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The indirect judicialization of health: a case study on the Experience of Cachoeiro de Itapemirim/ES

A judicialização indireta da saúde: um estudo de caso sobre a experiência de Cachoeiro de Itapemirim/ES

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Abstract

This work's scope is to analyze and understand a theme apparently incipient and not yet investigated: the indirect judicialization of health. The phenomenon crystallizes when questions inherent to the right to health are examined by the judiciary branch as a superficial matter or incidental form and not as the main object of a filed action. 263 civil actions, filed during the year of 2013 in the 1st Court of Childhood and Youth of Cachoeiro de Itapemirim/ES, were analyzed through case study methodology. The research identified important elements that characterize the theme, with prominence the role of the Public Prosecutor, which was responsible for the vast majority of requirements that they postulated the application of Protective Measures Incidental (92,1%) and the high concentration of requests defendants that focused on treatment against child and adolescent drug addiction (52,2%). In the end, the need to establish institutional and interdisciplinary dialogue between the constituted government, the actors that make up the system of guarantee of rights of the Children and Adolescents (SGDCA) and civil society organizations was pointed out, with the objective of developing and implementing nonexistent public health policies and improving those already in operation.

Keywords: Children and Adolescents Right to Health; Public Health Policies; Incidental Protection Measures; Indirect Judicialization of Health.

Resumo

O presente trabalho tem por escopo analisar e compreender um tema aparentemente incipiente e ainda não investigado: a judicialização indireta da saúde. O fenômeno cristaliza-se quando questões inerentes ao direito à saúde são levadas ao crivo do Poder Judiciário de forma superveniente ou incidental e não como objeto principal de uma ação ajuizada. Analisou-se, por intermédio da metodologia de estudo de caso, 263 ações cíveis, ajuizadas no decorrer do ano de 2013, na 1ª Vara da Infância e da Juventude de Cachoeiro de Itapemirim/ES. A pesquisa identificou importantes elementos que caracterizam o tema, merecendo

destaque o protagonismo do Ministério Público, o qual fora responsável pela ampla maioria dos requerimentos que postulavam a aplicação de "medidas protetivas incidentais" (92,1%) e a alta concentração de pedidos demandados que versavam sobre tratamento contra a drogadição infanto-juvenil (52,2%). Ao final, apontou-se a necessidade de se estabelecer diálogo institucional e interdisciplinar entre o Poder Público constituído, os atores que compõem o Sistema de Garantia de Direitos da Criança e do Adolescente (SGDCA) e a sociedade civil organizada, objetivando elaborar e implementar as políticas públicas de saúde inexistentes, bem como aprimorar aquelas que já estão em pleno funcionamento.

Palavras-chave: Direito à Saúde Infanto-juvenil; Políticas Públicas de Saúde; Medidas de Proteção Incidentais; Judicialização Indireta da Saúde.

1. Introduction

The Brazilian federal constitution of 1988 gave the right to health the *status* of a "citizenship right", guided by values such as universality, equity and integrity. It became, then, a responsibility of the State, which must ensure "*[…] social and economic policies of disease and other grievances' risk reduction as well as universal and equal access to actions and services for its promotion, protection and recuperation."* [Article 196, Brazilian federal constitution (CF/88)].

According to article 6, CF/88, health is a social right and constitutes one of the three systems integrating Social Security, along with welfare and social assistance. The materialization of this fundamental right, however, needs the implementation of effective public policies and services, which constitutes a positive obligation to be accomplished by the State.

Through this perspective of constitutional rights and guarantees, health is also a fundamental right of children and teenagers and must, as written in article 7 of federal law 8.069/1990 – Child and Teenager Statute (ECRIAD) – be implemented "*[…] Through the establishment of public social policies that allow a healthy and well-balanced birth and development in dignified living conditions".*

Children and teenagers are beings in a peculiar stage of development, which is why they need full protection and utmost priority in the assurance of their fundamental rights, since their context is one of social vulnerability.

It is the State's duty to create and implement public policies intended for the universe of childhood and adolescence. On the other hand, chronic under-investment in the public healthcare system and the lack of social and political commitment are important challenges that must be overcome. Some of these policies, such as specialized treatment for drug addiction in this particular age group, were never enforced in most Brazilian municipalities.

In this scenario of inadequate effectiveness of fundamental rights, the action of the "Child and Teenager Rights Guarantee System" (SGD) is crucial. This revolutionary mechanism of network protection was conceived by the ECRIAD and

regulated by the Resolution 113/2006 of the National Council of Child and Teenager Rights – CONANDA. It establishes a model of wide articulation and integration between all government bodies and the civil society, with the goal of elaborating and enforcing public policies for the protection of all human rights granted to that age group (article 1, Resolution 113/2006 – CONANDA).

The SGD structures itself around three lines of action: promotion, control and defense of rights. In the defense front, it is formed by the judicial branch (specially Childhood and Youth Courts), the Public Prosecutor's Office, the Public Defender's Office, Defense Centers, Public Safety, Counsels of Child and Teenager Rights and Guardianship Councils.

In this context, the judicial power and the Public Prosecutor's Office emerge as important actors of the defense line of action, since both access to justice and the adoption of legal protection mechanisms are forms of materialization and enforceability of the violated rights.

