Inclusion: from the school to the court – different point of view

Dalla scuola al tribunale – punti di vista differenti

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abstract

In the last 15 years the Administrative Court (TAR) become the most used tool to solve conflicts versus the school system. This study analyzes litigation between school and families with student with SEN, SLD and disabilities in Lombardia between 2010 and 2018.
Data were divided in two macro areas: Law 170/2010 (SEN and SLD) and Law 104/92 (disabilities) and divided according to motivation for the legal action and type of the school.
It was decided to conduct a quantitative, but also qualitative analysis to reveal the motivation which compelled families to refer to the TAR to solve their conflict against the School System.
The outcome of the research is totally different for the two laws since they differ in their content and in the population they protect. The analysis about Law 170/2010 lead to the question if the TAR is the right choice to solve the conflict since the majority of the judgmental acts did not have a positive result.
The results about Law 104/92, point out that almost all the appeals proposed are connected to an inadequate number of hours of special needs teacher. The use of the TAR seems to be a mechanism which guarantees a highly success rate, also due to its administrative and bureaucratic aspect.
What is evident is that communication between school and families should be improved on qualitative level and mediation inside the school should be taken in consideration and used before the crash of the trust in the School System. The cooperation between school and families should be corrected and ameliorated.

Key-words: Court - Special Education needs – Dyslexia – Disabilities

Esiti di ricerca e riflessione sulle pratiche
(A.ricerca qualitativa e quantitativa; B. progetti e buone pratiche; C. strumenti e metodologie)

1. Introduction

In the past ten years we experienced an exponential growth of families with children with special needs (Law 170/2010) or disabilities (Law 104/92) referred to the Court (Regional Administrative Court, It. *Tribunale Amministrativo Regionale*, TAR)[1] to try to resolve arguments with teachers and school system. Quantitative data analyzed by Bettinelli M., Cardarello R. (2019) showed that, although a higher number of families with children with disabilities and special needs was expected, families with children without any kind of pathological problems or special educational needs were unexpectedly the majority to refer to the court.

Also Mueller, T. G., & Carranza, F. (2011) in their study focusing on special education and litigations in court found no association between the disability of the student and the litigation. The study also underlined that the most represented disabilities in the processes were specific learning disabilities.

In this study we focused specifically on the cases of families with children in needs and only those were examined. As in the previous study (Bettinelli & Cardarello, 2019) data from the period between 2010 and 2018 were selected. It was decided to conduct a quantitative, but also qualitative analysis to reveal the motivation which compelled families to refer to the TAR to solve their conflict against the School System.

A broad description of cases of conflict between families of students with disabilities and schools can be found in the literature (Fish, M. C. (1990); Feinberg, E., Beyer, J., & Moses, P. (2002); Cope-Kasten, C. (2013); Reiman, J et al. (2007); Hazelkorn, M., Packard, A. L., & Douvanis, G. (2008); Caretti, A. M. (2005)). American literature is more developed in comparison with the European one. American literature is mainly focused on methods of conflict resolution and the majority of the conflicts are solved inside school, without the need for lawyers and interference of legal representatives and court. Dussault (1996) argues that the costs of the resolution of the conflict outside the school system are very high, additionally to the emotional cost for the family and the unpleasant situations experienced by the student.

Mueller, T. G., & Carranza, F. (2011) emphasize the costs of the process hearings which often create a major strain on the parent–district relationship. In their article they cite a report written by the U.S. Department of Education (2002) which described this problem further: "The threat of litigation alone has costs for teachers, students and taxpayers: the cost of attorneys in actual hearings and court actions; the cost of attorneys and staff time in preparation for cases that do not reach the dispute resolution system; and the cost of paperwork driven by districts believing that extensive records help prevent lawsuits. These costs and the dissatisfaction with the system merit serious reform" (pp.132).

1 In Italy there are 21 regional administrative tribunals (Tribunale Amministrativo Regionale, i.e.TAR), one for each region. In the biggest regions a separated section can be found, as in Lombardia where there are two courts: Milano and Brescia. As reported by the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union the administrative courts have jurisdiction over the protection of legitimate interests against the public administration, including the protection of subjective rights concerning administrative decisions, acts, agreements or behaviors adopted by public administrations. Report for Italy can be found at http://www.aca-europe.eu/en/eurtour/i/countries/italy/italy_en.pdf.

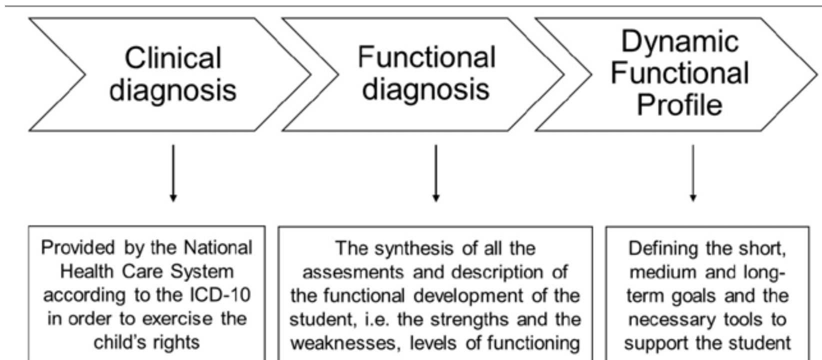
Resources used to resolve the legal conflict outside the school could be invested in the improvement of pedagogical activities. Thus, the need is emphasized to design strategies and solutions to prevent conflict and to resolve it at the school level when it becomes inevitable.

Globally, but also at the European level, it is evident that each school system supervises the access and inclusion of disabled students in different ways that leaves space for specific problems strictly related to the context.

In this exploratory research data connected to the Law 104/92 and data connected to the Law 170/2010 were analyzed separately. Since these two laws differ in their content and in the population they protect, it was reasonable to expect that also motivation of the conflict would be different.

LAW 104/92

An explanation of differences between the two laws is needed to understand the analysis of the data. The biggest difference between Law 104/92 and Law 170/2010 lies in the idea that Law for Handicap (104/92) covers all the aspects of the life of a child. This law tackles disability issues and ensures social, economic and legal protection. More specifically, the law ensures specific individual rights, provides assistance and ensures full integration. This law covers educational interventions for pupils with physical, mental and sensory impairment.

