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Article

From clinics to courts: judicialization as a tool for access to the transgender process in Brazil

Dos consultórios aos tribunais: a judicialização como ferramenta de acesso ao processo transexualizador no Brasil

De los consultorios a los tribunales: la judicialización como herramienta de acceso al proceso transexualizador en Brasil

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Abstract

Objective: To analyze the decisions of Brazilian courts on the right to health of the transgender population. **Methods:** 49 collegiate decisions issued by the courts of justice of Brazil were analyzed, the object of which was access to health care for transgender people. This study included collegiate decisions whose entire content was published between 2013 and 2024. **Results:** The number of judicializations has grown exponentially in the last decade. Most of the cases deal with sex reassignment surgeries. The decisions have the profile of recognizing the right to health of transgender people. In the case of the Unified Health System, the decisions are based on constitutional rights, while for health operators, the courts have ruled that the procedures related to the transsexualizing process are not cosmetic interventions, but issues intrinsic to well-being and health. It can be seen that medical prescriptions and the quality of medical records play an important role in the decision-making process, and that compliance with the criteria established for the transsexualization process in Ordinance No. 2,803/2013 is a determining factor in the granting of requests. **Conclusion:** Judicializations find fertile ground in a scenario of state inertia in implementing equitable public policies. In the context of transsexuality, it can be seen that judicialization emerges as a fundamental instrument for the realization of the right to health, especially when considering the scenario of invisibility and denial of rights for this population.

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Keywords: Transgender Persons; Right to Health; Health's Judicialization; Health Law; Health Policy.

Resumo

Objetivo: analisar as decisões dos tribunais de justiça do Brasil acerca do direito à saúde da população transgênero. **Métodos:** foram analisadas 49 decisões colegiadas emitidas nos tribunais de justiça do Brasil, cujo objeto era o acesso à saúde por pessoas trans. Neste estudo, foram incluídas as decisões colegiadas que apresentavam o inteiro teor publicado no período entre 2013 e 2024. **Resultados:** nota-se que o número de judicializações tem crescido de forma exponencial na última década. Os processos, em sua maioria, tratam sobre as cirurgias de redesignação sexual. As decisões apresentam o perfil de reconhecer o direito à saúde das pessoas transexuais. No caso do Sistema Único de Saúde, as decisões estão embasadas nos direitos constitucionais, para as operadoras de saúde, os tribunais dissertam que os procedimentos relacionados ao processo transexualizador não se tratam de intervenções estéticas, mas de questões intrínsecas ao bem-estar e a saúde. Observa-se que a prescrição médica e a qualidade dos prontuários desempenham um papel importante no processo de decisão e que cumprir os critérios estabelecidos para o processo transexualizador presentes na Portaria nº 2.803/2013 são determinantes no deferimento das solicitações. **Conclusão:** as judicializações encontram solo fértil em um cenário de inércia do Estado na implementação de políticas públicas equânimes. No contexto da transexualidade, visualiza-se que a judicialização emerge como um instrumento fundamental para a efetivação do direito à saúde, principalmente ao considerar o cenário de invisibilização e negação de direitos para esta população.

Palavras-chave: Pessoas Transgênero; Direito à Saúde; Judicialização da Saúde; Direito Sanitário; Política de Saúde.

Resumen

Objetivo: Analizar las decisiones de los tribunales de justicia de Brasil en relación con el derecho a la salud de la población transgénero. **Métodos:** Se analizaron 49 decisiones colegiadas emitidas por los tribunales de justicia de Brasil, cuyo objeto fue el acceso a la salud por parte de personas trans. En este estudio se incluyeron las decisiones colegiadas que presentaban el texto completo publicado en el período comprendido entre 2013 y 2024. **Resultados:** Se observa que el número de judicializaciones ha crecido de forma exponencial en la última década. La mayoría de los procesos tratan sobre cirugías de reasignación de sexo. Las decisiones muestran una tendencia a reconocer el derecho a la salud de las personas transexuales. En el caso del Sistema Único de Salud, las decisiones se fundamentan en los derechos constitucionales; en cuanto a las operadoras de salud, los tribunales argumentan que los procedimientos relacionados con el proceso de transexualización no son intervenciones estéticas, sino cuestiones intrínsecas al bienestar y la salud. Se observa que la prescripción médica y la calidad de los historiales clínicos desempeñan un papel importante en el proceso de decisión, y que cumplir con los criterios establecidos para el proceso de transexualización presentes en la Ordenanza Nº 2.803/2013 es determinante para la aprobación de las solicitudes. **Conclusión:** Las judicializaciones encuentran terreno fértil en un escenario de inercia del Estado en la implementación de políticas públicas equitativas. En el contexto de la transexualidad, se visualiza que la judicialización emerge como una herramienta fundamental para la efectivización del derecho a la salud, especialmente al considerar el escenario de invisibilización y negación de derechos que enfrenta esta población.