The indirect judicialization of health, this work's object, appears through the application of "Incidental Protective Measures". The use of this procedural mechanism, as a means to guarantee access to public healthcare policies for children and teenagers, has been constantly used, and especially by public prosecution. As a result of the repeated use of this instrument, **a new way of judicializing health** has been crystallized.

The research, conducted through case study methodology, will discuss matters such as the right to healthcare, direct and indirect judicialization of health and incidental protective measures. Results obtained using a data collection standard form will be presented and analyzed through charts and tables.

This paper's main goal was to shed light and encourage studies on a little known subject with few published works. With the adequate analysis and comprehension of the phenomenon, we hope to contribute for the strengthening of the Child and Teenager Rights Guarantee System and the improvement of the jurisdictional administrative protection undertaken by Specialized Courts of Childhood and Youth.

2. The judicialization of health

With the enactment of the 1988 federal constitution, health was granted the status of a fundamental right, therefore inherent to all citizens. *Pari passu*, it became the State's positive obligation. However, the universalization of the newly established public health depended on a comprehensive and rigorous infra-constitutional legislative process to ensure full implementation and effectiveness. For that matter, article 197 of the constitution imposed responsibility on the State to formulate a regulatory framework for the whole healthcare system with the identification of health actions and services as being of "public relevance" (ASENSI, 2012).

While regulating the constitutional provisions on the matter, federal law 8.080/90 assured in article 2 that "*health is a human being's fundamental right, obliging the State to provide the indispensable conditions for its full exercise".* In order to protect and materialize this fundamental right, article 4 of this law, inspired by article 198 of the constitution, created the Sistema Único de Saúde (SUS, *Unified Health System*). It consists of a "*series of health actions and services provided by federal, state and municipal bodies and institutions, the direct and indirect public administration and foundations maintained by the public authority".*

Therefore, SUS is a complex and dynamic healthcare system aiming "the promotion of comprehensive and universal care, preventive and curative, through the decentralized administration and provision of health services, promoting community participation in all government levels".

A true constitutionally recognized public subjective right, health is also considered a fundamental right inherent to children and teenagers. It is, according to article 4 of ECRIAD, "*[…] duty of the family, community, society as a whole and the public authority to ensure, with absolute priority […]"* the realization of this right, among others. The same bill, in article 7, prescribes that "*The child and teenager has the right to life and health protection by the realization of social*

public policies that allow healthy and well balanced birth and growth in dignified living conditions".

However, as Franco (2014) puts it, "*even without a deep investigation of the matter"* it is correct to deduct there is a great hiatus between what is regulated in health public policy laws and what the population has actually been experiencing in public hospitals and health centers.

In the face of the immense difficulties endured by the State, especially when it concerns the chronic under-financing of an eminently universal health system, the public administration has not been successful in complying the constitutional and legal directives, constituting service delay for citizens.

This reality, which affects a great part of the population, is the main responsible for the rising judicial demand of actions that aim to ensure this fundamental constitutional right. And in the field of childhood and youth this scenario is not different.

Based on the constitutional principle of the non-obviation of jurisdiction (art. 5º, XXXV, CF), the judiciary has been increasingly demanded to act, compelling the public administration to comply with its constitutional and infra-constitutional obligations.

The growing utilization of the judicial power as an instrument to ensure access to fundamental rights gave birth to a phenomenon called "judicialization of politics". The first decisive work to analyze judicialization was the compilation "*The Global Expansion of Judicial Power"*, made by Neal Tate and Torbjorn Vallinder (1995). According to these authors, the "judicialization of politics" happens when the judicial power, based on the constitution, is demanded by a third party to decide a particular conflict that involves decisions of a political power, ruling over it. By letting itself interfere in other powers, especially the executive, there is noteworthy expansion of the judicial power over others.

The judicialization of health is the judicial analysis and decision of matters involving various health provisions, such as the provision of orthotics an prosthesis, ambulatory and surgical medical assistance, drugs, dietary supplements, funding of treatments, among others.

Facing its unquestionable relevance, numerous legal experts, sociologists and public health experts have exposed their considerations on the matter.

After a thorough analysis of the main works on the theme, Machado (2010) identified "*two lines of interpretation":* the first, called "*procedural"*, argues that judicialization un-institutionalizes society, marginalizing mediation institutions such as associations and political parties and privileging a part of the population over the collectivity. In a completely opposite path, the second line, of "*substantial"* nature, argues that judicialization is an important step towards the improvement of citizenship practice, assuring marginalized groups the expectation of having theirs fundamental rights materialized. By all means, he concluded, there are enough elements to adopt one position or the other.

Corroborating the thesis of the "*dual effect of judicialization"*[1]*,* Marques (2008, p. 65-70) deducts the debate over judicialization is very controversial and involves the everlasting opposition between individual and collective rights. On one hand, the judiciary's participation might be considered a positive activity, since it can reduce the violation of rights committed by the State against its own citizens. In that way, it represents "*an advance concerning the effective practice of citizenship by the Brazilian population".* On the other, "*it is a tension point between public policy makers and enforcers in Brazil, who are subject to a growing number of judicial rulings that guarantee various State provisions",* the researcher explains.

Indeed, the judicialization of health produces serious consequences in the legal, political and social areas. It promotes an unquestionable diversion of resources, causing funds initially destined to the financing of public health programs and services to be relocated to the fulfillment of particular and isolated demands. Because of that, it is important to carry out a deep critical reflection about the role that legal professionals, especially judges, have been playing. Judicial decisions must be proffered in a rational way and in strict observation of the current legislation and public health policies, not individually to all that seek the judiciary to satisfy their personal interests (SILVA, 2008).