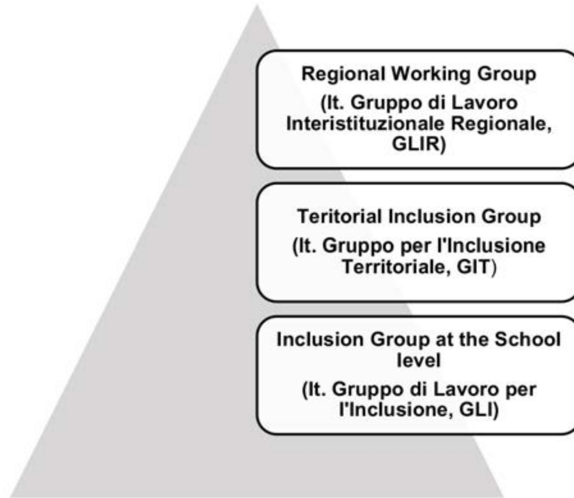


Scheme 1: From clinical diagnosis to Dynamic Functional Profile

Scheme 1 illustrates the process of getting the Clinical and Functional diagnosis ending with the Dynamic Functional Profile which defines goals and tools, not only in the educational system, but across all the life areas and activities (e.g. school system, sports, but also work settings later in life). From 1st September 2019 Functional Profile is introduced which replaces and covers both, Functional Diagnosis and Dynamic Functional Profile[2]. For school children, after this clinical procedure is completed, the focus is changing from a clinical to educational and pedagogical. As

2 Decree n. 92/2019, integration of decree n. 66/2017, for the law 107/2015, entered into force in September 12, 2019.

pointed out in Ianes (2008), further steps are based on a pedagogical and psychological perspective, and not a medical and prognostic one. The school system forms specialized working groups who are supporting the inclusion process, from the regional to the level of the school that the child attends (Scheme 2).



Scheme 2 School system: specialized working groups

For each disabled student a specific working group is the formed – Integration Working Group which includes the director of the school, a special-needs teacher, class teacher and all other experts who are supporting the student (e.g. psychologist, pedagogist, etc.). This team is not restricted only to the experts working at the child's school. This group delivers Dynamic Functional Profile (It. Profilo Dinamico Functionale, PDF) and Individualized Educational Plan (It. Piano Educativo Individualizzato, PEI). Its purpose is to fulfill the right of the child to be educated according to the skills, and regardless of the disability. Depending on the severity of disability, it is decided about the number of hours of Special Needs Teacher the child will be provided. After this decision is made, the director of the school sends official request to the Regional School Office with the number of Special Needs Teachers needed.

The IEP integrates school and extra-school activities, starting from didactic and educational projects. The IEP focuses on the class activities. The aspects that have to be defined in the IEP are didactic goals; working paths and timing; methods, tests and assessment; family involvement; support tools. One of the most important aspects of the IEP is the plan of hours of Special Needs Teacher and Educational Support – the total number of hours and detailed weakly plan of those hours.

Law 170/2010

Law 170/2010 recognizes dyslexia, dysgraphia, dysorthographia and dyscalculia as specific learning disorders (SLD). This Law, contrary to Law 104/92 concerns only about learning inside school system and/or some other specific institution (e.g. exams in courses of foreign languages, driving license test). The National school

system is supposed to find the right methodology and didactics in order for the students with SLD to achieve their full educational potentials. Subsequent guidelines published in July 2011[3] specify educational and didactic measures to support the teaching and learning processes for pupils affected with dyslexia, dysgraphia, dysorthography and dyscalculia at various degrees of development. Besides providing the pedagogic and didactic measures necessary to guarantee their educational goals, schools are also responsible for the early detection.

The Ministerial Directive of 27 December 2012, on 'Active measures for pupils with Special Educational Needs (SEN) and community organizations for inclusion', cites all the initiatives taken for different types of students with special needs: students with assessed disabilities, with specific developmental disorders or with socio-economic, linguistic and cultural disadvantages. This directive tends to cover different types of disadvantages in students with special needs, lifelong or temporary, as part of a developmental disorder or as part of acute health issues (e.g. abrupt emotional difficulties connected to momentarily family problems). This directive covers socio-economic, cultural and linguistic disadvantages. The directive specifically accounts for developmental language disorder and for intellectual functioning. As Ianes and Cramerotti (2013) underline, with this document the Italian school system is finally strongly stimulated to increase the inclusion for students without medical issues proved by diagnosis, moving from the pathological/medical models towards the right to individualized and personalized education, taking into consideration the issues that Ianes raised already in 2008: "an ordinary individualized teaching offered when needed…" (Ianes, 2009, p. 29, also in Ianes & Canevaro, 2008, p. 20).

To support the law 170/2010 MIUR also published:

- Ministerial Circular n. 8, March 6, 2013.
- MIUR Note June 27, 2013 "Annual plan about inclusion. Ministerial Directive of December 27, 2012 and Ministerial circular n.8 /2013.
- Ministerial note n.22 November 2013, "Tools and skills for students with special education needs, school year 2013-2014". Explanation.

SEN can be identified in two different ways:

- family brings to school documentation about the child difficulties and the school team decides if it is necessary to include the child in the SEN system;

or:

- the school system can identify a child with SEN also without any certification or documentation, and on pedagogical basis after a period of observation, decides to include the child in special educational needs. The school team will share the decision with the family.

Families with children with SLD must bring to the school all the documentation in order to get the rights explained in the law 170/2010 and start the process of getting SEN. For other disadvantages, the school has autonomy in deciding would the child be included in SEN or not, thus this decision needs to be verbalized in an

3 Minist. Decree no. 5669, enforcing Law no. 170/2010

official document. This process is in detail explained in Bettinelli and Cardarello (2019).

SEN are introduced exclusively at the school level. Therefore, while the acronym DSA (it. *disturbo specifico di apprendimento* – specific learning disabilities) is used by clinicians only, when there is a certain diagnosis of SLD with code F81.0 (dyslexia), F81.1 (dysortografia), F81.2 (dyscalculia) F81.8 (dysgraphia), F81.3 belonging to the ICD-10 (as explained above), the acronym SEN (or it. *bisogni educative speciali*, BES) is used exclusively in the school system and it does not indicate a diagnosis. Regardless, SLD are included in SEN law.

When a child is included in the system of special educational needs a Personalized Educational Plan (PDP, It. *Piano Didattico Personalizzato*) should be done. PDP is the programming document used by the school to define the intervention regarding the student with SEN. This document is obligatory, and the school must articulate a personalized plan for all the students with specific learning disabilities. Content and timing to prepare the document are explained and indicated in the Guideline of 2011[4]. PDP must be done before the first 3 months of school year[5].

The relevance of the PDP is underlined in the Guidelines published by the MIUR (http://www.istruzione.it/urp/dsa.shtml) where the minister defined the document as "*the programming document through which the school defines all the interventions towards students with SEN and specific learning disabilities. The document is obligatory for students with SLD (…) the timing of the projecting must not be longer than the first 3 months of school."*

PDP has to be developed with the participation of the family and the student and it is an official agreement between the family and the school. In the document compensative tools, strategies, evaluation methods and test methods must be clarified. The aim of this document is enabling the student to achieve adequate school results comparable to his peers and to ensure his/her inclusion within the educational environment. The law underlines the importance of holistic approach to the student learning development, what implies participation of all teachers who are responsible for the individual student, careful planning and focusing to ideas of individualization and personalization of learning.

In this study we examined the cases of families referring to the TAR, thus it is important to introduce the role of this court in the process, it's specificities and terminology.

The nature of the administrative documents of the judgments made by the School towards the students implies that in order to contest their legitimacy, the interested party (the student if he/she is 18 years old, the parents in the exercise of the parental faculties) may request their removal or modification in administrative terms from those who made them (class team – director of the school) or from authorities of the superior level (peripheral offices and MIUR central offices) with an appeal in self-defense. The other possibility is to appeal to the court for annulment or to the TAR competent by territory and, if needed, to appeal to the Council of State.

