

Inclusion of Oral Health in Disabled Patients. Legal Perspective*

Inclusión de la salud bucodental en pacientes discapacitados. Perspectiva jurídica

Inclusão da saúde bucal em pacientes com deficiência. Perspectiva legal

José Antonio Figueroa Valenzuela^a

DOI: <https://doi.org/10.11144/Javeriana.uo40.iohd>

Universidad Autónoma de Guadalajara, Guadalajara, México

joseantonio_f77@hotmail.com

ORCID: <https://orcid.org/0000-0002-2768-0785>

Received: 12 october 2021

Accepted: 09 december 2021

Published: 26 december 2021

Abstract:

Background: People with disabilities face obstacles to living full and healthy lives. **Purpose:** To identify, organize and analyze documents that account for the conditions and health care and the rights of people with disabilities in the United States of Mexico. **Methods:** A search of references was conducted in different databases using terms such as: oral health, human health, dentistry, medical practice, disability, and rights of people with disabilities. Documents that account for aspects such as standards and institutions that are related to health, particularly the health and rights of people with disabilities, were selected. **Conclusions:** Disability has evolved both in the concept and in the measures and mechanisms of care in the Mexican legal system. There are documents and legislation that address the issue. However, there are omissions and deficiencies that should be corrected to guarantee full and equitable access to health care for people with disabilities.

Keywords: delay, dentistry, disability, ethics, human health, inclusion, legal instruments, legal standard, lex artis, medical practice, official standard, oral health, prospects, responsibility, treaties.

Resumen:

Antecedentes: Las personas con discapacidad enfrentan obstáculos para llevar a cabo vidas plenas y saludables. **Objetivo:** Identificar, organizar y analizar documentos que dieran cuenta de las condiciones y atención en salud y los derechos de personas con discapacidad en los Estados Unidos de México. **Métodos:** Se realizó una búsqueda de referencias en diferentes bases de datos mediante términos como: salud bucodental, salud humana, odontología, práctica médica, discapacidad, y derechos de las personas con discapacidad. Se seleccionaron aquellos documentos que dieran cuenta de aspectos como normas e instituciones que se relacionan con la salud, particularmente, la salud y derechos de las personas con discapacidad. **Conclusiones:** La discapacidad ha evolucionado tanto en el concepto como en las medidas y mecanismos de atención en el sistema jurídico mexicano. Existen documentos y legislación que asumen el tema. No obstante, existen omisiones y deficiencias que deberían subsanarse para garantizar el pleno y equitativo acceso de las personas con discapacidad a la atención en salud.

Palabras clave: discapacidad, ética, inclusión, instrumentos jurídicos, lex artis, mora, norma jurídica, norma oficial, odontología, práctica médica, perspectivas, responsabilidad, salud bucodental, salud humana, tratados.

Resumo:

Antecedentes: As pessoas com deficiência enfrentam obstáculos para viver uma vida plena e saudável. **Objetivo:** Identificar, organizar e analisar documentos que dêem conta das condições e da atenção à saúde e dos direitos das pessoas com deficiência nos Estados Unidos do México. **Métodos:** Foi realizada busca de referências em diferentes bases de dados utilizando termos como: saúde bucal, saúde humana, odontologia, prática médica, deficiência e direitos das pessoas com deficiência. Foram selecionados documentos que contemplam aspectos como normas e instituições relacionadas à saúde, em especial a saúde e os direitos das pessoas com deficiência. **Conclusões:** A deficiência evoluiu tanto no conceito quanto nas medidas e mecanismos de atendimento no sistema jurídico mexicano. Existem documentos e legislação que tratam do assunto. No entanto, existem omissões e deficiências que devem ser corrigidas para garantir o acesso integral e equitativo aos cuidados de saúde das pessoas com deficiência.

Palavras-chave: atraso, ética, incapacidade, inclusão, instrumentos jurídicos, lex artis, norma jurídica, odontologia, padrão oficial, perspectivas, prática médica, responsabilidade, saúde bucal, saúde humana, tratados.

Author notes

Authors' Note: ^a Correspondence: joseantonio_f77@hotmail.com

INTRODUCTION

Since ancient times, men have built knowledge, developed abilities and skills, and have turned their experiences into ever broader and more systematized knowledge. By putting experience and knowledge into practice, men have created arts and sciences and adapted ever more specialized techniques, methodologies, and strategies.

