

Non-Discrimination

**Article 2 &
Governments' Budgets**

*Discriminatory expenditures
based on health status*



The case in brief

Access to Mexico's public health system is directly related to a person's employment status. A number of agencies and insurance systems provide this access to different sectors of the population. The Mexican Social Security Institute (IMSS) provides health services to people formally employed in the private sector, while the Institute for Social Security and Services for State Workers (ISSSTE) provides and regulates health services for public employees. Mexico's oil company and the military each have their own systems, while the informally employed or unemployed have access to a network of hospitals and clinics that are run by the federal and state ministries of health, as well as by the popular insurance scheme.

This highly fragmented structure is governed by a heterogeneous set of by-laws and regulations, some of which have threatened to undermine the realization of the rights to health and social security. This was the case of public employees affiliated with the Sonora state ISSSTE (ISSSTESON), who were denied access to health services due to pre-existing medical conditions, with the institute arguing that covering such conditions would negatively affect its finances. Such exclusions, whether in the private insurance market or in public schemes, are not consistent with the rights to health and social security, as well as the guarantee of non-discrimination, contained in the Mexican Constitution.

In 2007, Sonora Ciudadana took on the case of a public worker who for a decade had been denied his rights to health and social security as a result of these regulations. Using strategies ranging from budget analysis to strategic litigation and media campaigns, Sonora Ciudadana succeeded in getting a ruling from the Supreme Court, which ultimately led to the elimination of discriminatory practices affecting a large number of public workers who suffered from pre-existing medical conditions at the time they were hired.



The human rights issue

The Mexican constitution guarantees the enjoyment of rights on a non-discriminatory basis, explicitly stating that a health condition cannot be used as a basis for discrimination (article 1). Article 4 provides for the right to the protection of one's health, while article 123 guarantees the right to work and to social security, stating that provisions should cover health care for problems that are both work-related and those that are not.

Mexico has ratified the International Covenant on Economic, Social and Cultural Rights (ICESR), which guarantees non-discrimination (article 2), the right to

health (article 12), the right to work and to "equal remuneration for work of equal value without distinction of any kind" (article 7), and the right to social security (article 9).

The UN Committee on Economic, Social and Cultural Rights (CESCR) devoted General Comment 19 to the right to social security, saying that "[...] States parties [...] must take effective measures, and periodically revise them when necessary, within their maximum available resources, to fully realize the right of all persons without any discrimination to social security [...]" (para. 4).

The human rights argument

Being a public sector employee in Mexico promises important benefits in the areas of health care, retirement and other social services. However, because of certain exclusions within the regulations governing the provision of social security benefits in Sonora, Mexico, public employees were vulnerable to discrimination in the enjoyment of a number of their rights, including the rights to work, to social security and to health. By excluding employees with certain pre-existing health conditions from access to benefits, Sonora was failing to comply with the obligation of non-discrimination in ICESCR article 2, and in article 1 of the Mexican Constitution, which specifically excludes health conditions as a ground for discrimination.



Case study in detail

The beginning

Abel Montenegro is a public worker of the municipality of Hermosillo in the state of Sonora, Mexico. He suffers from hypertension, which has not hindered him in carrying out his work-related duties. When he started working for the municipality in 1998, he did all the paperwork required to sign up for the social security system for public employees in Sonora, ISSSTESON.

Despite the fact that the Mexican Constitution guarantees the right to health services, article 6 of ISSSTESON's by-laws on medical services required that public employees be in good health in order to be affiliated. On the basis of this article, Mr. Montenegro was barred from access to much-needed health services for a decade. Because he was not affiliated with ISSSTESON, Montenegro also lost out on other entitlements that normally come with formal employment: a pension fund, housing credits or a mortgage, and health services for his family, among others.

In 2007, Mr. Montenegro approached Sonora Ciudadana to explore if the organization could be of help. It agreed to take his case.

Governments at all levels (central, state or municipal) are obligated to realize human rights. The national or central government has the added obligation of ensuring that governments at the sub-national level are carrying out their human rights obligations, and if they are failing to do so, the national government must step in and provide for realization of those rights.

The importance of access to information

As a first step, Sonora Ciudadana used Mexico's access to information law to secure documentation to help it understand the origins and evaluate the scope of the problem. Its access to information requests helped the organization document the numbers of people affected by the ISSSTESON by-laws just mentioned. Sonora Ciudadana learned that over the previous seven years, more than 400 public employees (including police officers, teachers and other low-wage workers) and their families had been refused coverage due to such pre-existing health problems as hypertension and diabetes. Especially alarming was the fact that the practice seemed to be on the rise.