When referred to TAR, the judicial action is proposed with an appeal against the Institute that adopted the administrative act (i.e. the School) which is assumed to

4 Guideline linked to DM 5669/2011 (pp. 6-7)
5 (https://www.miur.gov.it/dsa)

be illegitimate. The action has to be notified within sixty days from the official notification of the act, and it has to be filed through the telematic platform (PAT) with the patronage of a lawyer. After the appeal is proposed, if detailed studies have not been prepared, a discussion hearing is fixed within one month and followed by the decision of a panel of three judges. The issued sentence is revocable, modifiable and can be appealed against at the Council of State (It. *Consiglio di Stato*).

However, it is important to note that the waiting time between the hearing and the decision depends on the workload of the TAR (also up to five years). The appellant who is afraid of suffering serious and irreparable damage during the time necessary to reach the decision on the appeal, may request the TAR to adopt the precautionary measures which appear, according to the circumstances, more suitable to ensure the effects of the future decision.

In the event of the extreme seriousness and urgency that does not allow to wait until the pre-trial hearing (e.g. the date of the final exams), the applicant can ask the President of the TAR to adopt provisional precautionary measures valid until the date of the collegiate pre-trial hearing. The President provides with a revocable or modifiable but non-contestable decree (artt. 56 and 61 CPA).

The precautionary measures are legitimate until the decision on the merits of the appeal, which may also have the opposite outcome. In fact, the precautionary judgment mainly assesses the existence of the reasons for the urgency and the seriousness of the damage that the applicant would receive from a decision that comes a long time later. In this case, only a very brief assessment of the basis of the applicant's reasons is made. The non-lasting effects of the precautionary measures can be best explained in an example: admission to the next class arranged as a precautionary measure will be effective until the decision on the merits, years later. If the non-admission to the next contested class will be later confirmed by the sentence of the TAR, the entire intermediate school path based on precautionary admission would fall and the student will need to resume the course of study from the year of non-admission.

2. Method

2.1 Procedures

As for the data analyzed in Bettinelli M., Cardarello R. (2019), it was decided to focus to the period between 2010 and 2018 in Lombardia, taking into consideration the two headquarters of TAR: Milano (covering the cities of Como, Lecco, Lodi, Milano, Monza e Brianza, Pavia, Sondrio, Varese) and Brescia (Cremona, Brescia, Bergamo, Mantova), which are sufficiently extended territories to give a fairly precise overview of litigations between school and family.

To collect data internal search in the web site of Administrative justice (https://www.giustizia-amministrativa.it) was used. The keywords were: MIUR, Law 104/92, Law 170/2010, SLD (DSA), SEN (BES), PDP, PEI.

All the administrative acts found in the internal search were analyzed together to have a complete view of the issues which led to the conflict. Sentences were analyzed separately since only few of them can be referred to the year when the litigation started and most of them referred to the previous period, before 2010 (what means that the period taken into consideration is much longer than the one

analyzed in this paper). For the Law 170/2010 an increased number of cases moving forward from the year 2010, when the law was made, is expected. First cases referring to the SLD can be found starting from the third year of schooling (8-year-old child) when it is possible to establish the first diagnosis. For the Law 104/92 data from kindergarten period to secondary superior school were considered.

The author of the paper used the Excel program to analyze the collected data and extracted the information by detailed reading of all the documents found by the internal search inside the Administrative Justice website.

As reported above, this study is an exploratory preliminary research which intends to investigate the quantity of cases of litigation between the families with students with disabilities or SLD and school and categorize the cases according to the motivation for the legal action, the type of school and according to the specific law they belong to.

We assume that most cases will be connected to children with SLD and accordingly to the Law 104/92. Further we assume that cases will be focused on the lack of special needs teacher hours; we assume that more cases should be found in the secondary schools (scuola media; scuola superiore) than in primary schools, and that there will be more cases in technical and professional schools than in lyceums.

In the text we are referring to primary school (scuola primaria) for students from 6 years old till 10 years old[6], to secondary school of first level (scuola secondaria di primo grado) for students from 11 years old till 13 years old[7], to secondary school of second level (scuola secondaria di secondo grado) for students from 14 years old till 18 years old[8].

It is important to underline and specify that the language used in this paper is strictly connected to the language found in the data which were analyzed, thus to the legal discourse used to communicate the decisions of the court. We cautiously emphasize that technicians, teachers and pedagogists may find it sometimes inappropriate, and most of the time not "inclusive". However, it needs to be understood that in this context, court is interested in inclusion only from the legal point of view, which means that the language used is inseparably linked to the student's diagnosis, or the "label" given to the student according to his diagnosis[9]. We need to acknowledge that this goes against the efforts and notion of inclusion itself but reflects the current state of art of the administrative and judicial system.

It is a different way to look at the subject but nevertheless for all experts included in the life of the child with SLD (and their parents) it is very important to understand and to be familiar with this different perspective used by lawyers and judges.

6 https://www.miur.gov.it/web/guest/scuola-primaria.

7 https://www.miur.gov.it/web/guest/scuola-secondaria-di-primo-grado.

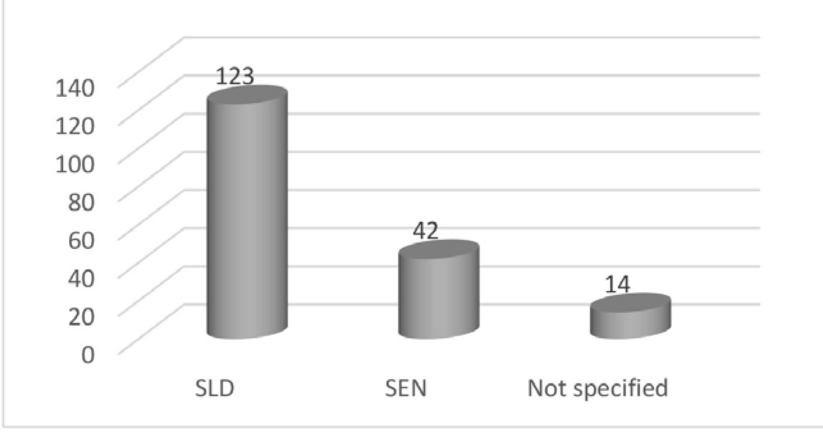
8 https://www.miur.gov.it/web/guest/scuola-secondaria-di-secondo-grado.

9 Inside the documents analyzed can be found "*affetto da dislessia*" – "affected by dyslexia", "*malato di dislessia*" – "sick…", "*soggetto affetto da un ritardo connesso a un disturbo specifico di apprendimento" - "person affected by intellectual disability connected to a specific learning disability"*, "*Affetto da BES/con diagnosi di BES*" - "Affected by BES/ with BES diagnosis".