Medicine, initially considered a liberal art, today is a fundamental science and the most valuable discipline for human health (without neglecting its usefulness for the animal and plant kingdoms in the prevention and preservation of health), has evolved conceptually and functionally. Thanks to this evolution, medicine went from being a liberal art to a scientific discipline subjected, in addition to the moral and ethical norms that governed it, to protocols, methodologies, technical rules, and legal norms. Dentistry and, therefore, everything that concerns oral health, does not escape this fate. With the nuances of its nature, dentistry also obeys the world of ethics, morality, and legal and technical standards.

The purpose of this paper was to analyze whether the current Mexican regulatory framework, which governs the rights of people with disabilities, is adequate and sufficient to guarantee their right to health, including oral health. Briefly, without the intention of being exhaustive, some legal regulations are listed, described, and associated to relevant institutions. With this aim, appropriate and sufficient sources of information were obtained and analyzed. The review included the study of reports, data, and electronic documents available in databases of national and international organizations and institutions, whose focus relates to patients with disabilities and their oral health care.

The restrictions or impediments that a disability presents to conduct an activity are addressed conceptually and are particularly related to health and the impact on quality of life. Disabled people have the same needs as people without disabilities; however, their condition confronts them with various obstacles and they often suffer from discrimination that makes them even more vulnerable. In response to this situation of susceptibility, national and international regulations and institutions have been created that seek to remedy and reorient treatment towards the right of people to enjoy an elevated level of health without discrimination.

As noted above, medicine has evolved and has its own space and scope. Therefore, it is pertinent to address, albeit briefly, aspects of the formation of the *lex artis* of medicine, that is, the rules for its practice. It extends to dentistry as a health discipline and its praxis. At the end of this paper, some considerations are raised about the state of care for disabled people and the prospects for their full inclusion.

MATERIALS AND METHODS

This paper addresses the legal perspective of oral health care for disabled people in Mexico, which was guided through the question, is the existing Mexican regulatory framework sufficient to guarantee the right to health of people with disabilities and, in particular, oral health care? To answer this question, various sources of information were used, particularly from the Internet, through which articles were obtained from periodicals, books and documents from people or public and private institutions related to health (World Health Organization [WHO], mainly with regard to care for people with disabilities). Likewise, other types of documents, such as international treaties and declarations, codes, laws, and regulations, were analyzed. The search for references was conducted using the terms: rights of disabled people; disability; medicine; odontology; medical practice; health; oral health.

RESULTS

Disability from the perspective of rights and capacity, relationship with public health and medical practice

Health and, therefore, medical practice are one of the most regulated human activities through moral, ethical, technical, methodological, and legal standards. Historically, the content of the Hippocratic oath allows us to think that the relationship of doctors with each other, with their patients, and with society is based on and regulated from moral concepts and perspectives. An example of legal regulation of medical practice can be found in provisions issued by Hammurabi (1810-1750 BC) that severely punished the doctor who, through a deep incision, produced a caruncle or the death of a patient. The Hippocratic Oath has been updated and modernized (1). For a long time, medical practice and most human activities were considered a liberal exercise, whose limits were determined by personal values and abilities and the "loyal knowledge and understanding" of the doctor.

Currently, there is a diversity of legal and regulatory provisions related to the practice of medicine. Some are contained in laws and general regulations or established in specific provisions, in terms of official standards and under the control of organizations related to dental practice. Both at the international level and in local (national) provisions, disability has been approached from quite different points of view, which gives rise to different forms of classification. Likewise, the forms of treatment and medical and legal protection have evolved. Dentistry does not escape scrutiny and is bound by ethical and moral standards as well as legal rules and regulations. In the case of the United Mexican States, the regulations are derived from provisions contained in the Political Constitution of the country and international treaties (2).

Article 1 of the Mexican Constitution foresees the creation of the system of individual guarantees and recognition of human rights protected by international law (2). Fundamentally, the rights related to health, education, and freedom of work and profession stand out, which are regulated by general laws, such as the General Health Law, the Professions Law, the Federal Labor Law, and the General Law of Education. From each of them other norms and institutions have derived. Some of these regulations related, for example, to the spaces for the practice of environmental health in medical facilities (offices, clinics, and hospitals), establishing minimum infrastructure and equipment requirements (3). The characteristics and content of medical records and histories (4), the care of people with disabilities (5), the prevention and control of oral diseases (6), the requirements for the classification and management of hazardous waste (7), the regulation of techniques, protocols and specific methodologies for the development of the activity that implies the prevention and care of oral problems or situations (8) are also pointed out. On the other hand, institutions such as the National Commission for Protection Against Sanitary Risks (in Spanish, *Comisión Nacional para la Protección Contra Riesgos Sanitarios*—COFEPRIS), the National Commission for Medical Arbitration (In Spanish, *Comisión Nacional de Arbitraje Médico*—CONAMED) and the National Bioethics Commission were created. Likewise, instruments for operation and regulation have been created, including the Code of Bioethics for oral health personnel, the Charter of General Rights of Dental Surgeons, the recommendations to improve dental practice, and the Regulation for the certification and recertification (Mexican Dental Association).