[1] According to which the judicialization of health is conceived and analyzed from the viewpoint of the two essentially opposite theoretical frameworks.

When the judiciary delivers jurisdictional protection to the public health, it influences the State's activity directly, considering that there will be unequivocal inversion of resources destined to the collectivity for the benefit of a specific part of the population. In the opposite sense, it will ensure the party that had its right denied, limited or violated by the public administration the opportunity to materialize its fundamental right to health.

3. The indirect judicialization of health

At first, in order to achieve better comprehension and reach, it is important to make some distinctions for the correct delimitation of the theme.

Usually, the judicialization of health occurs directly, ordinarily in its origin, since the materialization of the right to health is the main object of the filed action. The process flow diagram follows the will of the user who has had his access to public health policies in any way violated, generally due to delay or denial of treatment. Dissatisfied, he seeks the judiciary as a viable alternative for the problem's resolution. Properly represented by a public prosecutor, defender or a private attorney, he files a suit in which the provision of needed medical supplies or treatment is required. The judge then grants or rejects the application and the suit follows its normal course.

In indirect judicialization, the application for protective measures in the field of health is filed incidentally or supplementary, introduced in the context of a process not originally initiated by health-related questions. Its flow diagram follows actions already in progress. Hence, in a given procedural phase, after *in loco* investigations that verify situations of risk or vulnerability of children and teenagers, the interprofessional technical team or the Guardianship Council recognizes the need for the judiciary's intervention and reports its conclusions to the court.

After that, the public prosecutor analyses the report, technical opinion or suggestion attached to the process. If he considers a document pertinent and appropriate to the case, a supplementary motion is then proposed for the

application of “Incidental Protective Measures”. The use of this procedural instrument aims to assure the access of children and teenagers to the public health services denied or limited by the State.

Meanwhile, based on article 98 combined with 101 of the Children and Teenager Statute (Estatuto da Criança e do Adolescente) – the judge, in an interlocutory decision with advance relief effects, applies the suggested protective measures, compelling public administration to supply the medication or treatment the child or teenager needs.

After the summonsing of the defendant (the public power), if there is any resistance, the process follows the normal course of an ordinary lawsuit, with strict observance to all legal and procedural guarantees in effect, especially the full right to defense and the due process of law.

The actions in which the phenomenon was visible belong to the procedural classes of “Provisions”, “Special Case Files” or “Protective Measures”. These actions are filed with the purpose of investigating complaints, making inquiries and temporary monitoring or applying the adequate protective measures to children and teenagers facing risks or social vulnerability, and whose circumstances have been submitted to the judiciary’s analysis.

The research pointed out that the phenomenon of indirect judicialization benefited an important part of the children and teenager population in a context of extreme marginality and social risk, mainly in peripheries. The principle of equity, corollary of the democratic state based on the rule of law and and an important factor of the reduction of social inequality, was exhaustively considered by the interprofessional team, Guardianship Council, public prosecutors and the judicial power. It was proven that the application of incidental protective measures really affected those in greater need: children and teenagers who were abandoned, in social and economic disadvantage, in broken families or deeply involved with drugs.

Still on the matter, but comparatively, Marques and Dallari (2007) came to the conclusion, through a study of lawsuits filed in the state of São Paulo applying for access to drugs, that the vast majority of those who benefit from judicialization, directly and as the main object of an action, is made of people who

are not in economic disadvantage. Considering that 67,7% of plaintiffs was represented by private attorneys, the authors argue these parties are generally better informed and intellectually more conscious of the right to health.

In a similar way, Vieira and Zucchi (2007), while analyzing and researching suits filed by citizens against the São Paulo Municipality's Department of Health, observed that around 63% of the plaintiffs resided in areas not comprehended by social exclusion maps.

Both researches show constant judicialization of health in favor of people who are not in a situation of risk or social vulnerability, strongly increasing the inequality the Unified Health System (SUS, Sistema Único de Saúde) must deal with. This is due to the fact that, in these cases, resources destined to the collectivity are allocated for the fulfillment of specific demands of those who could have access to justice.

This way, it can be inferred that indirect judicialization has a clear and unequivocal potential for inclusion and social justice, unlike what occurs in most times judicialization of health happens ordinarily, that is, as the main object of a filed action.

4. Protective measures

Protective measures are the resources or instruments available at the Child and Teenager Statute (ECRIAD, Estatuto da Criança e do Adolescente) that must be used whenever rights granted to the youth are menaced or violated: "*I – by the State's action or omission; II – by the parents' or legal custodian's fault, omission or abuse; III – by their own conduct"* (article 98 of the ECRIAD).

On the various types of specific protective measures applicable to the actual case, the Child and Teenager Statute prescribes:

> **Art. 101.** When any of the hypothesis described in article 98 are verified, the competent authority can determine the application of the following measures, among others:
> **I –** submissio**n** to parents or legal custodian, upon the signature of a term of responsibility;

> **II –** temporary counseling, support and assistance;
> **III –** obligatory enrollment and attendance at an official primary education establishment;
> **IV –** inclusion in official or community family, children and teenager aid program;
> **V –** requisition for medical, psychological or psychiatric treatment in hospital or ambulatory facilities;
> **VI –** inclusion in official or community aid, counseling and treatment program for alcoholics and drug addicts;
> **VII –** institutional sheltering;
> **VIII –** inclusion in family sheltering program;
> **IX –** substitute family placing.