3. Analysis and interpretation of results

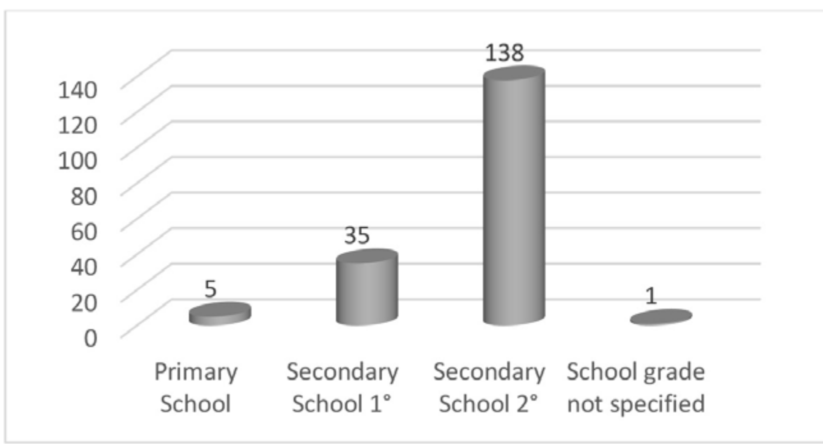
In the period between 2010 and 2018, 176 court orders were collected for Brescia and 681 for Milano. The total of data analyzed is 857.

Law 170/2010 Data analysis



Graf. 1 Law 170/2010 SLD – SEN 170/2010

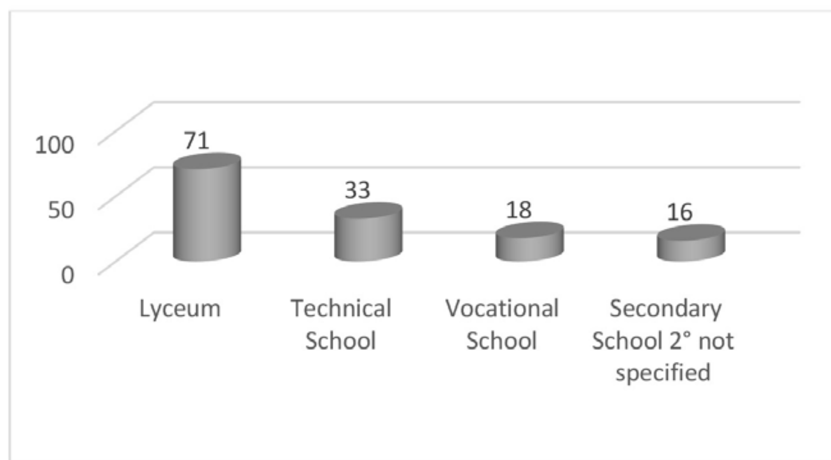
Between 2010 and 2018, 179 judicial orders were made in the TAR of Lombardia. Analysis showed that out of 179 cases arrived at the TAR, 123 referred to the specific learning disabilities, while 42 referred to the special educational needs. In 14 acts the specification of the disorder was missing, thus it was only possible to link them to the Law 170/2010, but not specifically to SLD or SEN [Graf. 1].



Graf. 2 - Distribution of litigation connected to school grade between 2010 – 2018 Law 170/2010

Graf. 2 shows the distribution of the litigations between school and family by the school level. Primary school is the least represented in the sample. This can be explained by the fact that the first diagnosis of SLD cannot be given before the

beginning of the third year of school[10]. However, this explanation does not account for SEN where the law number of cases should be explained in different fashion (communication between family and school, establishing of parent-school relationship). It is quite clear that the highest number (138 on 179) of litigations between school and family is at the secondary level of school where there are at least 100 more cases than at any other school level.

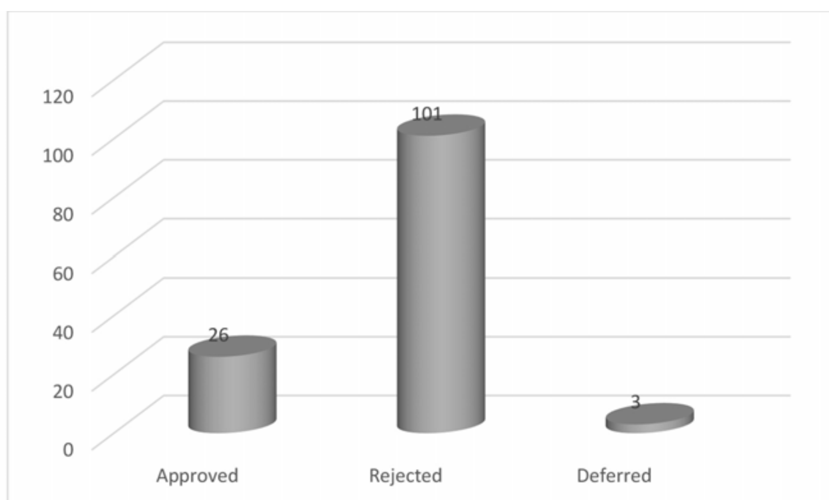


Graf. 3 Type of secondary school of second grade – Law 170/2010

Lyceum is the most represented type of school of secondary level while vocational schools are the least represented in the sample (Graf. 3). Technical schools are moderately (33 on 138) represented. For 16 cases only the information about the school level was provided (secondary school of second grade), but the type of the school was missing. As pointed out in Bettinelli & Cardarello (2019) the possible explanation of the higher number of litigations in Lyceums can be found in higher social position, family's stronger motivation and expectations in school result than in other types of secondary schools. Supposing that students in other types of school more often come from lower socio-economic or disadvantage backgrounds, this conclusion might be supported by Dusi (2012, pp. 18): *"If middle-class parents are able to make use of a common culture, networks of friends and the type of knowledge that allows them to understand the school system and its language, migrant families and those of a lower socio-economic status have very little information at their disposal regarding the organization of the school, disciplinary practices and so on. Teachers and school personnel tend to take this information for granted, which only aids in strengthening inequalities of already existing knowledge…".*

10 Consensus Conference (2007). Disturbi Evolutivi Specifici Di Apprendimento. Raccomandazioni per la pratica clinica. Montecatini Terme, 22-23 settembre 2006, p.6.; Consensus Conference, (2011). Disturbi Specifici Di Apprendimento, p. 8.; PARCC (2011). DSA. Documento d'intesa, Quesito A5, p. 11; https://www.miur.gov.it/documents/20182/187572/Raccomandazioni+-cliniche+sui+DSA.pdf/9e6cb7ee-8046-4aa7-be3c-ef252a87bccd?version=1.0&t=1495444427432

It should be underlined also that students, before coming to secondary school, should already have a diagnosis, so the problem might also be in poor counseling when the student is choosing the school at the end of the secondary school of the first level. Like reported in Barbiero (Barbiero et al. 2019) there is also a small group of students who get their first diagnosis in second level of secondary school when educational demands are increasing so difficulties linked to the SLD are becoming more evident and action is needed (even though for most students it is too late).



Graf. 4 Outcome of the first phase of process proposed to the TAR between 2010 and 2018. Law 170/2010

What emerges is that families who appeal to the TAR based on the Law 170/2010 are unlikely to obtain a favorable result (Graf. 4). Only 26 applications were accepted and 101 were rejected in the first evaluation phase.

The outcome of the judgments reflects the legal process: in the matter of Law 170/2010 when introducing the precautionary measures, it is difficult to demonstrate that the applicant receives a “serious and irreparable damage” (art.55 CPA) from the failure to accept the application and the family request is rejected. This outcome is due to the abstention of the judges from replacing the teachers in the technical evaluations. If a student lost a year, even if the school has not done well in providing the student with SLD or SEN the appropriate tools for his/her learning, it is not possible to admit to the next grade or higher level of education a student who has not reached the expected level of competences for that grade or has not reached school maturity.

