THE CHILD WITH DISABILITIES AND THE RIGHT TO EDUCATION THE ROLE OF DAMAGES

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Summary: 1. The right to education of the child with disabilities; 2. The Individualised Education Plan (PEI); 3. The role of damages; 4. Protection of the rights of children with disabilities. Between pedagogy and law.

Abstract: The right to education, recognised at the international, supranational and national levels, is of particular importance to the child and is guaranteed to the child with disabilities, with provisions that ensure respect for his or her condition. Non-implementation or inadequate implementation of this right causes harm to the individual. Civil law traditionally responds to the need for redress with the remedy of compensation. More effective protection of the rights of the child with disabilities, beyond the limits of compensation for damages, can be achieved through inclusion and inclusiveness at school, in the dialogue between law and pedagogy.

Keywords: child with disabilities; right to education; damages; law and pedagogy.

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1. The Right to Education of the Child With Disabilities

Education shall be open to everyone. Thus begins Article 34 of the Constitution, recognising in the Italian legal system the right to education[1]. The evolution of the Italian school system over time has been shaped by the legislative framework that has been established in relation to this right, including its various declinations and applications[2]. It takes on a particular significance as regards children's rights[3].

With the adoption of the United Nations Convention on the Rights of the Child in 1989, and the shift in the legal view of the child from an object of rights to a subject of rights, the entitlement of the child to fundamental rights was explicitly enshrined at the international level. These include not only participation rights such as the right to be heard, freedom of expression, thought, conscience and religion, freedom of association and assembly, and respect for private life (Articles 12-16), but also provision rights such as the right to health (Article 24), the right to assistance and social security (Article 26) and the right to education (Article 28)[4].

At the supranational level, the Charter of Fundamental Rights of the European Union proclaims the right to education in Article 14. Furthermore, as outlined in Article 9 of the Treaty on the Functioning of the European Union, the

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[1] P. PERLINGIERI, *La libertà di educazione*, in *Rass. dir. civ.*, 1987, 674 ss., and ID., *Diritto allo studio uguale per tutti. A margine della sentenza n. 454 del 1994 della Corte costituzionale*, in *Rass. dir. civ.*, 1995, 386 ss.; both now in ID., *La persona e i suoi diritti. Problemi del diritto civile*, Napoli, Edizioni Scientifiche Italiane, 2005, 205 ss. and 547 ss.; ID., *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, III, *Situazioni soggettive*, 4ª ed., Napoli, Edizioni Scientifiche Italiane, 2020, especially 166 ss.

[2] U. POTOTSCHNIG, «Istruzione (diritto alla)», in *Enc. del dir.*, XXIII, Milano, Giuffrè, 1973, 96 ss.; A. POGGI, nel *Commentario alla Costituzione*, edited by R. BIFULCO, A. CELOTTO e M. OLIVETTI, Torino, Utet, 2006, agg. 2024 in *OneLegale*, *sub* art. 34 Cost.

[3] A. SANDULLI, *Aspetti giuspubblicistici della posizione dei minori*, in AA.VV., *Diritto di famiglia. Raccolta di scritti di colleghi della facoltà giuridica di Roma e di allievi in onore di Rosario Nicolò*, Milano, Giuffrè, 1982, 283 ss. Cf. F. GIARDINA, *La condizione giuridica del minore*, Napoli, Jovene, 1984; P. STANZIONE, «Minori (condizione giuridica dei)», in *Enc. del dir.*, Annali IV, Milano, Giuffrè, 2011, 725 ss.; R. SENIGAGLIA (ed.), *Autodeterminazione e minore età. Itinerari di diritti minorile*, Pisa, Pacini, 2019.

[4] On children's rights, also from a historical and pedagogical perspective, A. THIENE, *La Grammatica dei diritti dei bambini e dei genitori nel pensiero di Gianni Rodari*, in M. BENETTON (ed.), *Il cielo è di tutti la terra è di tutti. Gianni Rodari, l'educazione e i diritti dell'infanzia*, 2020, Pisa, ETS, 93 ss., and on the UN Convention especially 107 ss.

definition and implementation of the Union's policies and activities must encompass the requirements associated with a high level of education, training and the protection of human health. The development of a European dimension in education is one of the objectives of Union action under Article 165 TFEU (formerly Article 149 TEC), whereby the Union shall also «contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity»[5].