Palabras clave: Personas Transgénero; Derecho a la Salud; Judicialización de la Salud; Derecho Sanitario; Política de Salud.

Introduction

Transgender is understood to be a set of identities that encompass gender variability, especially with regard to people who do not recognize or identify with the gender assigned at birth. It should be

noted that gender, unlike sex, is a social construction, in which its signs and expression have received important historical and cultural influence[1,2].

According to Vieira, Goldberg and Bermúdez[3] the construction of gender has been based on two single lenses: the figure of man/masculine and woman/feminine. The binary reading of gender not only assigns meanings to bodies, but above all has been used as an instrument of violence against dissident bodies.

Under the concept of abjection anchored by Kristeva[4] and Butler[5] every body or existence that escapes the hegemonic rule is placed in a space of "non-existence" or "non-recognition" in society. In today's society, we can see how much the social structure and institutions have sanctioned transsexual existences to inhabit this territory of abjection, by making their existences invisible and, above all, by erasing their rights.

The right to health, in particular, is an important social problem experienced by this community, since trans people face social and programmatic barriers in accessing services and are conditioned to contexts of violence, such as not using their social name, not recognizing their gender and not respecting their bodies[6].

Against this backdrop, recognizing the need to discuss a policy that takes into account the particular health needs of the trans population, the transsexualization process policy was instituted in 2008 in the Unified Health System (SUS) by means of Ordinance GM/MS No. 1707. Despite having important limitations in terms of guaranteeing access to medical technologies, this publication was considered an important legal milestone in guaranteeing this population's right to health, as it was the first institutional act of the state to legitimize the specific health demands of trans people in Brazil[7].

Due to the limitations in terms of legitimately guaranteeing access to medical resources such as hormone therapy and surgeries related to the transsexualizing process, the Ministry of Health redefined the transsexualizing process policy in the SUS through Consolidation Ordinance GM/MS No. 2, signed on September 28, 2017. This infra-legal norm innovates by presenting in its scope, for the first time, the set of medical technologies that make up the transsexualizing process to be accessed by this population through the Brazilian Health Care Network[8].

After the first decade of the policy's publication, it can be seen that the country still faces a major process of limiting access to specialized services in the transsexualizing process and, consequently, to hormones and surgeries. According to Vieira[8] Brazil currently has only 22 health services qualified by the Ministry of Health, distributed over 13 federal units, to provide specialized care for the transsexualizing process, most of which are outpatient services.

In addition to the limitation of access determined by the territorial centralization of services, there is an administrative delay in guaranteeing flows and documents that allow the states to organize the line of care for this population. Despite the publication of a policy that guarantees the availability of hormones, this technology has not been included in the National List of Medicines (Rename), which symbolizes an important weakness in guaranteeing access, since dispensing is subject to local arrangements.

The literature shows that the lack of access to medical technology conditions trans people to worse health outcomes and, consequently, to the process of becoming ill. The disruption of the right to health means that this community ends up resorting to clandestine clinics and the use of medication without a prescription and medical monitoring, bringing significant vulnerability and risk to the health of this population[9,10,11,12].

In this scenario, it is understood that guaranteeing access to the transsexualizing process for this population emerges as an important public health problem, noting that the imposed programmatic vulnerability, in addition to depriving the fundamental and human right to health, exposes these people to contexts that make them vulnerable to compromising their health[9,10,11,12].

Despite considering the transsexualization process policy as the main specific milestone related to the right to health of trans people, it is important to substantiate that the guarantee of full and equal access to health for trans people has legal backing in several other norms that instruct the right to health of the Brazilian population and the 1988 Federal Constitution of Brazil itself, which adds to the right to health the *status of* a fundamental right, in addition to a human right, given that Brazil is a signatory to the Universal Declaration of Human Rights.