Number of public employees denied affiliation with ISSSTESON

2001	2002	2003	2004	2005	2006	2007	2008
5	14	58	56	62	66	60	83

In addition, the bases for denying access to ISSSTESON's medical services seemed to be broadening. While the vast majority of cases comprised people suffering from diabetes, the institute had more recently started to turn down people affected by cancer and morbid obesity.

These public employees were being told that they had no entitlement to health care or the other benefits of social security, even though each day they put in their hours of work in public service. By-laws that should have been simply ensuring the effective operation of an institution were hindering the enjoyment of rights.

In addition to the information it gathered through these access to information requests, Sonora Ciudadana learned in a meeting with ISSSTESON's board of directors that, from ISSSTESON's perspective, it was not financially viable for



the Institute to affiliate people suffering from pre-existing medical conditions, especially those with chronic degenerative diseases.

A strategic partnership for strategic litigation

The regulations and by-laws that permitted ISSSTESON to discriminate against Mr. Montenegro appeared to be unconstitutional. However, Sonora Ciudadana had no legal staff to push the case to the courts. Therefore, it decided to join forces with Fundar—Center for Analysis and Research, a Mexico City-based organization dedicated to transparency, accountability and human rights. Fundar's legal strategy pursued two goals: to ensure ISSSTESON's fulfillment of Abel Montenegro's rights and to secure a precedent that would be applicable to others' cases.

In November 2008, the two organizations took Mr. Montenegro's case to Mexico's Supreme Court, which six months later ruled that ISSSTESON's practices were indeed unconstitutional, because they were contrary to the spirit of articles 1, 4

and 123 of the Constitution. The court ordered ISSSTESON to immediately provide health services to Mr. Montenegro and his family. In June 2009, Abel Montenegro was formally affiliated with ISSSTESON.

Increasing the pressure to reform the law

The Supreme Court's judgment, while clearly setting a precedent, only applied to Mr. Montenegro, which meant that ISSSTESON's discriminatory clause continued to affect the rest of the excluded employees in Sonora. Many public workers approached Sonora Ciudadana for help. Using the Supreme Court decision, they started advocating for their rights through a campaign called "The Rebellion of the Sick", which was eager to push for change through diverse tactics.

In response to ISSSTESON's claim that affiliating all previously excluded public employees was not financially feasible and in support of the Rebellion campaign, Sonora Ciudadana submitted hundreds of additional requests for information, this time for detailed budget information, seeking to demonstrate that the

government had money that could be used for this purpose. The organization identified several important pieces of information, all of which they used in their advocacy. They learned that:

- While ISSSTESON had incurred deficits every single year, several public institutions owed it money (500 million pesos as of 2008, approximately US 47.6 million); they had not paid the quotas due from them to affiliate their employees.
- Each year ISSSTESON paid increasing amounts to private health institutes to provide services that it could not offer. From 2002 to 2009 it also spent over 400 million pesos (US 38 million) to buy out-of-stock medicines from private drug stores, at a considerably higher price than what they were paying through their own procurement process.
- In the state budget as a whole, there were numerous non-essential expenditures that could be cut back in order to make room for an increased budget for ISSSTESON. The government had, for example, spent over 4 million pesos (close to US 381,000) to hire a dancer for a ceremony.

General Comments 19 (para. 10) confirms that “social security should be treated as a social good, and not primarily as a mere instrument of economic or financial policy.” While social security can be an important tool in stimulating an economy, for example, by providing purchasing power to the poor, this General Comment is saying that first and foremost, social security is a right and should be assessed by a different set of values than those used for assessing tools for advancing economic goals.

Governments have an obligation to use the maximum of available resources to realize economic and social rights. When a government says that it does not have the resources to guarantee specific rights, such as social security, to all the people, it must be able to show that it has explored all possible options for securing the necessary resources. Sonora Ciudadana’s budget analysis in this case demonstrated that the Sonora state government had failed to do such a full investigation.

N.B. This case also demonstrates how the obligation of non-discrimination goes hand-in-hand with the other obligations in ICESCR article 2.

Finally, with the help of the “Rebellion of the Sick”, Sonora Ciudadana developed an estimate to determine how much it would cost to provide medical attention to those suffering from diabetes. The costing determined that medicines, medical appointments and blood tests for one patient for a year would amount to 25,482 pesos. Sonora Ciudadana estimated that providing care to the public employees who had been denied affiliation because of diabetes would cost ISSSTESON no more than 20 million pesos.

Members of the “Rebellion of the Sick” received training in understanding the budget evidence and were coached to speak about it in public rallies, talk shows and hearings in Congress. Under increasing pressure, the Health Committee in Congress commissioned its own costing study, which produced an estimate very close to that of Sonora Ciudadana.