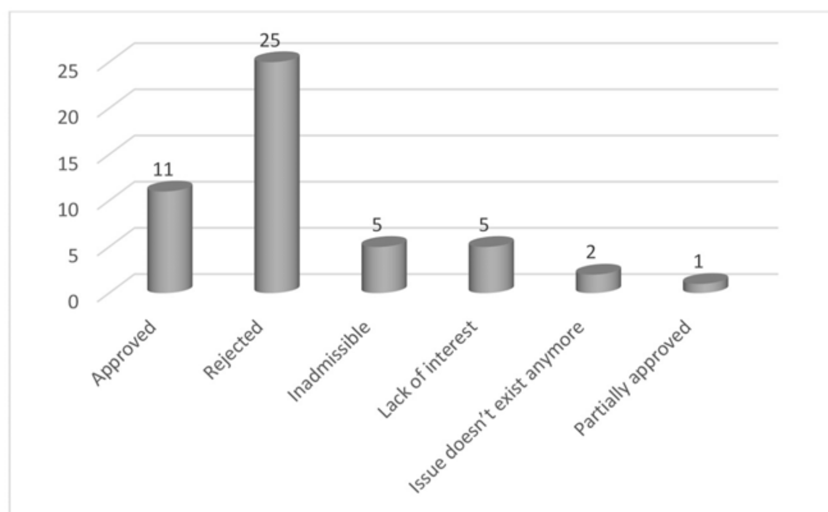
Inside the decree n. *00513/2017 - 00958/2017* we can find a good example of one of the issues described above. Inside the act is it possible to read: “ *considered the opposite interests (*school and family*) also in order to do not to create further and new critical factors for the psychological balance of the student, which the precautionary request be admitted in the next level of school, although under condition, cannot be accepted…”.*

The decisions of the TAR can then accept the appeal in whole or in part, both in the precautionary phase and in the verdict; declare the appeal inadmissible (inam-

missibile – inadmissibility – There is some mistake in the request) or inadmissible (irricevibile – the lawyer should not have done the request in the way he/she did)when the TAR ascertain the lack of the conditions for the legal action; declare the appeal inadmissible (improcedibile - inadmissibility) when in the course of the proceedings the interest of the parties in the decision ceases (art.35 CPA) and declare the matter of the dispute resolved if the claim of the appellant is fully satisfied (art.34 ult.comma CPA), for example when the school in advance, before the decision of the TAR, cancels the contested provision (e.g. school failure).

In the last two situations (It. *inammissibile* e *improcedibile*), the proceed ends without a ruling (holding) by the Judge. The difference between the "lack of interest" in going on with the procedure – the issue which caused the problem is solved without the judge and *cessata materia del contendere* (the issue doesn't exist anymore) is made by the presupposition of a definitive cancellation of the damage act by the School, before the court hearing – often after the acceptance of a precautionary act that could make the appeal merit founded.

For the verdicts (Graf. 5), the results confirm those presented at the Graf. 4.

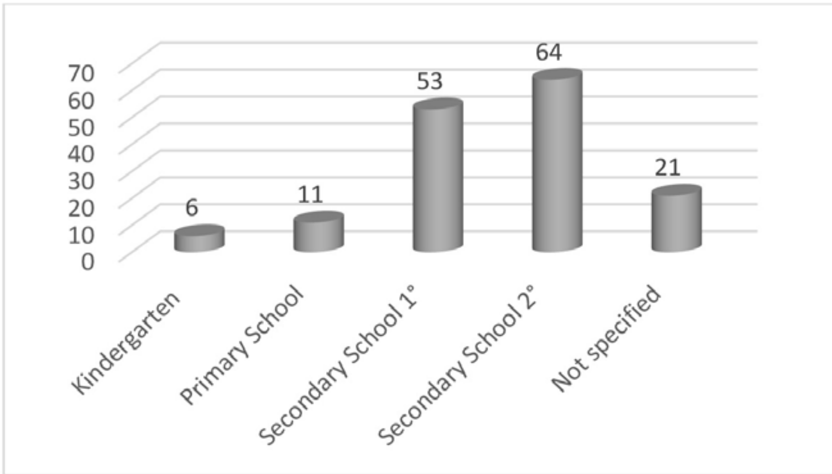


Graf. 5 Outcome of the verdicts TAR Lombardia between 2010 - 2018. Law 170/2010

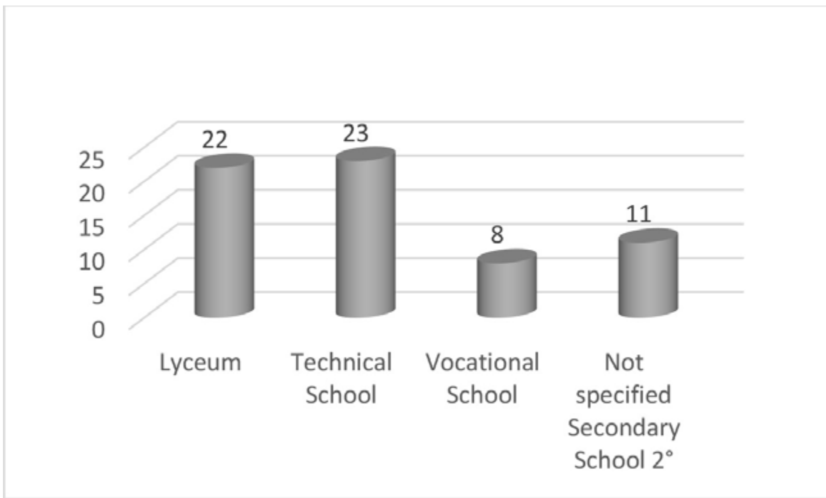
Law 104/1992

In the period between 2010 and 2018 in TAR of Lombardia (Brescia and Milano) there were 155 judicial orders linked to the Law 104/1992.

As it can be seen in the Graf. 6, the lowest number (6 on 155) of cases is present in Kindergarten and Primary School, while there is an increasing number (117 on 155) at the secondary school level. In 21 analyzed judicial orders the level of school was not indicated.