Taking into account the gap faced by trans people in their access to the transsexualizing process of the SUS, this article is dedicated to the study of judicialization processes for access to medical technologies related to the gender transition process and the instruments and arguments that the courts have used in their decisions.

Methodology

This is an article that explains qualitative research based on documentary analysis, which aimed to understand how the courts have ruled in cases involving requests for access to the transsexualizing process. To do this, we searched the databases of Brazil's 27 courts for collegiate decisions on the subject.

The search was based on the descriptors transsexuality, transsexual and transgender. The inclusion criteria were: judgment date after 2013, due to the publication of the Transsexualization Process Policy in the SUS, through Consolidation Ordinance GM/MS No. 2/2017, and having the full content of the judgment available. The exclusion criteria were monocratic decisions, duplicate judgments and judgments which did not deal with the right to the sex reassignment process. After searching and applying the inclusion and exclusion criteria, the result was 49 judgments for analysis.

Data on the services authorized by the Ministry of Health was requested from the agency and acquired through the Access to Information Act.

With regard to ethical aspects, it should be noted that the analysis process was based on documents made available in the public domain on the websites of the state and Federal District courts of justice. In the process of writing the article, in order to protect the identity of the applicants, we opted for an anonymous analysis, focusing only on the inner content of the collegiate decisions, in a way that protects the identity of the subjects.

Results and discussion

Judicialization has been used in several countries as a tool to access health policies, goods and services and, consequently, has become an important instrument for making the Right to Health a reality[13, 14].

Even if we consider the Brazilian reality, in which the Right to Health is a fundamental and human right, enshrined in the 1988 Federal Constitution, we can see a growing surge in the number of judicialization processes with the aim of making this right effective and materialize[15].

However, even if we consider the right-guaranteeing nature established by judicialization in health, it is understood that important issues have been established in this context related to the limits

of individual and collective rights, budgetary impact, profile of claimants and, above all, their impact on public health policies[16,17].

In this sense, there is considerable scientific production that highlights the negative points of judicialization in the planning and management of public health policies. These studies show that judicialization can, in some respects, favour certain groups or accentuate inequalities in access to services[18].

On the other hand, other studies show that the shortcomings and gaps in the health system must be taken into account and that judicialization emerges from a movement in society to bring the right to health closer and more effective[19].

The problems faced in accessing health policies and services are a daily barrier for transgender people, who face not only social violence, but also institutional violence within health facilities[10, 11, 12].

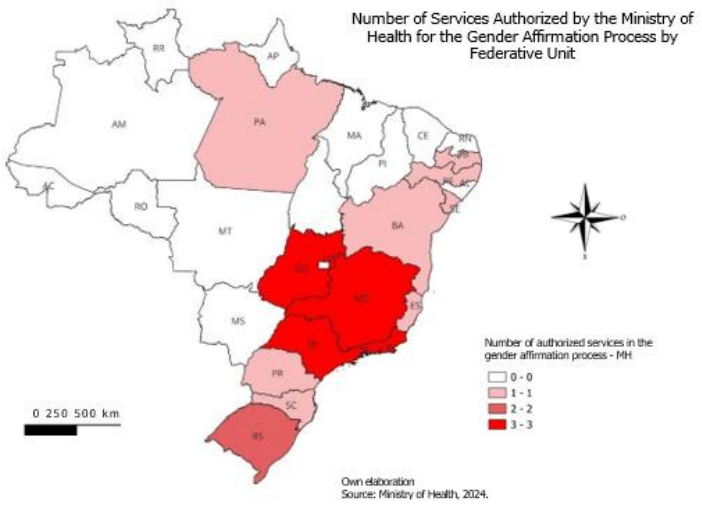
In addition to the non-recognition of their identity and social name, this community is also deprived of the right to health, which, despite being enshrined in the Brazilian legal system, has been widely denied to this population[8].

It is in this context that many trans women and men end up resorting to clandestine procedures and self-medication so that they can go through the process of gender transition. This exposes these identities to illness and worse health outcomes[8, 10].

In this respect, it is understood that judicialization is an important tool in the fight for the right to health of this population, in a country where the scenario of specialized care in the context of the transsexualizing process is still fragile and depends on windows of political opportunity for its implementation.

With regard to the services qualified to carry out the transsexualizing process, only 22 services are qualified and they are distributed across 13 federal units. The vast majority of services are centralized in the Southeast of Brazil. The North region has the biggest gap in care in this area, as shown in Figure 1.