In most country around the world there are similar regulations and institutions that in each case are in accordance with local circumstances and contexts. For example, the Political Constitution of Colombia establishes the equality of all people, privileges the right to health, education, housing, and general well-being (9). In the legislative field, the right to health is guaranteed to people with disabilities through a General Health System (10). There is also a provision to seek timely and effective access for all Colombians to health services, reserving protection measures for people with disabilities and their comprehensive health care (11).

The United Nations recognizes disability as a concept that evolves and results from the interaction between people with some type of disability and barriers due to attitudes and the environment, which prevent their full and effective participation in society, under equal conditions with the others (12). Since 1980, conceptual distinctions have been made between deficiencies, disabilities, and handicaps. In 1993, the WHO touched on the subject in the document International Classification of Impairments, Disabilities and Handicaps—ICIDH, which relates disability to the consequences or damage caused by diseases. In 2001, a new classification called the International Classification of Disability and Health Functioning—ICF (13) was approved.

The WHO estimates that worldwide 15 % (more than one billion people) suffer from some type of disability. Of these, about 190 million are adults and half of them reside in Latin America. 65 % of the population with a disability is located in poor countries, which increases vulnerability, exposure to greater difficulties, and obstacles that affect their quality of life (12,14). In Mexico, it was estimated that there were 6,179,980 people (53 % women and 47 % men) with some degree of limitation or disability, according to the 2020 Population and Housing Census (15).

In any case, people with disabilities have the same health needs as the rest of the population. Therefore, they need access to health care services. However, the trend in human rights protection is to emphasize that people with disabilities have the right to enjoy the highest possible level of health, without discrimination. This is due to the influence of International Law that has favored the promotion of the global protection of human rights. Declarations and treaties have become legal instruments that recognize rights to people and impose obligations on States. Women, children, workers, migrants, and other human groups have been subjected to it. In the specific case of people with disabilities (who form the largest minority in the world), it was only in 2008 that a Convention on the Rights of Persons with Disabilities was signed, which is a binding legal instrument (14). In its article 1, the Convention establishes as its purpose "to promote, protect and guarantee that all persons with disabilities enjoy fully and in the same way all human rights and fundamental freedoms and that respect for their inherent dignity is promoted" (14).

The Convention covers rights such as equality, non-discrimination, and equal recognition before the law, liberty and security of the person, accessibility, personal mobility and independent living, the right to health, work and education, and participation in political and cultural life. Likewise, the Convention abandons the disability "medical model" and replaces it with a "social model." Thus, it assumes the perspective of the WHO through the International Classification of Functioning, Disability and Health (ICF). It should be noted that the study of disability tends to focus on the perspective of the protection of rights rather than concrete actions to remedy its consequences, in terms of inequalities, discrimination, and exclusion (14).

The evolution of concepts and points of view can be seen in the redefinition of *lex artis* and *lex artis ad hoc*. Medicine has its own *lex artis*, which is understood as the set of standards or evaluative criteria that the doctor, in possession of knowledge, abilities and skills, must apply diligently in the specific situation of a patient and that peers universally accept (15). This means that health professionals have to decide which of these rules, procedures, and knowledge acquired in the study and practice are applicable to the patient whose health has been entrusted to them, always in accordance with the scientific and ethical principles that guide the medical practice (16). Medicine is not an exact science, so it cannot predict or ensure favorable results in all cases. Therefore, it can be said that the *lex artis ad hoc* is an indeterminate legal concept that must be established in each case, in which the doctor, through a process of deliberation, applies the measures prudently to the specific clinical situation and in the measure of prevailing conditions (17,18).