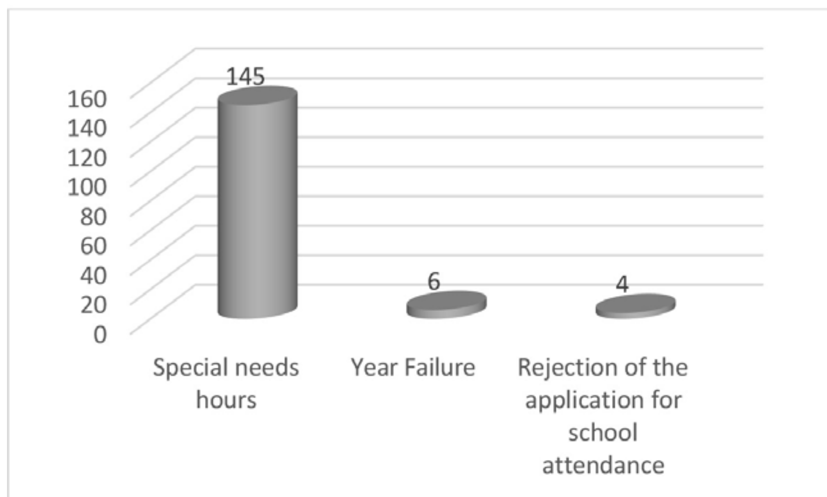


Graf. 6 Distribution of litigation connected to school grade between 2010 – 2018- Law 104/92



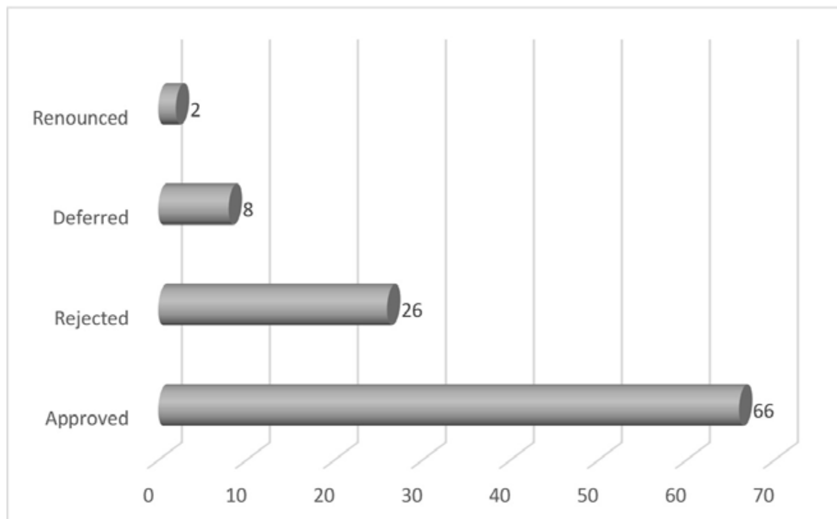
Graf. 7 Type of secondary school of second grade – Law 104/92

When observing the type of the secondary school of second grade, there is a bigger number of litigations in Lyceum (22 on 64) and Technical Schools (23 on 64) than in Vocational Schools. In 11 judicial orders the type of school was not specified.



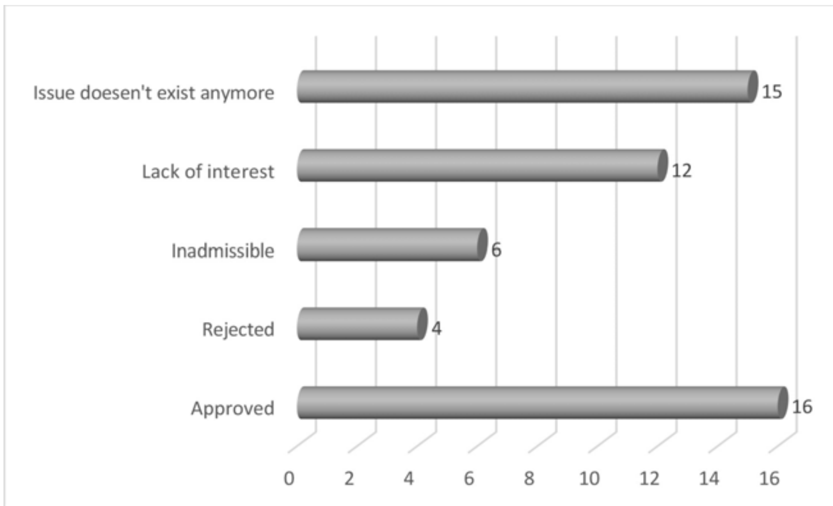
Graf. 8 Motivations of litigation TAR - Law 104/92

Three motivations of litigation could be found in the data: hours of special needs teacher, school failure and rejection of the application for school attendance. As it is shown in the Graf. 8 the vast majority of the litigations (145 of 155) are connected to the hours of special needs teacher.



Graf. 9 Outcome first phase TAR process - Law 104/92

In the first phase of the process for the Law 104/92, 66 cases were accepted and 26 rejected.



Graf. 10 Verdicts Tar Lombardia between 2010 and 2018 - Law 104/92

49 verdicts were analysed. 16 verdicts were accepted, meaning that family's request was proved to be correct, while only 4 were rejected. The two other outcomes were proceed without a ruling of the judge, all together 27 cases. The lack of interest in the continuation of the judgment for the appellant is often a result of non-acceptance of a precautionary request or the family choses other solution (e.g. changing the type of school).

4. Discussion

The outcomes of the analysis of the data suggest to divide the topic in two macro-areas according to the Law that was in the focus, since the critical issues for the two laws were different, as well as the motivations for the litigations in the analyzed cases.

For the Law 170/2010, several areas can be underlined:

– Malfunction of both system, school and family, was present in the data.
– The majority of the judgmental acts did not have a positive result.
– Families mostly complained about the lack of the personalized educational plan, difficulties in demonstrating the correct application of PDP and evaluation of a student with SLD and SEN.

To thoroughly understand these issues, it is of great importance to consider the timing before the judgment and the conditional admission to the superior grade of school, the conditions that are leading to this decision and the consequences for the student and the family that this decision can have. The analysis also emphasized the importance of the educational consultancy in choosing the secondary school, in general, but even more importantly for the students with SLD. Newcomer and Zirkel (1999) conducted a study that analyzed 200 due process hearings held between 1975 and 1995. They found, not only that students with learning disabili-

ties represented the highest disability category in due process hearings, but also that placement was the primary issue of dispute.

As we pointed out, the majority of the procedures at TAR have a negative ending for the family. Different kind of reasons can be identified. The most evident reason is the extreme difficulty in proving that if the PDP is not respected and the compensatory tools are not granted to the student with SLD or SEN, the damage in student's learning is most of the time irreparable, and the student will most of the time fail in examination. The following example shows a rare positive result regarding this specific dispute.

In the act n. 00268/2011 - 01981/2008 the family did not contest the student's school failure, but the lack of preparation that was created since the school did not observe and respect the PDP and the student was not allowed to use the compensatory tools during the tests in a correct way. TAR Lombardia, with a verdict n. 2356, 15 September 2014 revoked the judgment of non-admission of a student to the next class because "the School has failed in creating the PDP, in any case, during the school year not enough compensative tools were adopted, (...) to put the student, with specific learning disabilities, in a position to succeed in the school year with success…".

Going deeper in the problematic of compensatory tools, the verdict number 01064/2011 - 02022/2011 states: "because of the damage made by the school when declining the student to use compensative tools to mitigate the disturb …". The same position, although not in Lombardia, has a verdict made by TAR in Piemonte, n. 1270, July 11, 2014.

To try to overcome this difficulty, the appeal should always be supported by the expert analysis provided by pedagogist who verifies the diagnosis of the student, gives analysis of PDP and examination of written tests and controls if the plan developed by the school was applied. (Note that the mark is never considered in the analysis because of the autonomy of teachers in evaluating students.)