It can be inferred from the article's interpretation that its list of measures is not exhaustive, and others can be applied if necessary and appropriate for the regularization of violated rights (CARMELLO JUNIOR, 2013).

According to Sêda (1996, p. 305), protective measures have a specific goal, which is to reestablish the full exercise of children and teenagers' menaced or violated fundamental rights. This is the reason why:

> They should not be limited by procedural formalisms that impair pedagogical needs, for the latter must necessarily respect the developing person's individual condition that characterizes childhood and adolescence, as one can read from article 227 of the federal constitution.

Based on these premises – the possibility of the application of alternative protective measures and the search for the social purpose for which they were established – that the 1st Specialized Court of Childhood and Youth of Cachoeiro de Itapemirim/ES has been issuing decisions that oblige the public administration to provide drugs or treatment for children and teenagers. This extreme resource has also been used in situations when the Guardianship Council has, for any reason, showed itself incapable of solving the problem at hand.

Protective measures can be requested in the form of a **complaint** or through **incidental requests.** When the initial pleading in a Childhood and Youth Court applies for the application of protective measures in the field of health, there is direct **judicialization of health,** since the main application deals **directly** with the matter. In an opposite sense, if the application for these measures is

made during the course of an ongoing action there is **indirect judicialization of health**, once the health related demand occurred incidentally, **indirectly.**

In conclusion, specific protective measures, direct or indirectly, are prompt procedural instruments of guarantee capable of effective action in favor of the children and teenagers who need to have their fundamental right to health materialized.

5. Results and data analysis

5.1 The document analysis matrix and the access to the process records

This study carried out a thorough analysis of the 263 civil actions filed in 2013 in the 1st Specialized Court of Childhood and Youth of Cachoeiro de Itapemirim/ES, except those applying for alimony, child custody, adoption, family authority suspension/destitution, writs of mandamus, and ordinary procedures. A standard form was applied only to cases in which health related incidental or supplemental pleadings were identified.

According to the Automation System of The Judicial Power of Espírito Santo State – e-Jud – the chosen actions belong to the procedural classes of "Provisions", "Special Case Files" or "Protective Measures".

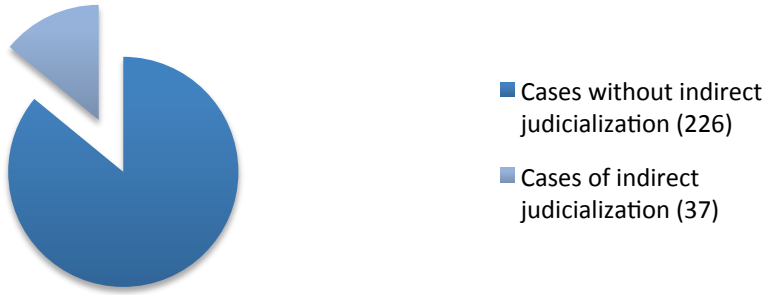
The access to the court records and the data in it was granted by court authorization through Service Order 001/2014[2], since all lawsuits in Childhood and Youth Courts are protected by confidentiality. There are no elements in the research or in its results that can identify the children or teenagers who benefited from the suits. For that reason, there was no offense to their privacy, intimacy or image.

[2] Service Order 001/2014, issued by the 1st Specialized Court of Childhood and Youth of Cachoeiro de Itapemirim/ES judge Priscilla Bazzarella de Oliveira in 11/10/2014, authorizing scientific research and application of the data collection form in all civil actions filed in the year of 2013.

5.2 The incidence of the phenomenon in the analyzed lawsuits

Out of the **263** analyzed lawsuits, **37** had health related incidental applications, which corresponds to **14,06%** of the total (CHART 1). From this percentage, it can be inferred that there was a relative mass of lawsuits with repetitive applications, that is, about the same subject. Because it presents singular elements and characteristics, once it emerges during the proceedings and not as the main object of a filed action, the observe phenomenon crystallizes as a new form of **judicialization of health.**

Chart 1 – Incidence of indirect judicialization in the analyzed lawsuits



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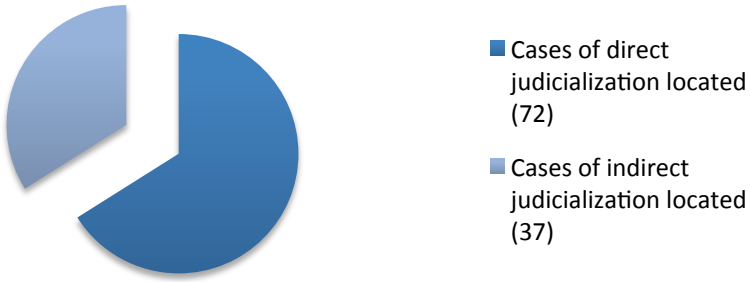
The e-Jud system is currently not equipped with search engines able to identify indirect judicialization of health in its database. For this reason, the phenomenon happens in a "limbo", shadowed by an "invisible" procedure. Its recognition is only possible through scientific analysis of empirical research, like this one.

In the opposite sense, direct judicialization is evident in an autonomous and distinct procedural class, which allows it to be easily researched in the e-Jud by procedural subject – "health" area – among the three possible procedural

classes - citizen suit, ordinary procedure and child and teenager protective measures.