Among the essential concepts of Health Law, the general framework of action of the professional, technical, and auxiliary disciplines for health is defined. The *lex artis ad hoc* is integrated in Mexico by: a) the magisterial literature that is used in higher education institutions to train health personnel; b) indexed bibliohemerography, that is, publications authorized by national committees specialized in indexing and bibliohemerographic homologation or *ad hoc* institutions; c) publications issued by *ad hoc* institutions, which

refer to health research results; d) publications that demonstrate scientific merit and statistical validity; e) the criteria established by the Ministry of Health; f) the interpretive criteria of the *lex artis ad hoc* issued by the National Medical Arbitration Commission; g) the pharmacopoeia of the United Mexican States (which is mandatory in accordance with articles 224 and 258 of the General Health Law); h) dictionaries of pharmaceutical specialties duly authorized by the Ministry of Health; and, i) the criteria issued by the *ad hoc* commissions authorized by the Ministry of Health (research, ethics, and biosafety commissions, as well as the internal transplant committees (19).

Disadvantages and Perspectives of Inclusion

For natural reasons, people with disabilities may require more health services than people without them. Generally, they are at a disadvantage compared to the rest of the population. Some of these disadvantages, present both in institutional and private practice, cover multiple aspects. Some are described below:

- Lack of adequate public programs and policies
- Plans, programs and actions may not contemplate people with disabilities as recipients
- Insufficient and inadequate supply of specialized health services
- Inadequate infrastructure, facilities, and medical equipment
- Lack of training and specialization of medical and auxiliary personnel
- High costs of care
- People with disabilities are more likely to engage in risky behavior
- Comorbidity phenomena
- Higher premature mortality

Currently, Mexico has eight national programs related to human rights, disability, non-discrimination, and care for people with disabilities. They constitute a palliative for the care required by the population with disabilities. Among these programs are:

- Care Program for People with Disabilities
- National Program for the Development and Inclusion of Persons with Disabilities 2014-2018
- National Work and Employment Program for People with Disabilities 2014-2018

The first and second programs offer care and rehabilitation services. The third one seeks to promote labor inclusion. In 2011, the National Council for the Development and Inclusion of Persons with Disabilities, known as CONADIS, was created. The Council is the agency responsible for directing and coordinating public policy for the care to this group. Since the same year, the National Human Rights Commission supervises the implementation of the Convention on the Rights of Persons with Disabilities and the active protection of their rights.

CONCLUSIONS

The object and subject of medicine is, at the same time, the human being. Man, exposed to his natural or occasional environment, becomes vulnerable from many fronts. Particularly, in one of their most important conditions: health. The affectation of the capacities of the human being can be represented by one or several diseases or one or several conditions.

The challenge of disability is addressed by emphasizing the impact on rights and its consequences, which represent marginalization, exclusion and discrimination, are left in the background.

The right to oral health is subsumed under the generic right to health. In Mexico, the fundamental basis of the legal protection of health is in the second paragraph of Article 4 of the National Constitution, as well as in secondary laws and in specific provisions with the character of Official Norm. Among them, due to its particular relationship with the subject, NOM-015-SSA 3-2012 is cited, aimed at comprehensive care for people with disabilities (5).

In addition, the provision contained in Article 1 of the Political Constitution of the United Mexican States (2) states that the guarantees contained therein and the human rights derived from the international treaties to which Mexico is a part of are **the rights of all people**. That is, no distinctions are made between people for health care; that is, age, weight, religion, color, height, sex, or health condition. This means that the protection includes all people and all forms of affectation of protected rights, among which health prevails in all its extension and scope.

However, the practical application of the legal principle that establishes that "the unequal must be treated unequally," as occurs in other areas, with regard to the protection of health to people with disabilities, is framed in a normative protector structure. Said system is represented by norms and institutions that try to protect the disadvantages that particularly afflict people according to the type and degree of disability. It remains a great challenge for societies and governments to find the means and strategies, if not to eradicate, to minimize the limitations and disadvantages that people with disabilities face on a daily basis in the environments in which they operate.

The regulatory framework, even with its deficiencies and omissions, is sufficient to cover the fundamental claims of protection to fairly deliver care to the disabled population, including their oral health. However, the legal framework *per se* could not resolve the situation of disadvantage faced by people with disabilities. That would be achieved as omissions and deficiencies are remedied. Thus, the presence and improvement of care for people with disabilities could be aspired to.