Not all families have a technician who can help them to verify the PDP provided by the school and some families lack the skills to provide important information about their child's learning and respectively to help the school to create the individualized plan. Unfortunately, even in the case where the appeal came with a pedagogist's report, the judge will hardly enter into the technical merit of the discussion and will simply verify if both administrative and bureaucratic aspects have been respected. This can be due to the fact that dyslexia, as other language disorders, is "invisible" while other disabilities being more obvious and noticeable might be easier for the judge to perceive (Mautner,1984; Feeg, 2003; Oslund, 2013).

Sometimes the inadequacy of the tests made for the student is realized, as in the decree n. 1255 of 2015 where the judge made a decision in interest of the family in the first phase of the procedure. The same outcome can be found also in Decree n. (00869/2018 - 01970/201).

A certain negligence in the school system regarding the importance of the PDP can be illustrated by the following examples: in a decree (n. 00561/2016 - 02929/2015) the school was forced to make a PDP for a student with SLD. However, the school was resistant to the decision of TAR and PDP was actually created only after three subsequent decrees. In the decree n. 1100/2012 (TAR Lombardia) the family contested that the PDP was made only in the last three months of the school, instead at the beginning of the school year.

The problem of evaluation of students with SLD and SEN, is recurring numerous

times in the appeals to the TAR, as already mentioned in the articles 3, 4 and 5 of the Ministerial Decree n. 5669/2011, educational institutions are required to develop and create personalized training courses, which take into account the needs and potential of each student. A lot of verdicts can be found regarding this issue in regional level: e.g. TAR Lombardia, verdict n. 2251 del 30 June 2008; TAR Lombardia verdict n. 1087 del 12 April 2012; TAR Lombardia, Brescia, short verdict n. 47 del 17 January 2013; but also, in the national level[11]. The decree number 371, 12 March 2014 made by TAR Lombardia revoked unsatisfactory marks of a student with SLD, because the school did not approve the PDP. For this reason, "considering that at the moment the negative evaluation of the first part of the school year is not affecting too much the next months since the student can recover the accumulated gaps on condition that the school approves the PDP and also implement the document for the past period" TAR ordered to the school to approve the Personalized Didactic Plan within 15 days of receiving the order and to implement its provisions also retroactively.

This decision is particularly significant because for the first time a school was sentenced, during the course of the school year, to nullify all the tests with a negative result of a student with SLD, as they were carried out without respecting the law 170/2010.

We found a similar situation in the decree of TAR Lombardia, n. 07063/2010 - 02027/2010 where the school claimed not to be aware that the student has a specific learning disability, but in the report prepared by the class team, the diagnosis of the student was declared.

The family, in accordance with the ministerial guidelines, must formalize the educational plan with the school and the educational plan should be approved by all the teachers of the class. This agreement is really important in the occasion when the family brings to school the diagnosis of the student very late during the school year. Regarding this case different position in the TAR Lombardia can be found e.g. TAR admits conditionally the student to the final test although the family brought the diagnosis very late (00768/2017 - 01337/2017). In the decree n. (00876/2017 - 01309/2017) the school rejected the diagnosis because it is too late in the school year, but TAR conditionally admits the student to the next year. Further on, diagnosis presented to the school at the end of school year TAR rejected (01437/2011 - 02454/2011).

The family who proposes an appeal against the school must evaluate, as a realistic prospect, even if their appeal would have a positive outcome, if there are other school institutions ready to welcome the student. This leads to further problems and questions which families should be helped to consider:

11 Examples of the verdicts in the national level: Verdict TAR del Lazio n. 31203/2010; TAR Lazio, section III bis, decree n. 3616 del 4 august 2010; TAR Friuli Venezia Giulia, short verdict n. 420 del 12 October 2011; Tar Campania, verdict n. 2404, 30 April 2014; verdict TAR Lazio n. 10817, 28 October 2014; Consiglio di Stato (State Council), verdict n. 3593, 14 August 2012; TAR Lazio n. 8752 del 24 October 2012; short verdict n. 9, 12 January 2012, TAR Friuli-Venezia Giulia; Tar Puglia, Lecce, short verdict n. 2027, 22 November 2011, TAR Lazio, verdict n. 3465, 28 March 2014, Tar Toscana, Firenze, verdict n. 6223 16 November 2005; Tar Trentino Alto Adige, Trento, short verdict n. 190, 5 October 2010; Tar Puglia, Bari, verdict n. 376, 3 March 2011; Tar Puglia, Lecce, verdict n. 566, 12 March 2013; TAR Puglia, Lecce, Verdict n. 2045, 27 September 2013; Tar Liguria, verdict n. 1181 del 24 July 2014.

> Does the student want to change school, change learning context and school friends? Does the student want to travel to another city to follow the same type of secondary school because maybe in his living place there are no other solutions?
> Does the new school chosen by the family and by the student have places available?
> In case of the secondary school of second grade, is there a school that can be attended by the student without supplementary exams?

For those families who would like to change the school but the student has to attend the September supplementary exams to go further in the next class (it. *Giudizio sospeso*), more difficulties should be underlined:

> The student will have to take exams in the old school before he/she could attend the new school selected by the family. If the student will not be successful in the exams, he/she will lose the year. So, it is important to verify if in the new school there is a place available in both scenarios: in the lower class if the student will fail the exam, and in the further class if the student will pass the exam.
> In the case of supplementary exams, to fulfill the gap with the new type of school, the student will have to have a positive result in texts to pass through the school year in the old school, and just after that positive evaluation, take exams in the new school (for the subjects that were not represented in the old school).

A lot of families are not aware of this bureaucratic problem, and even less aware about the possible psychological problem:

> How will the student deal with the school year knowing that he/she is waiting a court decision?
> How will the student deal with schoolmates when they will know he was going through the school year thanks to a legal process?
> All these aspects cannot be underestimated when choosing to take an appeal to the TAR.

As regards the Law 104/92, data is showing an alarming situation: almost all the appeals proposed are connected to an inadequate number of hours of special needs teacher for the students with disabilities. Only a small percentage of the appeals to the TAR is to contest the year failure.

The use of the TAR to obtain an adequate number of hours of special needs teacher seems to be a tool which guarantees a highly success rate, also due to its administrative and bureaucratic aspect. This data is posing a very important question: why there is a need for the family to seek help at the court to get the support guaranteed by the law. Families are experiencing frustration because the rights of their children are not respected and when institutions are not providing the help they need to solve the problem. Consequently, families see in the Court the only way to be listened by the school system.

It would be necessary to find a model which secures that the family obtains their right without emotional, economical and time costs connected to the process at TAR. It should be kept in mind that, considering the costs of the procedures, the need to refer to the court amplifies the social differences. In 2019 a verdict of the TAR Campania (verdict n. 5668 2 December 2019) retraced the rights of a student

with disabilities step by step, analyzing in detail the request procedures. The verdict also revoked the decision made by MIUR where the number of special needs teachers for the school year 2018/2019 in the institution was determined, decision which assigned to the school attended by the student less special needs teachers than those necessary in relation to the number of students with serious disabilities present in the school. MIUR was also sentenced to refund the family because of the damage the student experienced in the school.