Crosschecking the data from the two types of judicialization, it was visible that, in 2013, direct judicialization was responsible for 66% of health related demands, while indirect judicialization corresponded to 34% of cases (CHART 2). That way, the final account included **109 actions** on the right to health: being **72 direct and 37 indirect.**

Chart 2 – Data crosscheck of the amount of lawsuits in which the phenomenon of direct or indirect localization occurred



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5.3 The lawsuits' profile

In this topic, the lawsuits' main characteristics, as identified through a standard form, will be listed. The obtained results are organized by monthly amount of filed petitions, plaintiff's legal representation, defendant, previous administrative application, granting of applications for incidental protective measures and appeals.

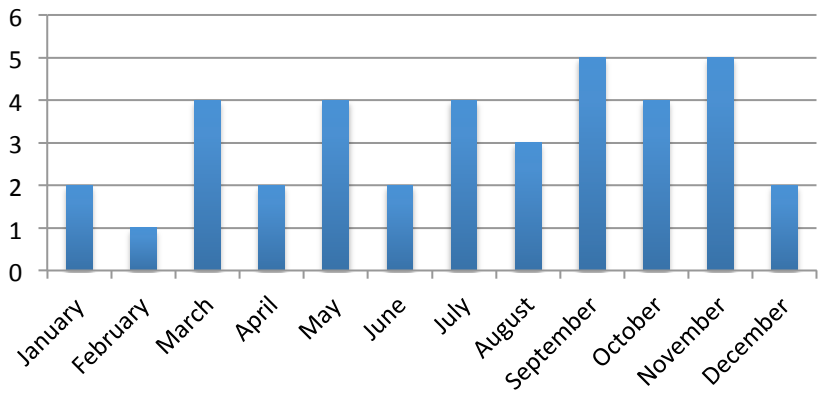
It is worth noting that, in a single suit, two autonomous petitions were filed in different time periods, which is why the data related to each of these requests were accounted individually in all items related to the suit's profile.

Chart 3 indicates the monthly amount of filed petitions. All of them applied for the granting of necessary incidental protective measures in the field of health.

After a preliminary analysis, it is possible to see there was a spike in the number of petitions in September and November, with 5 in each. Paradoxically, the months of January, February, April, June and December were those with the smallest amount of petitions: 2, 1, 2, 2 and 2, respectively. **38** incidental or supplemental pleadings were filed in all of 2013, in an average of **3,2** per month.

As a rule, there is no plausible justification to explain, empirically, the reason why September and November have a larger number of petitions. Especially because the collected data is very similar to the values identified in March, May, July and October, each one with four applications. As for January (2 petitions), February (1 petition) and December (1 petition), it is safe to say that in these months there is a noticeable decline in judiciary activity, since this is traditionally the time of year chosen by judges, public prosecutors and clerks to go on vacation. In addition, December is the chosen month for what is conventionally called the judiciary recess[3].

Chart 3 – Monthly amount of filed petitions applying for incidental protective measures



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[3] Time period of temporary suspension in judiciary activities, except for the provision of matters considered to be urgent.

The results identified by table 1 point out the vast majority of health related supplemental pleadings, through petitions and requirements, were filed by public prosecution (92,1%). Of that total, the important participation of the childhood and youth court's multidisciplinary technical team (42,10%) and guardianship counsel (18,4%) professionals stands out as the basis for the prosecution's application through reports, technical opinions or requirements.

No supplemental pleadings filed by private attorneys or public defenders were verified. In 5,3% of cases (2 lawsuits), there was no manifestation from public prosecution, even though a decision of the childhood and youth court granting a protective measure based on an interprofessional technical team report was issued.

By express constitutional provision[4], public prosecutors act in defense of the legal order, the democratic regime and social and individual inalienable interests. The research pointed out that prosecutors are unequivocal protagonists and agents of crucial importance in the defense of children and teenagers' right to health.

In a similar way, confirming the data collected in this work, Sauerbronn (2012) stated that the Public Prosecutor's Office has been the most collaborative democratic institution on the implementation and effectuation, through the interposing of procedural instruments, of children and teenagers' fundamental right to health.

Table 1 – Plaintiff's representation

Beneficiary's representation	Requests/Petitions	Percentage
Private Attorney	-	0%
Public Defender	-	0%
Public Prosecution	**12**	**31,6%**
Public prosecution after suggestion of an Interprofessional Technical Team member	**16**	**42,1%**

[4] Article 127 of the Brazilian federal constitution

Public prosecution confirming a request or suggestion of the Guardianship Counsel	**7**	**18,4%**
Parent or legal custodian representing or assisting a child or teenager	1	2,6%
Absence of representation (the Childhood and Youth Court judge granted a protective measure based on a report by the Interprofessional Technical Team without the public prosecutor's manifestation)	2	5,3%
Total	**38**	**100,00%**

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Regarding the defendant, the state of Espírito Santo, through the South Regional Superintendency of Cachoeiro de Itapemirim/ES – SRCI – was the passive party in 92,10% of actions, which corresponds to 35 total health related supplemental pleadings. In an opposite sense, the municipality of Cachoeiro de Itapemirim/ES was the defendant in only 2,63% of actions, which corresponds to one single suit (CHART 4).

In one of the analyzed actions, both the state of Espírito Santo and the municipality of Cachoeiro de Itapemirim/ES are defendants. For that reason, the two federative entities were counted individually.