REFERENCES

1. Asociación Médica Mundial (AMM). Declaración de Ginebra, adoptada por la 2ª Asamblea General de la AMM. Ginebra, Suiza: AMM; 1948.
2. Estados Unidos Mexicanos. Constitución política. Ciudad de México, México: Cámara de Diputados del Honorable Congreso de la Unión: 5 de feb 1917.
3. Estados Unidos Mexicanos, Secretaría de Salud. Norma Oficial Mexicana PROY-NOM-197-SSA1-2000, que establece los requisitos mínimos de infraestructura y equipamiento de hospitales generales y consultorios de atención médica especializada. Diario Oficial de la Federación. 2000.
4. Estados Unidos Mexicanos, Secretaría de Salud. Norma Oficial Mexicana PROY-NOM-0168-SSA-1998, del expediente clínico. Diario Oficial de la Federación. 1998.
5. Estados Unidos Mexicanos, Secretaría de Salud. Norma Oficial Mexicana PROY- NOM-015-SSA3-2012, para la atención integral a personas con discapacidad. Diario Oficial de la Federación. 2012.
6. Estados Unidos Mexicanos, Secretaría de Salud. Norma Oficial Mexicana PROY- NOM-013-SSA2-2015, para la prevención y control de enfermedades bucales. Diario Oficial de la Federación. 2015.
7. Estados Unidos Mexicanos, Secretaría de Salud. Norma Oficial Mexicana PROY-NOM-087-ECOL_SSA1-2002, Protección ambiental - Salud ambiental - Residuos peligrosos biológicoinfecciosos - Clasificación y especificaciones de manejo. Diario Oficial de la Federación. 2002.
8. Estados Unidos Mexicanos, Secretaría de Salud. Norma Oficial Mexicana PROY-NOM-013-SSA1-2015. Campaña Nacional contra la Enfermedad de Newcastle, presentación velogénica. Diario Oficial de la Federación. 2015.
9. República de Colombia. Constitución Política. Bogotá: Congreso de la República; 1991.

10. República de Colombia. Ley estatutaria 1618 de 2013, por medio de la cual se establecen las disposiciones para garantizar el pleno ejercicio de los derechos de las personas con discapacidad. Bogotá, Colombia: Congreso de la República; 2013.
11. República de Colombia. Resolución 2841. Por la cual se actualizan integralmente los servicios y tecnologías de salud financiados con recursos de la Unidad de Pago por Capilación (UPC) de 2020. Bogotá, Colombia: Ministerio de Salud y Protección Social; 2020.
12. Organización de Naciones Unidas (ONU). Convención sobre los derechos de las personas discapacitadas. Nueva York: ONE, Asamblea General; 2006.
13. Organización Mundial de la Salud (OMS). Clasificación Internacional del Funcionamiento, de la Discapacidad y de la Salud: CIF. Ginebra, Suiza: OMS; 2001.
14. Organización de Naciones Unidas (ONU). Convención sobre los derechos de las personas discapacitadas. Nueva York: ONE, Asamblea General; 2014.
15. Estados Unidos Mexicanos. Tesis de la Suprema Corte de Justicia, Primera Sala. V/lex. 2021. <https://vlex.com.mx/vid/tesis-jurisprudenciales-864313977>
16. Estados Unidos Mexicanos, Comisión Arbitraje Médico (CNAM). Reglamento de procedimientos para la atención de quejas médicas y gestión pericial de la Comisión Nacional de Arbitraje Médico. Ciudad de México, México: CNAM; 2003 ene 21 (actualizado 2018 ago 8).
17. Garzón Arévalo D, Parada Vargas D. Las obligaciones de medio y de resultado y su incidencia en la carga de la prueba de la culpa contractual. Univ Estud (Bogotá, Colombia). 2015 ene-dic; 12: 241-252
18. Estados Unidos Mexicanos, Suprema Corte de Justicia de la Nación (SCJN). Responsabilidad de las instituciones hospitalarias privadas por actos ejecutados en su interior por terceras personas. Amparo directo 51/2013. Ciudad de México, México: SCJN; 2013.
19. Estados Unidos Mexicanos, Comisión Arbitraje Médico (CNAM). Reglamento de procedimientos para la atención de quejas médicas y gestión pericial de la Comisión Nacional de Arbitraje Médico. Reformado. Ciudad de México, México: CNAM; 2006 jul 25.

Notes

* Original legal research.

Licencia Creative Commons CC BY 4.0

How to cite this article: Figueroa Valenzuela JA. Inclusion of Oral Health in Disabled Patients. Legal Perspective. Univ Odontol. 2021; 40. <https://doi.org/10.11144/Javeriana.uo40.iohd>