's health and assist in protecting and assuring handicapped people"; and c) 30, VII, that specifically

imposes on the Municipality the duty to provide health services and assistance to the population, with the cooperation of the Union and the State.

In this manner, article 7, header, of the Statute of Children and Adolescents guarantees that “a child and an adolescent have the right to the protection of life and health through the implementation of social public policies that permit their healthy and harmonious birth and development with dignity for their existence.” Article 11 guarantees, “comprehensive assistance to children’s and adolescent’s health with universal and equal access to acts and services for the promotion, protection and rehabilitation of health,” and further specifically established in §1and § 2 that:

**§ 1 - “The handicapped child and adolescent shall receive specialized assistance”;**

**§ 2 –“The Public Authority shall provide those in need, access to medications, prosthetics and other resources related to treatment and rehabilitation free of cost.”**

The Municipality is also not in compliance with Law No. 8.080/90, providing the conditions for the promotion, protection and rehabilitation of health, establishing in its article 2, header, that health is a fundamental right belonging to all humans and requiring the State (defined broadly) to provide the indispensable conditions that guarantee in its plain application; and in § 1 of the same article, that “the State’s duty to guarantee health includes the formulation and execution of social and economic policies that aim to reduce the risk of disease and other conditions that guarantee universal and equal access to acts and services for the promotion, protection and rehabilitation of its citizens.”

In reality, as a handicapped person, who is also in need and also a minor, RFN has no other means to obtain the services that he needs if he is not transported by the ATENDE service. Such transportation is essential to guarantee him the right to life and health and the dignified conditions allowing for his survival.

In fact, the argument that such service is a public utility and not an essential service is implausible under any circumstance.

What would be considered essential services if not those that protect life and health?

The right to life and to health are fundamental rights connected to being human and are superior to any other right. They impose on the Municipality the duty to protect such rights with the utmost priority and in an equal manner.

Note that the Federal Constitution attributes to the Municipality the authority to provide public transportation services, which are expressly considered as essential (article 30, V of the Federal Constitution).

Considering that public transportation service, on its own, is considered an essential service, it is even more forceful to note that the issue in this case, guaranteeing the right to life and health, depends upon access to such services.

With regards to the other handicapped people, who are allegedly in line waiting the opportunity to access the ATENDE service, no proof was presented to verify this fact and the case documents show the opposite to be true. The vehicle used to pick-up the RFN child’s brother was frequently empty (p. 20), which signaled that there was not an excessive unmet demand.

Even in the event that others in the same situation as RFN existed, they will have the same right to be attended by the Municipality, with the right to impose, if necessary, the appropriate action to oblige it to do so.

The Municipal Public Authority is the one who is disrespecting the principal of equality by failing to assist RFN, denying the same rights that were provided to his own brother, when it is certain that he is also in need of the service.

In light of the legal and constitutional principles that oblige the Municipality to assist the minor in this case, it is evident that it is not important to discuss administrative discretion. Instead, it is relevant to discuss the related act that should be completed by the co-acting authorities, allowing the Judiciary Power to impose on them the obligation intrinsic to their authority. Otherwise they will be exerting their power arbitrarily.

As HELY LOPES MEIRELLES teaches, “the discretionary power does not confuse itself with the arbitrary power. Discretionary and arbitrary are entirely different attitudes. Discretionary is liberty of administrative action, within the limits of the law; arbitrary action is an action that is contrary or beyond the limits of the law.When a discretionary action is authorized by Law, it is legal and valid; arbitrary action is always illegal and invalid” (in “DIREITO ADMINISTRATIVO BRASILEIRO”, Malheiros Editores – 33rd edition– 2007 – pp. 118-119).