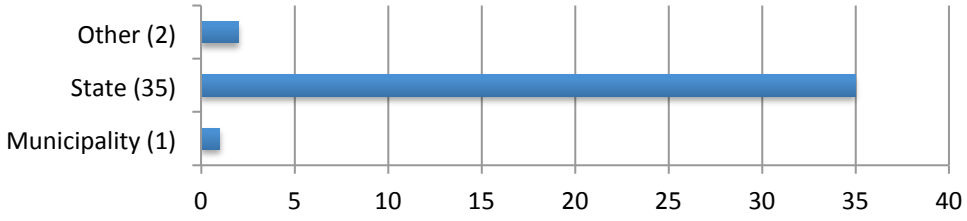
The high percentage of actions against the state of Espírito Santo found in this research resembles the conclusions of the paper "Diagnosis of the Legal Actions Directed at the Department of Health of the Espírito Santo State" (BRASIL, 2010, p. 19), which identified that the district of Cachoeiro de Itapemirim/ES, when compared to other municipalities in terms of population, presented an elevated percentage of lawsuits against the state. The document also reports the preoccupation of government agents facing the anomaly and considers the "urgent need to design an intervention strategy for this municipality".

Finally, the research stated that 43,5% of the judicial decisions issued by courts in Cachoeiro de Itapemirim compelled the state to supply basic care drugs, which are the municipality's responsibility. That way, the disregard of the principles of tripartite responsibility in the system's organization clearly undermines the SUS and National Medicine Policy directives.

In this same line of thought, in a preliminary analysis, it can be inferred that the repeated decisions obliging the state of Espírito Santo to provide drug addiction treatment (SEE CHART 3) did not follow the directives adopted by the National Drug Policy – PNAD (BRASIL, 2011) – which is guided by the principle of shared responsibility between all entities and levels of federation.

Clearly, decisions issued in first instance courts need greater legislative accuracy and deeper knowledge of health public policies, especially since they involve eminently interdisciplinary and integrative questions, in order to avoiding overburdening a federative entity in detriment of the other.

Chart 4 – Defendant



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The analysis of table 2 allows the conclusion that, in the vast majority of cases in which supplemental pleadings were filed it was not possible to identify, through the elements in the records, if the plaintiff sought an administrative solution before filing a judicial complaint (84,2%). In the opposite sense, previous administrative applications were only verified in 13,2% of cases, in which they were unfruitful. In only one case the absence of a non-judicial application was documented.

Table 2 – The party applying for an incidental protective measure petitioned administratively/non-judicially before seeking a judicial provision?

Documented previous administrative application	Amount	Percentage

Yes	05	13,2%
No	01	2,6%
Impossible to identify	**32**	**84,2%**
Total	**38**	**100,00%**

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Chart 5 shows that, of the 38 filed petitions, 35 were granted, which demonstrates a high level of approval (92,1%). Of the 3 denied cases, one was reconsidered by the Childhood and Youth Court.

In all suits in which indirect judicialization of health was identified, the supplemental pleadings were analyzed and granted by the judge in the context of a preliminary injunction or advance relief, even though this terminology was not used in the application for the incidental protective measure. In its vast majority, they were granted through an interlocutory decision instrument.

It is plausible that, due to the measures' urgent nature and the fact that they concern an inalienable fundamental right directed to a usually socially vulnerable public, in a particular development condition, judges are more sensitive towards granting petitions.

The high percentage of grants computed in this paper agrees with the data collected by Oliveira (2014) in a field research made in the district of Leopoldina/MG, where 95% of health related applications were granted and only 5% were denied.

Chart 5 – The petition for the incidental protective measure was granted?

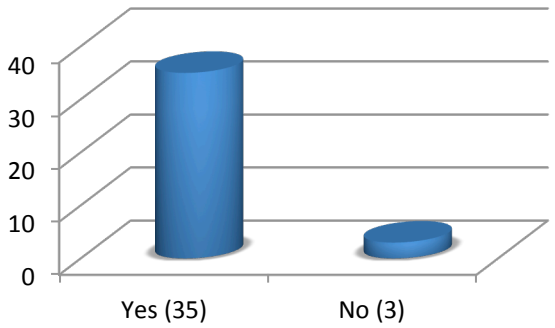

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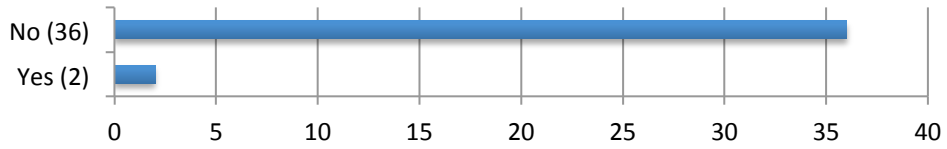
Chart 6 points out that, of the 38 decisions that anticipated or denied relief, only two were subject to appeal, materialized in a petition for reconsideration and a motion for clarification[5].

The judge granted the motion partially, agreeing with the appellant (the state) over the fact that the interlocutory decision that determined the involuntary commitment for the treatment of drug addiction needed better substantiation and clarifying on the reasons of the relief. In the reconsideration plead, the application was fully granted.

None of the interlocutory decisions that granted the application were subject to interlocutory appeals, the necessary and adequate form of appeal to question the decision that anticipated the relief effects[6].