Data is showing that this type of situation is unfortunately frequent in national school system, and these situations are creating a wider damage than the economic one: from a didactic and pedagogical point of view, a lower number of hours of special needs teacher negatively affects the inclusion of the student in the school environment, as the skills and the development of abilities to actively attend the program are restricted to minimal terms.

From an economic point of view, recurring to the court is a damage for the family, for the school and for the MIUR which has to compensate the damage created. It can be hypothesized that costs would be lower if the school is immediately provided with the number of special needs teachers needed to cover the hours for students with disability. Economical disadvantages of the families of children with disabilities should not be underestimated since children often need different treatments, therapies, medications and support. Thus, it is important to stress the decision of the Court of Roma (decree n. 21122, 14 November 2013) where it is stated that also in private schools the cost of the hours of special needs teachers must not be charged to the family but covered by the system.

In 2010 the Constitutional Court (verdict n. 80 del 2010-37) proclaimed unconstitutional the rule, established by the financial law in 2008, where because of the control of public spending, a specific number of hours of special needs teacher was established, forbidding the recruitment of additional teachers regardless of the number of children with disabilities present in a certain school[12].

Regarding the same issue the Court of Trieste (it. Corte d'appello) with the verdict n. 645, 31 July 2013, verified "the discriminatory nature of the school administration's decision not to grant special needs teachers for 25 hours per week (previously only 6 and then 12 were assigned), to a student with severe disability." These examples are showing the national character of the issue; although in this study we examined only the state in Lombardia, the problem is recognized by the courts in the entire country and it has to be taken in serious consideration by the MIUR.

Basilica and Fiandaca (2013) reflected on this problem from the legal point of view.

Conclusion

In conclusion, is TAR a good mechanism to apply to the Law 170/2010? Families are using the court as tool to solve their issues with the School system: they tend to improve a bad situation inside the school, change the school system or improve it.

12 Were declared unconstitutional art. 2 comma 413 law n. 244/2007 and art. 2 comma 414 law n. 244/2007.

Sometimes they just want "justice" because they experienced frustration and a feeling of resignation and rejection.

What is evident is a lack of communication between the family and the school and the absence of the superior level in the school system (regional school office), due to unfamiliarity and inexperience of the family with this type of bureaucracy.

So, what is actually missing, and it is essential for a good cooperation between family and school, are the steps between the conflict in school and litigation at the Court. There is no mediation or mediation is not efficient enough to sort out the issue. The conflict must be solved inside the school system. The possibilities to solve the conflict inside the school system will be explored deeply after the following part of this research which sees involved teachers (data from teachers are already collected and they are being analyzed), families and students.

Magni (2015) points out the same question at the end of his article, wondering if the aim of the law is to protect the rights of the weakest students (in this specific case students with different kind of disabilities or specific learning disabilities), to pursue the right to have a complete inclusion, schooling and education and are we sure that a system like the one used by the law and by the TAR is the good one to reach the final goal? What surprised Magni is the higher number of decrees and notes from the MIUR which created in few years a "bureaucratic labyrinth of rules"[13].

It is necessary to intervene to prevent the conflict, before the conflict leads to break of trust between school and family. The conflict must be solved before it damages and affects the learning and outcomes of the student who is between the conflicted parties. It is necessary to intervene before conflict creates situations where inclusion is missing.

Mueller, T. G. & Carranza, F. (2011) suggest two roads to solve the conflict before ending at the Court: mediation and resolution meeting. Mediation should be voluntary for both parties and, although it is an attempt to solve the conflict without the Court, it should not in any way delay or deny a parent's right to a legal process. Mediation is confidential and if an agreement is reached, it is documented in writing. On the other side, a resolution meeting is not voluntary, but required (note that the authors are referring to the American system) and must be held within 15 days of receiving notice of a parent's due process complaint. This meeting includes parents, a Local Education Agency (LEA) representative, and relevant IEP team members. This meeting gives the opportunity to resolve the dispute before referring to the court. Authors emphasize that mediation and resolution meeting options continue to be much more cost effective than due process. Bar-Lev, Neustadt, S., & Peter, M. (2002) also focused their research on using mediation in school to prevent the conflict and the abuse of court resolution.

In Italian context, it is interesting to report a study made by Sarzi Sartori (2009) focusing to the relationship between the family and the school and attempts to turn the conflict into collaboration.

13 It. *"il quadro che emerge da questa rapida rassegna è quello di un ambito estremamente delicato, in rapida ed esponenziale espansione. innanzitutto, sorprende il numero delle sentenze uscite dalle aule dei tribunali amministrativi italiani negli ultimi anni, così come il continuo rincorrersi di decreti, note e circolari ministeriali che, nel giro di un paio d'anni, sono andati a costruire un vero e proprio labirinto normativo".*

In January 2006, the autonomous province of Trento activated a free phone number to offer effective answers to parent's requests and to monitor the family-school relationship. Different school levels were represented, from kindergarten to secondary school of second grade. In their study 168 cases were analyzed. The areas where most important conflicts were found were conflicts between the family and a teacher, conflicts between the families of one class and the conflict between the family and the school. An increasing need of "social mediation" emerged from the study: the conflict arises from the complexity of communication, difficulties in listening and taking responsibility for the child's education. Mediation proposed by the service had to take into account all these variables.

In some situations, the simple empathic listening allowed an already resolutive relief or favored the resolutive approach with parents involved in conflicts or in uncomfortable situations.

In more complex cases, a different approach in mediation was chosen involving the director of the school, teachers and parents, and when it was possible also the student.

What is important to underline is that in this project, in the cases of conflict faced between family and school, the issues have rarely had a clear and univocal interpretation.

Conflict most of the time rises because of lack of respect of the role of people around the student: teacher is a teacher and should be a teacher, parents are parents whatever is their job, technician can help with learning strategies and specific tools, clinician must explain the diagnosis in a comprehensive way to the family and to the student because it's the first step in understanding the needs, and again, clinician if called from school, has to explain to teachers the medical part connected to learning process. Magni (2015) argues that it is necessary to reaffirm the idea of education, and consequently all the tools linked to it, including legal ones. It is needed to put on focus the human in his/her uniqueness and unrepeatability. Parents should not change into lawyers, teachers must not be paralyzed by the huge amount of bureaucratic work, and courts must not take the place of the student's class teachers.

TABLES INDEX

Graf. 1	Law 170/2010 SLD – SEN 170/2010
Graf. 2	Distribution of litigation connected to school grade between 2010 – 2018 Law 170/2010
Graf. 3	Type of secondary school of second grade – Law 170/2010
Graf. 4	Outcome of the first phase of process proposed to the TAR between 2010 and 2018. Law 170/2010
Graf. 5	Outcome of the verdicts TAR Lombardia between 2010 - 2018. Law 170/2010
Graf. 6	Distribution of litigation connected to school grade between 2010 – 2018- Law 104/92
Graf. 7	Type of secondary school of second grade – Law 104/92
Graf. 8	Motivations of litigations TAR - Law 104/92
Graf. 9	Outcome first phase TAR process - Law 104/92
Graf. 10	Verdicts Tar Lombardia between 2010 and 2018 - Law 104/92

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