Finally, on December 28, 2010, the state Congress of Sonora reformed the ISSSTESON law, to say that discrimination against public employees seeking affiliation due to pre-existing medical conditions was prohibited. ISSSTESON was forced to remove article 6 of its by-laws.

“Costing” can be an invaluable analytical tool in advancing human rights arguments, as this case demonstrates. In simple terms, “costing” is the process of assessing how much a specific good or service would cost to purchase. While arriving at a true cost for a good or service to be provided by a government can be difficult for a CSO, because of the technical nature of costing and because CSOs normally do not have access to such figures as government administrative costs, a carefully-reasoned estimate put forward by a CSO can have the effect of shifting the “burden of proof” onto the government, forcing it to justify its failure to provide the desired benefits.

Epilogue

Sonora Ciudadana documented affiliation practices of social security institutes in every one of the 32 federal states of Mexico. It uncovered the fact that social security institutes of 14 states had clauses that allowed them to discriminate against sick people, although only the state of Nuevo León was applying theirs. Indeed, the discrimination clauses in Nuevo León referred not only to employees with pre-existing conditions, but also to persons who were joining public services for the first time and were older than 50.

Sonora Ciudadana identified a group of employees in Nuevo León who had been denied their rights, documented the extent of the practice (more than 1,100 employees had been disqualified), analyzed the budget, developed a costing exercise, and launched a social marketing and advocacy campaign. This time around, the precedent of Abel Montenegro’s case and the reform of ISSSTESON’s bylaws in Sonora, paved the way for an expedited resolution. The state Congress of Nuevo León reformed the legal framework of ISSSTESON to prohibit discrimination on the basis of health conditions as well as age.

Questions you might ask yourself or your government about discrimination in the access to rights-related benefits

What rights-related benefits does the government provide to people in the country? Are these benefits dependent on employment status or are they provided to all people regardless of employment?

Does the government maintain records on who has been denied rights-related benefits? If not, why not? If so, does it maintain records of the reasons for denial?

If it does maintain records of the reasons it denies benefits, what reasons does it rely on? Is there a pattern that would indicate that certain people are being denied benefits as a result of their gender, disability, age, or other status that is not allowable as a basis for discrimination?

Does government regularly assess its benefits-related regulations to ensure that they enhance people's enjoyment of related rights and not serve as impediments to such enjoyment?

Is the denial of benefits consistent across the country or is it more prevalent in certain areas? What are the reasons for different treatments?

Does the national government monitor regulations used by sub-national governments related to benefits, to ensure that those regulations are consistent in different parts of the country, and that the regulations do not inappropriately interfere with people's enjoyment of rights-related benefits?

Does the government deny certain benefits to individuals on the basis of their health status? If so, which benefits? Which health status? What rationale does government provide for denying benefits?

Does the government justify denying benefits to certain groups of people because it lacks adequate financial resources? If so, can the government demonstrate that it has explored all possible options for increasing resources to provide the specific benefits, including shifting resources from less essential areas, increasing efficiencies in expenditures, developing additional revenue-raising schemes, etc.?

SONORA CIUDADANA

Founded in 2005 and based in the Mexican state of Sonora, Sonora Ciudadana is a civil society organization that promotes human rights, transparency, and accountability at the local level. Over the years, Sonora Ciudadana has focused on democratizing state institutions by advocating for greater citizen participation in policy processes. Sonora Ciudadana seeks to be an agent of change in the state of Sonora and beyond, by using access to information, social marketing, media and evidence-based advocacy to promote transparency and accountability, especially in relation to health.

For more information on Sonora Ciudadana,
go to: www.sonoraciudadana.org.mx

The Article 2 Project

This booklet is part of the *Article 2 & Governments' Budgets* handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) for how governments should develop their budgets, raise revenue and undertake expenditures. The project encourages the use by civil society and governments of the legal provisions of article 2 to monitor and analyze governments' budgets. Download the complete handbook at:

www.internationalbudget.org/publications/ESCRArticle2.

The case study is based on Guillermo Noriega y María Eugenia Jaime Bracamonte, *Discriminación y Acceso a los Servicios de Salud*, Sonora Ciudadana-Fundar, Hermosillo, 2009; Artemiza Michel y Guillermo Noriega, *La rebelión de los enfermos: No somos números, somos personas—Cronología de una historia de participación ciudadana y exigencia del derecho a la salud*, Sonora Ciudadana, Hermosillo, 2011; and Guillermo Noriega, *La rebelión de los enfermos: Auditoría Ciudadana—La discriminación en el ISSSTELEON*, Sonora Ciudadana, Hermosillo, 2012.

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