



## **"GENERALIZED DISORDER": THE SUBROGATION OF DAYCARE CENTERS IN MEXICO**

**Document presented to Mr. Kishore Singh, United Nations Special Rapporteur on the Right to Education**

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### **I. Introduction: The fire at the ABC daycare center and the investigations on the subrogation system**

The case of the ABC daycare center is particularly important to Center Prodh, as well as other social and human rights organizations and society in general, because a group that requires special protection and who has the right to receive initial education in safe conditions was severely victimized. The deaths and the harm done to the physical and emotional integrity of a group of children resulted in serious violations not only against the direct victims, but also against their parents, who legitimately expected minimum security conditions in the daycare center.

On June 5<sup>th</sup> 2009, 49 children died and 100 others were seriously injured in Hermosillo, Sonora, by a fire that started in a state-owned warehouse next to the ABC daycare center. The ABC center was in fact also a warehouse outfitted to provide childcare services, but that lacked minimum safety conditions.

In the following days, both the Attorney General of the state of Sonora and the Federal Attorney General's Office started investigations into the matter. However, the investigations to date have yielded very few results and have only been directed against the center's owners and some low-level public officers; while high-level public officers remain untouched by justice, without any administrative or criminal proceedings being carried out against them.

Meanwhile, 1480 childcare facilities all over the country continue to operate under the

same legal status as the ABC daycare center, that is, a system of “subrogation” implemented by the Mexican Social Security Institute (IMSS) for 27 years to reduce its operating expenses by delegating its responsibilities (such as providing daycare) to private entities. As expected, these private entities have privileged profit over services that guarantee human rights.

Considering that criminal investigations were hindering access to justice and compliance with the parents’ requests (formulated by the parents through their organization Citizen Movement for Justice “June the 5<sup>th</sup>”), on August 6, 2009 the plenary of the national Supreme Court decided to carry out its own investigations under Article 97, second paragraph, of the Mexican Constitution, through the creation of an ad-hoc Inquiry Commission. Hence, the Supreme Court decided to: a) analyze the IMSS daycare center subrogation system and b) investigate the facts and responsibilities derived from the fire in the ABC daycare center. Although the results of these investigations were not binding, they had an important moral and political weight.

It is important to note that due to the events mentioned in this document, the investigations about the daycare centers were focused on those delegated to private entities, in the context of IMSS authority. The model of subrogation (delegating state services to private entities) has also been applied to childcare services in other government bodies such as the Social Development Ministry.

During the Supreme Court’s investigation process, Center Prodh sent each of the Court’s Justices an Amicus Curiae brief that sought to provide them with legal arguments with a human rights perspective.

## **II. Information collected by the Supreme Court’s Inquiry Commission.**

### **a) The subrogation of daycare centers by the IMSS: generalized disorder**

The Inquiry Commission was composed of judges María del Rosario Mota Cienfuegos and Carlos Ronzón Sevilla. After 6 months of documentary and field work, in February 2010 the commissioned judges handed in a Preliminary Report, which stated that the ABC daycare center tragedy had been caused by **the generalized disorder that prevails in the daycare center subrogation system**. According to the Preliminary Report, only 14 out of the 1468 subrogated daycare centers (0.9%) operated in compliance with all legal requirements needed to be contracted by the IMSS in the first place. Once contracted, only 0.3% fully complied with the legal conditions to operate.<sup>1</sup>

The generalized disorder is a result of many irregularities found in the contracting process, which benefited individuals linked to well-known political figures. The Inquiry Commission

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<sup>1</sup> María del Rosario Mota Cienfuegos and Carlos Ronzón Sevilla, Supreme Court of Justice, *Preliminary Report under the power to investigate* 01/2009, February 26, 2010, p. 377-379.

observed that authorities from the three levels of government in many cases fail to comply with their obligation to ensure childcare services under minimum security conditions.

The Mexican Social Security Institute's supposed authority to delegate its functions to private entities remains unclear. The so-called legal framework that authorized the institute to contract private entities to offer childcare services on its behalf was made up of resolutions adopted by the Technical Board, in its capacity as governing and representative body of the IMSS.<sup>2</sup>

Nevertheless, delegating the service violated article 203 of the Social Security Act, which states that childcare services are to be offered directly by the IMSS. The only exception to this rule is contained in article 213 of the same Act; however, this exception does not apply in the present case.

Contracting private entities to offer services on behalf of the IMSS, without a clear legal basis to do so, not only endangered the children's right to health, as well as those of the social security beneficiaries, but also resulted in the tragic violation of the rights to life and to personal integrity of a large number of children.