In this sense, the Second Section of the Federal Supreme Tribunal determined in the opinion published by MINISTER CELSO DE MELLO that, “the subjective right to health represents the undeniable judicial prerogative guaranteed to the general public by the Constitution of the Republic (article 196). This translates as a constitutionally mandated right, and by such authority proscribes that, in a responsible manner, the Public Authority, whomever constitutes such position and has the power to implement appropriate social and economic policies must provide and guarantee its citizens, including those carrying the HIV virus, universal and equal access to pharmaceutical assistance and medical-hospital access. In addition to qualifying as a

fundamental right applicable to all people, the right to health represents an undeniable constitutional consequence of the right to life. The Public Authority, whichever institution is deemed responsible for such role in the Brazilian federal system, must not show itself indifferent to such public health problems, so as to avoid the risk of adopting, even if by censurable omission, unconstitutional behavior. THE INTITUTIONALIZED LAW'S INTERPRETATION MUST NOT BECOME AN UNENFORCED CONSTITUTIONAL PROMISE. The institutionalized nature of the rule described in article 196 of the Political Letter – that applies to all political institutional entities that compose the Brazilian federalist scheme, must not become an unenforced constitutional promise. Such principle is important in order to avoid the risk that the Public Authority will defraud the people's fair expectations and illegitimately substitute compliance with this non-delegable chore by way of an irresponsible act of government infidelity that violates the very principles that govern the Fundamental Laws of this Nation.Precedents of the Supreme Federal Tribunal."(RE-AgR 271286 / RS - RIO GRANDE DO SUL

AG.REG.NO RECURSO EXTRAORDINÁRIO

Author: Min. CELSO DE MELLO

Judgment: September 12, 2000 - Court: Second Section - Publication DJ 24-11-2000 PP-00101 EMENT VOL-02013-07 PP-01409 - Party(ies):APPEALLANT: MUNICIPALITY OF PORTO ALEGRE - ATTORNEY: CANDIDA SILVEIRA SAIBERT - APPELLEE: DINÁ ROSA VIEIRA - ATTORNEYS: EDUARDO VON MÜHLEN ET AL - ATTORNEYS: LUÍS MAXIMILIANO LEAL TELESCA MOTA ET AL.

In the same sense, the First Section, of the same supreme Court of Justice determined that "Article 196 of the Federal Constitution establishes that it is the

State's duty to provide health assistance and guarantee universal and equal access to the services and acts for the promotion, protection and rehabilitation of its citizens. The right to health, as guaranteed by the Letter, must not suffer from complications imposed by the administrative authorities in the sense that it reduces or frustrates its access." (RE 226835 / RS - RIO GRANDE DO SUL - RECURSO EXTRAORDINÁRIO

Author: Min. ILMAR GALVÃO - Judgment: December 14, 1999 Publication- DJ 10-03-2000 PP-00021 - EMENT VOL-01982-03 PP-00443 Party(ies):APPELLANT: STATE OF RIO GRANDE DO SUL -ATTORNEYS: PGE-RS - CARLOS HENRIQUE KAIPPER ET AL - APPELLEE: ROSEMARI PEREIRA DIAS - ATTORNEYS: ÁLVARO OTÁVIO RIBEIRO DA SILVA ET AL.

In the same sense, the Superior Justice Tribunal manifests itself (REsp 577.836/SC, Author Minister LUIZ FUX, PRIMEIRA TURMA, judged on October 21, 2004, DJ 28.02.2005 p. 200; REsp 700.853/RS, Author Minister FRANCISCO FALCÃO, Author of the Opinion, Minister -LUIZ FUX, FIRST SECTION, judged on December 6, 2005, DJ 21.09.2006 p. 219; REsp 442693 / RS ; RECURSO ESPECIAL 2002/0071199-4 - Author - Minister JOSÉ DELGADO (1105) - Court- T1 - FIRST SECTION - Date of Judgment - September 17, 2002 - Date of Publication/Source -DJ 21.10.2002 p. 311).

For all of the reasons stated herein, the Justice Department has opines that it rejects the Municipality's request and the request to revoke the Writ of Mandamus, affirming the first instance court's ruling in all of its integrity, in light of JUSTICE.

São Paulo, September 12, 2007.

DORA BUSSAB CASTELO

June 28, 2010 Civil Appeal No. 152

Judge designated by the Court of Justice for the Minority and Collective Interest