Figure 1. Number of services qualified by the Ministry of Health in the transsexualizing process by federal unit



Source: own elaboration.

https://doi.org/10.17566/ciads.v14i2.1312

In this study, 49 judgments were used for analysis in which the purpose was to acquire, by judicial means, the right to the transsexualizing process - which according to GM/MS Consolidation Ordinance No. 2/2017 consists of specialized and multiprofessional medical care, hormone therapy and surgeries.

In the last 10 years, there has been an exponential growth in court cases involving medical technologies related to the transsexualizing process, as shown in Table 1. The number of judgments grew from 1 in 2013 to 11 in 2023. It should be borne in mind that the unavailability of information from the 1st instance makes it impossible to study in depth the true scale of this growth.

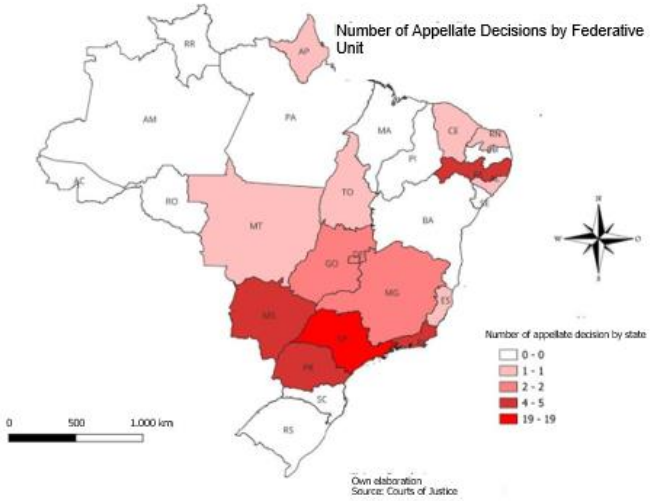
Table 1. Flow of judgments over time - year

Year	Number	%
2013	1	2,04
2014	1	2,04
2015	2	4,08
2016	2	4,08
2017	4	8,16
2018	0	0
2019	5	10,2
2020	5	10,2
2021	9	18,36
2022	7	14,28
2023	11	22,44
2024	2	4,08
Total	49	100

Source: own elaboration.

When stratifying the rulings by the origin of the judgments, one can see a significant concentration in the Brazilian Southeast, which is responsible for 55% of the judgments found for this study. The North region has the lowest number of 2nd instance judgments, and is the region with the largest void, as shown in Figure 2.

Figure 2. Distribution of judgments by federal unit between 2013 and 2024

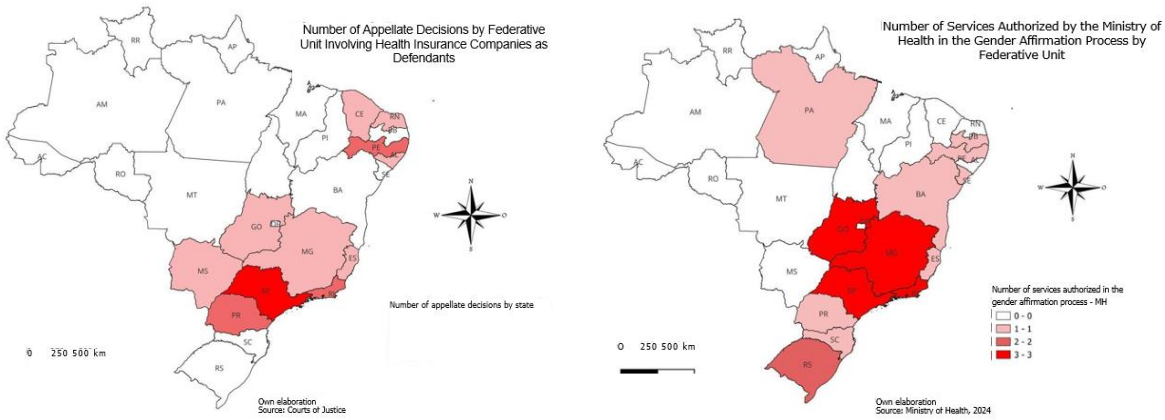


Source: own elaboration.

https://doi.org/10.17566/ciads.v14i2.1312

In the process of identifying the defendants, it was possible to determine that the majority of cases were directed at health operators (n= 36). The states of São Paulo, Pernambuco and Paraná had the highest number. In relation to SUS (n=13), the state with the highest number of decisions was Mato Grosso do Sul, as shown in the maps in figure 3.