Among the evidence in the ABC daycare center we find data that allows us to determine the real and imminent risk in which many children receiving daycare services under the subrogation system remain. As has been already mentioned, only 0.9% of daycare centers met all the security conditions to be contracted, while the rest, that is 99.1%, showed irregularities.<sup>3</sup>

In the field of civil protection (a matter that is the responsibility of IMSS but also of state and municipal authorities), the Inquiry Commission also found serious flaws: the majority of daycare centers had not received approval to operate<sup>4</sup> or the license renewal by the Civil Protection Agency, at least before the fire.<sup>5</sup> Additionally, 72.2% of the daycare centers did not have the Fire Department's permit and 91% do not renew it each year.<sup>6</sup>

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<sup>2</sup> This legal framework was consolidated according to Technical Board Resolution number 159/2003, August 27, 2003, by which the use of multi-annual contracts was authorized. The subsequent resolution 498/2004, October 20, 2004, consolidated the subrogation system by establishing a unique type of subrogation.

<sup>3</sup> *Preliminary Report, op. Cit.*, p. 114.

<sup>4</sup> Half of the daycare centers are still working irregularly in relation to the civil protection report and other requirements. The commissioned judges declared that "*the majority of daycare centers were approved by a civil protection report (fifty point two percent), although among that group three hundred and one received a positive resolution before the fire and three hundred and forty three obtained it after the fire, the truth is that a great number of them do not fulfill this requirement (seven hundred and thirty, that is forty nine point eight percent)*". *Preliminary Report, op. Cit.*, p. 126.

<sup>5</sup> 1137 subrogated daycare centers, that is 83.7%, do not have a renewed civil protection license. *Preliminary Report, op. Cit.*, p. 126.

<sup>6</sup> *Ibid.*, p. 126.

They also lacked a favorable fire risk analysis, which is issued by the municipal or state authorities depending on the state law.<sup>7</sup>

Similar flaws are found regarding the proper functioning of electrical systems, since 72% of daycare centers lacked the authorities' approval.<sup>8</sup> Besides, childcare employees do not receive up-to-date training on civil protection issues or drills.<sup>9</sup>

In addition to state and municipal authorities' negligence in monitoring childcare centers under the subrogation system, the IMSS has breached the law by not correctly supervising their safe operation.

Although the members of the Inquiry Commission expressed that 88.7% of the daycare centers were supervised (in the context of a mere administrative control system), the so-called supervision did not include checking that the daycare centers' owners adopted the security measures stated by the applicable law.<sup>10</sup>

In fact, that the IMSS has failed to conduct security inspections. In 52% of the cases the IMSS failed to conduct security inspections along with the civil protection agencies.<sup>11</sup>

Fortunately, many deficiencies were corrected after the fire of June 5, 2009 in the ABC daycare center. For example, 98% of childcare facilities that were visited afterwards now comply with the "Sonora Alarm System" requirement. However, only 55% met this requirement before the fire in the ABC center. Similarly, today 91.3% and 96.6% of the audited childcare centers comply with the number of smoke detectors and emergency lights required, respectively; but only 43% and 45%, respectively, complied with those measures before the fire. Almost 100% of the centers comply with the required number of emergency exits, but in 58.3% of the cases, the daycare centers made this adjustment just after the fire.<sup>12</sup>

This suggests that once the social demands driven by the fire at the ABC daycare center are forgotten, the subrogated childcare facilities will not necessarily continue to meet the legal requirements to operate, considering that the legal framework for the subrogation system is not clear.

Finally, we emphasize the lack of accountability mechanisms for authorities in charge of

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<sup>7</sup> The majority of the daycare centers do not have a positive report on this matter, considering that 1021 (69.7%) could not prove the existence of adequate and sufficient fire equipment. 12% of the daycare centers corrected this situation after the fire. *Preliminary Report, op.Cit.*, p. 115.

<sup>8</sup> *Ibid.*, p. 115.

<sup>9</sup> 75.1% of the daycare centers do not fulfill the requirement of carrying out drills. 73.3% do not train their employees in civil protection issues. *Preliminary Report, op.Cit.*, p. 127.

<sup>10</sup> *Ibid.*, p. 378.

<sup>11</sup> *Preliminary Report, op.Cit.*, p. 132. The observations and requirements pointed out by IMSS officers carrying out inspections are limited to sanitation, education and food; security conditions are disregarded.

<sup>12</sup> *Preliminary Report, op.Cit.*, p. 144.

monitoring the proper functioning of the childcare services offered by private entities on behalf of the IMSS.

**b) Emblematic case: Irregularities found in the contracting process, operation and supervision of the ABC daycare center in Hermosillo, Sonora**

The irregular operating conditions reported by the Inquiry Commission existed in the case of the ABC daycare center. In addition to the lack of supervision by the Civil Protection authorities and the IMSS, it was proven that the warehouse owned by the Sonora state government, located next to the ABC daycare center, housed thousands of paper documents, which were a constant risk due to their flammability. Still, authorities never took the necessary measures to prevent a fire.