Chart 6 – An interlocutory appeal or any other form of appeal was filed against the decision that granted or denied the relief effects?



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[5] The motion for clarification is a form of appeal. In the words of article 1.022 of the Brazilian code of civil procedure "The motion for clarification is admitted against any judicial decision with the objective of:
I – clarifying obscurity or eliminating contradiction;
II – supplementing omission on point or matter about which the judge must decide *ex officio* or upon request;
III – rectifying a material error." [Translator's note]

[6] As stated by article 522 of the Brazilian code of civil procedure (CPC): "interlocutory decisions are subject to interlocutory appeals, to be filed in 10 (ten) days, in the process records or by instrument (t. n.: directly in the court of appeals)"

5.4 Requested treatments and medical supplies

With respect to items 5.4 (required treatments and medical supplies) and 5.5 (beneficiaries profile) it is important to settle that, in a single petition, there can be different beneficiaries and applications. That is why the amount of filed petitions (38) is different than the total of required treatments and medical supplies (44) and beneficiaries (45).

The data collected in table 3 shows that mental health care, specifically when aimed at the treatment of drug-addiction, has been the most important obstacle in child and teenager health to be judicialized supplementally. That way, it is visible that the majority of filed and granted applications were related to drug abuse, representing 52,2% (34% related to specialized medical consultation for the definition of the best treatment against addiction and 18,2% to treatment in hospitalization level).

Nowadays, questions related to the use and abuse of drugs are a serious public health problem, especially while involving children and teenagers, and must be treated with urgency and technical approach by the bodies of health management and the Rights Guarantee System – SGD.

The obtained results point towards a common problem in the majority of Brazilian municipalities, not only Cachoeiro de Itapemirim/ES: the absence of specific public policies aimed at the treatment of drug addiction in children and teenagers. In a recent research, Leal, Santos e Jesus (2014), identified that in all of Espírito Santo there was only one juvenile CAPS-AD, established in Vitória, the state's capital. This conclusion contrasts with directive 2.2.5 of the National Drug Policy (PNAD), elaborated by the National Department of Drug Policies (SENAD, *Secretaria Nacional de Políticas Sobre Drogas*), which defines that different treatment alternatives must suit the needs of specific groups, specially children and teenagers (BRASIL, 2011).

Confirming that statement, Raupp and Sapiro (2009) come to the conclusion that the treatment of drug addiction in children and teenagers at adult institutions is not appropriate and contradicts the main public policies developed by the sector and the Child and Teenagers Statute. In the end, they assert "*[…] the*

treatment of drug addiction for children and teenagers stands out as a 'problem question', due to the shortage of adequate locations and qualified professionals able to meet this public's singular demands".

Finally, the collected data also emphasizes the relative amount of supplementary applications for specialized medical appointments, such as neuropediatrics (15,9%), ophthalmology (2,3%) and psychiatry/psychology (25%). The latter is not related to drug issues. The analysis of these numbers indicates a notorious shortage of this kind of professional in the workforce of the municipality and state's health care network, especially in mental health.

Table 3 – Granted health supplies and treatments

Health Supplies and Treatments	Amount	Percentage
Specialized Medical Appointment: Neuropediatrics	**07**	**15,9%**
Specialized Medical Appointment: Ophthalmology	01	2,3%
Specialized Medical Appointment: Psychiatry or Psychology	**11**	**25%**
Specialized Medical Appointment: Psychiatry or Psychology, for the definition of the best treatment against drug addiction**.**	**15**	**34%**
Specialized Medical Appointment: Psychiatry or Psychology, for the definition of the best treatment against drug addiction for parents or legal guardians	1	2,3%
Family Orientation Towards the Family Health Strategy Program	1	2,3%
Treatment of Drug Addiction at Hospitalization Level	**8**	**18,2%**
Total	**44**	**100%**

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5.5 Beneficiaries' profile

Tables 4 and 5, together with chart 7, relate to the indirect judicialization beneficiaries' profile, characterized by gender, age group and neighborhood of residence.

The vast majority of beneficiaries is male (71,4%) and belongs to the 10-14 year old (42,2%) and 15-17 year old (33,3%) age group.

Considering most applications are related to treatments against drug addiction (SEE TABLE 3), this research's results are similar to the data presented in a recent paper published by the Ministry of Health in partnership with FIOCRUZ (BRASIL, 2014). The research, titled "National Research on the Use of Crack and Similar Drugs" (Pesquisa Nacional Sobre o Uso de Crack e Similares), identified that this drug users are predominantly male (78,68%) and that children and teenagers already correspond to 14% of the total. In the end, the study came to the conclusion that, among users who were under eighteen (children and teenagers), there were groups with a zero (babies < 01 year olds) or practically zero (children under 08 years of age) consumption rate, which makes teenager use substantial and worrying.