Figure 3. Number of rulings, by federal unit, separated by the parties to the case



Own: elaboration.

In order to analyze the content of the rulings, the documents were separated into cases involving public entities and health operators. This separation made it possible to understand the decision bases and distinctions between these cases.

With regard to the judicialization of health plans, it can be seen that they are governed by the Consumer Protection Code. The appeals generally claim that the procedures involved in the transsexualization process are not included in the list issued by the National Supplementary Health Agency (ANS).

However, when analyzing the justification of the votes, it appears that it is already common ground among the courts that when there is a clear medical indication, refusal to cover the cost of treatment on the grounds that it is experimental or that it is not included in the ANS list of procedures is considered abusive.

Also present in the rulings is the issue addressed in Technical Opinion No. 26/GEAS/GGRAS/DIPRO/2021, which deals with coverage of the transsexualization or gender affirmation process by healthcare providers. The document states that trans people will be covered for some procedures as long as they are indicated by the treating doctor, *in verbis*:

> Although the transsexualizing or gender affirmation process is not listed in RN No. 465/2021, transgender beneficiaries or those with gender incongruence, diagnosed with sexual identity disorders (ICD10 F.64) will be assured coverage for some of the procedures that are listed in the current list and do not have guidelines for use, once indicated by their treating physician. In this sense, procedures such as MASTECTOMY; HYSTERECTOMY; OOPHORTECTOMY OR OOPHORTOPLASTY; THYROPLASTY, among others, which are listed in the list without a Usage Guideline and do not have any restriction on coverage expressed in the name of the procedure, under the terms of Art. 6, §1, item I, of NR. 465/2021, will

> be covered when requested by the attending physician, even within the scope of the transsexualization process[20].

The quality of the medical report emerges as an important item in the granting of requests, especially when emergency relief is required. In this sense, in addition to complying with the requirements set out in Ordinance GM/MS No. 2,803/2013, it was noted that the judges sought to identify how trans people were subjected to a risk to their lives by not having the procedure.

The poor quality of the professional reports and the absence of documents proving actual entitlement hindered the process of analyzing the merits of the issue. In this sense, it was observed in the process of analyzing the content of the judgments that, in many cases of dismissal of the appeal, it was not about the lack of recognition of the right to health of this population, but, above all, in relation to insufficient evidence.

In the requests for injunctive relief, the justification for granting it was based on the understanding that the risk of damage (*periculum in mora*) is revealed insofar as the unwarranted delay in continuing treatment directly influences the plaintiff's psychological and emotional health, and could trigger complications in the course of medical monitoring.

In the decisions in which the defendant was a public entity, the decisions were based on the fundamental rights to health, life and dignity. The judges emphasized that health is a right of trans people and that it is up to the state to provide the necessary resources for the monitoring and treatment of this community, as set out in Article 196 of Brazil's 1988 Federal Constitution.

In the decisions in which the state is ordered to carry out the procedure, the decision is made when there is state inertia, understanding that it is up to the Judiciary, when provoked, to ensure the implementation of the constitutional right to health and the protection of human dignity.

For the Judiciary, the social rights established in the Federal Constitution are not limited to guiding the development of public policies, but also create fundamental subjective rights for people, with full effectiveness and immediate applicability. It is in this sense that the defendant public bodies should be obliged to provide treatment to transsexual people. This is because the measure complies with legal precepts, especially the principles governing both constitutional and infra-constitutional rights applicable to requests.

In line with the decisions of the collegiate bodies, the Federal Supreme Court (STF) decided in 2024, by ruling on the Argument for Non-Compliance with a Fundamental Precept (ADPF) 787[21] that the Ministry of Health must ensure that trans people have access to specialized care through the SUS, with the aim of breaking down inequities in access to health for this population.

In this process of analysis, the social aspects related to transsexuality should not be disregarded, which condition these existences on the social margins, subjecting them to greater vulnerability to illness due to the conditions of housing, work, income, food and access to health care[20].

This field of abjection arises not only from the logic of making these existences invisible, but above all with the intention of preventing these actors from assuming spaces of representative presence. It is at this level that the health needs and particularities of this population are "shelved", since the lack of representation of this population in decision-making spaces does not allow this agenda to be discussed[22].