It is estimated that between 1 November 1993, when the Maastricht Treaty came into force, and 1 July 2014, the European institutions drafted 428 documents in the field of education, training and education. In addition, the ongoing evolution and structuring of European Union law in this particular domain is evident. This observation enables the comprehension of the profound and significant efforts undertaken by the European Union, spanning from the Green Paper of 1993 up to the present era[6].

In its Communication of 30 September 2020, the Commission delineated a 'European Education Area' comprising six dimensions, namely: (1) the quality of education and training; (2) inclusion; (3) the green and digital transition; (4) teachers and trainers; (5) higher education; and (6) the geopolitical dimension. The document explicitly asserts that «education is at the heart of the European way of life, strengthening social market economy and democracy with freedom, diversity, human rights and social justice».

Education has been identified as playing a pivotal role in the affirmation of social rights, as delineated within the framework of EU Law. According to Principle 1 of the European Pillar of Social Rights, «everyone has the right to quality and

[5] Cf. C. SILVA (ed.), *Educazione e cura dell'infanzia nell'Unione Europea*, Pisa, ETS, 2016.
[6] P. CASELLI, *Le emanazioni dell'Unione Europea sull'ECEC: dal Libro Verde del 1993 alla Strategia "Europa 2020"*, in C. SILVA (ed.), *op. cit.*, 95 ss.

inclusive education, training and life-long learning in order to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labour market». While principle 11(a) proclaims that «children have the right to affordable early childhood education and care of good quality».

The right to education assumes particular significance in the context of children with disabilities. On 13 December 2006, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities, which was ratified by Italy on 15 May 2009. This development marks a significant milestone in the global effort to recognise the rights of persons with disabilities[7]. The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms of persons with disabilities, and to promote respect for their inherent dignity. The general principles, in addition to respect for the inherent dignity, individual autonomy and independence of persons, non-discrimination and full and effective participation and inclusion in society, specifically include «respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities» (Article 3(h)).

As stated in the preamble, under sub-paragraph r, children with disabilities are recognised as having the right to enjoy all human rights and fundamental freedoms on an equal basis with other children. Furthermore, the obligations assumed by the States Parties to the 1989 Convention on the Rights of the Child to this end are recalled. Article 7 is explicitly focused on children with disabilities, and it obliges states to undertake all requisite measures to ensure their full enjoyment of all human rights and fundamental freedoms on an equal basis with their non-disabled peers. Furthermore, it obliges States to guarantee children with disabilities the right

[7] M.R. SAULLE, *Lezioni di organizzazione internazionale*, II, *Le organizzazioni internazionali e i diritti umani*, Napoli, Edizioni Scientifiche Italiane, 2003, 395 ss.; EAD., «Norme *standard*», in *Enc. del dir.*, agg. II, 1998, Milano, Giuffrè, 591 ss. Cf. A. VENCHIARUTTI, *I diritti delle persone disabili*, in S. CANESTRARI *et al.* (ed.), *Il governo del corpo*, in *Trattato di biodiritto* directed by S. RODOTÀ e P. ZATTI, I, Milano, Giuffrè, 2011, 173 ss.; M.E. QUADRATO, *Il soggetto disabile tra capacità e discriminazione. L'illusione della normalità*, Napoli, Edizioni Scientifiche Italiane, 2022.

to express their opinions on all matters affecting them, and that these opinions are duly taken into account, considering their age and degree of maturity, ensuring that appropriate assistance is provided in relation to their disability and age. «In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration» (Article 7(2)).

The right to education is explicitly recognised for persons with disabilities in Article 24 of the Convention, which requires States Parties to ensure an inclusive education system at all levels. In particular, they must ensure that children with disabilities are not excluded from free and compulsory primary or secondary education on the basis of their disability. States must also take appropriate measures to ensure that children with disabilities can participate on an equal basis in recreational, leisure and sports activities, including those provided by the school system (Article 30(5)(d)).

Reconciling the right to education and early childhood care with the protection of persons with disabilities is a challenging but necessary task, which the European institutions have also supported. Principle 17 of the European Pillar of Social Rights, 'Inclusion of people with disabilities', enshrines the right of persons with disabilities to income support that guarantees a dignified life, to services that enable them to participate in the labour market and in society, and to a working environment appropriate to their needs. In its European Pillar of Social Rights Action Plan of 4 March 2021, the Commission pointed out that «persons with disabilities face important barriers in education, training, employment, social protection, housing and health». In this context, it adopted a new strategy for the rights of persons with disabilities for the period 2021-2030 in its Communication of 3 March 2021.