The study carried out by the Inquiry Commission shows the State's negligence, which is proven by the grave deficiencies in relation to civil protection issues and the flawed operation of the daycare center in question.

Some of the grave deficiencies were: lack of effective enforcement of the law as to the requirements to offer childcare services; absence of a report that proves the existence of a firewall, operating permits and security reports; lack of technical certification for the daycare facility and a lack of adequate follow-up inspections by IMSS to expand the installed capacity.<sup>13</sup>

The inspections carried out by IMSS personnel showed numerous irregularities; for example, the Preliminary Report states that before 2003 not one inspection had been carried out in the ABC daycare center, though the IMSS had granted them the contract to offer childcare services on its behalf as of 2001.<sup>14</sup>

In addition, the Preliminary Report shows that once the inspections were made, they did not focus on civil protection issues.<sup>15</sup> Nonetheless, some observations were made as a result of those inspections, observations that were then ignored.<sup>16</sup>

State and municipal authorities are also responsible for not supervising the correct application of civil protection laws. They not only inadequately supervised the ABC daycare center, but they also disregarded the operating conditions of the state of Sonora's warehouse next to it.

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<sup>13</sup> *Preliminary Report, op.Cit.*, p. 352 et. seq.

<sup>14</sup> *Ibid.*, p. 207.

<sup>15</sup> *Ibid.*, p. 232.

<sup>16</sup> The local IMSS representative, Emigdio Martínez García, issued resolution 2790013200/23180, dated July 26, 2005, addressed to the legal representative of ABC daycare center, in which he informs the latter of abnormal conditions found in the childcare facility. Besides, inspections carried out by regional coordinator Irma C. Díaz Gómez showed that she mentioned the expiration of the Fire Department resolution and the incomplete fulfillment of the civil protection program. None of the aforementioned documents received proper attention in order to correct the deficiencies. *Preliminary Report, op.Cit.*, p. 233 et. seq.

Local authorities also had specific duties in relation to the supervision of the ABC daycare center, for example, verifying the conditions in which the childcare services were offered, considering that the building was a supposedly adapted warehouse.<sup>17</sup> Taking into account the nature of the building, special care was needed in order to guarantee the security of the children inside it.

However, local authorities overlooked this situation and issued positive security reports. In view of the events of June 5<sup>th</sup>, 2009, we can conclude that such reports were not made as a result of careful fire prevention tests.<sup>18</sup> Additionally, the records of the ABC daycare center do not show that the Fire Department or the Civil Protection Agency carried out regular inspections to supervise the fulfillment of security measures. Finally, the ABC daycare center did not have an operating permit issued according to the existing legislation.<sup>19</sup>

### III. Conclusions

The lack of a clear legal framework for the subrogation system, as well as the absence of effective supervision prevented the implementation of measures to guarantee the due administration of public goods in the context of accountability, transparency, and legality mechanisms.

In the present case, the justification for the existence of the subrogation system was the IMSS's incapacity to cover the population's demands. Nevertheless, by delegating its responsibilities without adequate supervision, childcare services were offered in unsafe conditions that provoked the tragic events in the ABC daycare center.

Consequently, taking into account the State's primary obligation to offer childcare services, federal, state and local authorities had the direct responsibility to supervise the private entities offering the services on their behalf.

The investigation carried out by the Supreme Court proved the violation of the children's and parents' rights. The sum of all the irregularities derived from the lack of a clear legal framework is a key element of the State's responsibility. The State's lack of compliance

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<sup>17</sup> Only 32.4% of the subrogated daycare centers operate the facilities built for that purpose. *Íbid.*, p. 112.

<sup>18</sup> The resolutions issued by the Fire Department and the local Civil Protection Agency were from 2004, 2006 and 2007; which means that issuing the resolutions periodically was disregarded. The Fire Department should have supervised the building, according to NOM-002-STPS-2000, and did not. Neither was there a Police and Good Government Proclamation as required. *Preliminary Report, op.Cit.*, pp. 361-364.

<sup>19</sup> "Issuing that permit was necessary to previously verify that the facility had the technical and location approval [...] It has not been proven that Fernando Landgrave Gándara, Director of Urban Development from Hermosillo, in year two thousand and one, issued that document. Neither did Juventino Quintana and Javier Hernández Armenta, who worked as directors of that area from two thousand and three to two thousand and six, and from the latter to two thousand and nine, issue the document". *Preliminary Report, op. Cit.*, pp. 361-362.

with the law and the rights of the citizens makes it extremely important to expose the constant risk of human rights violations against the life, personal integrity, security and health of hundreds of children.