In addition, there is a lack of population data on gender identity in Brazil. The lack of census data on this population is also an instrument for making these existences invisible and suppressing the state's responsibility to produce public policies for social justice.

Although the country has made progress with the publication of Ordinance GM/MS No. 2,803/2013, which redefines the transsexualizing process in the SUS, placing surgery and hormones as therapeutic possibilities, there is an important implementation GAP, which weakens access to the gender transition process.

It is against this backdrop that we see the growing number of lawsuits in the context of the transsexualizing process, where the main object of the lawsuits is intervention surgery and access to hormones.

In the judgments analyzed, the plaintiffs requested access to the following technologies: Facial feminization surgery (04), Sex reassignment surgery (19), Mammoplasty surgery with implants (02), Masculinizing mastectomy (20), Vocal surgery (01) and the drug Testosterone Undecylate (03).

In the analysis process, the rulings were grouped based on the decisions presented by the panel of judges. As a result, it was possible to characterize that the majority (83.6%) of the lower court decisions were in favour of the right to health of transgender people, determining that the state or health insurance providers should release the requested procedures, as shown in Table 2.

Table 2. Final decisions of the panel of judges

Decision	Number	%
Upheld the lower court's decision in favor of the plaintiff's right to health.	34	69,38
Upholds the lower court's decision against the applicant's right to health.	7	14,28
Reinstates the lower court's decision in favor of the applicant's right to health.	7	14,28
Reverses the lower court's decision in favor of the plaintiff's right to health.	1	2,04

Source: own elaboration.

The data shows that Brazilian courts have been increasingly called upon to rule on issues related to public health, often taking on the role of effective public policy makers. However, in the case in question, it can be seen that the manifestations emerge from the state's inertia in guaranteeing minimum conditions of access and assistance to this population[23].

Although access is often difficult for any citizen, in the case of the trans population there are aggravating factors such as stigma, discrimination and violence based on gender identity, as Vieira[8] shows. Situations of violence and barriers in health services discourage future searches and insertions, which makes them seek alternative means for the transition process, such as guidance from companions, friends and clandestine clinics[10].

The trans population doesn't need a new health system, since fair, comprehensive and universal care is guaranteed by the Brazilian Constitution of 1988, with the creation of the SUS. However, it is

essential to reconfigure the health system, which, for the most part, is still far removed from the real health needs of the trans population.

It is necessary for the Executive to understand its role as executor of public policies that provide equity in health, encompassing the needs related to the process of gender transition in the country as ensured by the Federal Constitution of 1988, the organic law of the SUS Law No. 8,080/1990 and Ordinance GM/MS No. 2,803/2013 that redefines the transsexualizing process.

Conclusion

The right to health care for trans people is part of the fundamental right to health guaranteed by the Brazilian Constitution of 1988, as the paradigms of universality (for all), equity (without unfair discrimination or prejudice and with fair discrimination for the vulnerable) and comprehensiveness (welcoming all needs) are guaranteed.

However, despite these guarantees, the reality faced by the trans population reveals a health system that is flawed and insufficient to meet their specific needs. The lack of adequate public policies and the exclusion of trans people from adequate healthcare are clear examples of the state's inertia in promoting the real inclusion of this population in the SUS, which compromises the realization of their rights.

The judicial confrontation of this scenario has required the actions of the public authorities to be focused on guaranteeing the implementation of the transsexualizing process policy in the SUS, overcoming institutional resistance and guaranteeing that the right to health, as provided for in the Constitution, is effectively universal and respects equity and comprehensiveness.

It is essential that the state assumes its responsibility to promote inclusion, dignity and equity in health care for trans people, by creating specific programs that address the various gender issues and offering treatments that truly meet their needs (integrity).

In the case in question, it is necessary to highlight that the fragility of the care process for this population and the state's administrative delay in implementing this public policy makes the judicialization process a legitimate tool for reducing the discrepancy between formal law and lived law.

Conflict of interest

The authors declare that there is no conflict of interest.

Authors' contribution

Vieira VF contributed to the conception/design of the article, data analysis and interpretation, writing of the article. Lamy M contributed to the conception/design of the article, analysis and interpretation of data, writing of the article, critical revision of its content, approval of the final version of the article. Vitoriano PHS contributed to drawing up the graphs using the Qgis *software*, critically reviewing the content and approving the final version of the article.

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