Table 4 – Beneficiary's Gender

Gender	Amount	Percentage
Male	**30**	**71,4%**
Female	12	28,6%
Total	**42**	**100%**

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Table 5 – Beneficiary's age group at the moment of application for indirect judicialization

Age group	Amount	Percentage
< 01 year old	1	2,2%
1-4 years old	-	0%

5-9 years old	7	15,6%
10-14 years old	**19**	**42,2%**
15-17 years old	**15**	**33,3%**
Parents or legal guardians	03	6,7%
Total	**45**	**100%**

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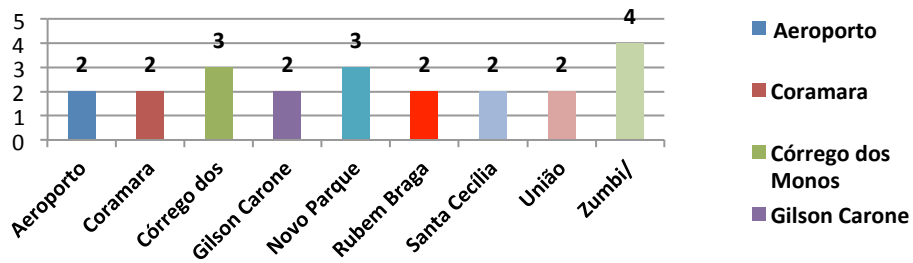
Chart 7 corresponds to the beneficiary's neighborhood of residence. The Zumbi/Eucalipto neighborhood presented the larger amount of supplementary pleadings (4), followed by the district of Córrego dos Monos (3) and Novo Parque (3). Other neighborhoods and districts of the municipality identified in the research presented less relevant numbers, which is why they were not listed.

According to the historian Dias (2014), the Zumbi/Eucalipto area is constantly portrayed by media and the general population as a place of high risk and social vulnerability due to its elevated violence, misery and drug traffic and consumption statistics. This information is similar to the data collected in this research, considering 3 of the 4 filed applications for indirect judicialization in favor of Zumbi/Eucalipto residents concerned treatment against drug addiction. The data analysis shows, therefore, that children and teenagers living in the Zumbi/Eucalipto neighborhood find themselves in a situation of extreme risk and social vulnerability, especially concerning drug abuse, consumption and the consequent misfortunes of drug traffic.

Chart 7 – Beneficiary's neighborhood of residence



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From all that has been exposed, it can be inferred that the data collected by this research unveils important elements that define indirect judicialization of health, in addition to providing crucial information for the adequate comprehension of the initiation "triggers" and functioning mechanisms of the phenomenon.

6. Final considerations

The full protection doctrine, written in the article 227 of our constitution and reproduced by the Child and Teenager Statute bases itself on the recognition of children and teenagers as subjects and holders of all fundamental rights inherent to the human person. Among these rights, health has a "public relevance" character, for it is intimately related to the full, balanced and beneficial development of the youth population.

However, although unequivocal social progress has been made with the implementation of these regulations, there are important challenges to be overcome, since there is still a long way to be covered on the enforcement of efficient public policies aimed at this target group.

In this scenario of realization of rights, the Judiciary and the Public Prosecutor's Office play a relevant role in the current Rights Guarantee System – SGD -, considering they must act fast and efficiently for the benefit of those who, due to their singular development condition, find themselves in a situation of social vulnerability.

The results collected in this research point out to a phenomenon that has its own distinct characteristics and elements, emerging as a **new form of health judicialization**. As shown previously, it initiates supplementary or incidentally, in the course of a process originally unrelated to health questions. Hence, it becomes "invisible" and untracked by electronic search mechanisms, since there are not, in the current court databases, instruments able to qualify and quantify these types of legal acts or facts that arise after the action's regular course.

The indirect or supplementary judicialization of health results from an equation in which the Judicial Power uses, regularly and in repetitive demands, the procedural legal instrument called “Incidental Protective Measures”. The use of this resource, generally requested by the public prosecutor, aims to assure access to health supplies and treatments to children and adolescents who had that access limited or denied by public power. By reestablishing the full exercise of the fundamental right to health, protective measures turn into real instruments of social inclusion and guaranteed access.

The study showed that the greatest obstacle of the indirect judicialization of health in the analyzed court relates to **mental health care**. A high rate of applications for this kind of care (77,2%) was verified. Of that total, 52,2% were involved with questions linked to drug addiction. That way, it could be verified that there are no public policies specifically designed for children and teenagers’ treatment against addiction in Cachoeiro de Itapemirim/ES. In a similar sense, the compiled numbers also reveal a high incidence of applications for appointments with psychiatrists and psychologists for reasons unrelated to drug consumption or abuse (25%). Finally, it can be inferred from empirical analysis that the phenomenon occurs due to the **absence** of public policies as well as the **inefficiency** of some of those already in effect.

The research highlighted the prominence of the Pubic Prosecutor’s Office in the materialization of the fundamental right to health, given that the vast majority of supplementary applications (92,1%) was filed or fostered by public prosecution. Hence, it consolidates as the main democratic institution to act for the defense, implementation and effectiveness of the youth’s right to health.

In the face of the collected data and the definition of the obstacles to be overcome, the importance of establishing institutional and interdisciplinary dialogue between the public power, the agents of the Rights Guarantee System and organized civil society stands out. The main objective of this broad and healthy partnership is the elaboration and implementation of non-existing public health policies, as well as the perfection of those already in effect.

With the enforcement of these measures, the massification of actions and supplementary pleadings in health could be avoided, and access to quality public

service specially aimed at the universe of children and teenagers would be guaranteed.

Finally, it can be concluded that the research has certainly not discussed the theme to its full possible extent, but brought important scientific and empirical elements to the beginning of deep debates, with the main objectives of contributing to the strengthening of the Rights Guarantee System for Children and Teenagers and improving the administrative judicial protection exercised by Specialized Courts of Childhood and Youth.

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