In February 2021, the Council of the European Union adopted the *Resolution on a strategic framework for European cooperation in education and training towards the European Education Area and beyond (2021-2030)*, for which 'Strategic priority 1', among other things, all «actions towards broader inclusion are to be encouraged, such as

supporting access to inclusive quality education for persons with disabilities» and «persons with specific learning needs».

The right to education, recognised and promoted at several levels – from international and supranational to domestic – is thus counted among the fundamental rights of the person, specifically among the social rights enjoyed by the child[8]. In order to become effective and to be truly guaranteed, it requires, from the very beginning, the intervention of the State, which must translate its enunciation into actions, measures and concrete measures. This guarantee, in compliance with the principle of substantive equality, implies that even for this right, if equal situations correspond to equal treatment, different treatments must apply in different situations.

Education, including that which is provided during childhood, is a right universally guaranteed. It is essential that this right be exercised equally by all individuals. A failure to implement the right to education can give rise to prejudice against individuals, which can have particularly severe consequences for children with disabilities[9] due to their specific vulnerabilities[10]. In addressing this issue, civil law has historically relied upon the compensation remedy as a solution[11].

2. The Individualised Education Plan (PEI)

[8] G. BARONE - G. VECCHIO, *Il diritto all'istruzione come «diritto sociale». Oltre il paradigma economicistico*, Napoli, Edizioni Scientifiche Italiane, 2012.

[9] Corte cost., 26.2.2010, n. 80, in *Giur. cost.*, 2010, 879. From the standpoint of juvenile civil law, A. CORDIANO, *Minori in condizione di disagio o di particolare vulnerabilità*, in A. CORDIANO e R. SENIGAGLIA (ed.), *Diritto civile minorile*, 2ª ed., Napoli, Edizioni Scientifiche Italiane, 2024, 263 ss., especially 281. Q.v. S. CORSO, *Diritto all'educazione e all'istruzione del bambino con disabilità e strumenti di tutela. Il Piano educativo individualizzato (PEI)*, in *Pampaedia (Bollettino As.Pe.I.)*, 2021, n. 191, 56 ss.

[10] S. GIOVA, *Minori in condizione di particolare vulnerabilità*, in *Riv. giur. Mol. Sannio*, 2022, n. 3, 167 ss. In relation to the legal aspects pertaining to patrimony, AR. FUSARO, *L'atto patrimoniale della persona vulnerabile*, Napoli, Jovene, 2019.

[11] L. VALLE - C. VITAGLIANO, *Il diritto all'inclusione e il diritto alla non discriminazione in ambito scolastico, il loro riconoscimento e le responsabilità in caso di mancata o incompleta attuazione*, in *www.rivistafamilia.it*, 13 november 2024.

In the context of the Italian legal system[12], a seminal piece of legislation that plays a fundamental role in the protection of persons with disabilities is Law No. 104 of 5 February 1992. According to Article 1 of the Law, its primary objectives are the promotion of full integration of persons with disabilities in all facets of life, including family, professional, social and school life (Article 1(a))[13]. Children with disabilities are often confronted with significant challenges and require specialised support to ensure that their rights, including the right to education, are fully recognised and protected. Differentiated treatment and dedicated protection are crucial for this group, as it enables them to receive the necessary support to maximise their potential and realise their full development[14]. Law No. 104 of 1992 guarantees the right to education of children with disabilities mainly with the provisions of Art. 12[15].

Paragraph 5, as redefined by the legislator, now provides that, at the request of parents or those exercising parental responsibility, the medical commissions are required to ascertain the condition of developmental disability for the purpose of school inclusion. This assessment is preparatory to the drafting of the functioning profile for the purpose of drawing up the Individualised Education Plan (PEI).

In the Italian education system, the Individualised Education Plan (PEI) is the primary instrument through which the right to education for children with disabilities is realised[16]. This Plan constitutes a component of the life project of the

[12] The reference in the Italian Constitution is to Article 38, in which the corresponding right to education is also expressed.
[13] V. Corte cost., 29.10.1992, n. 406, in *Dir. e giur.*, 1992, 910, with note by COCORULLO.
[14] E. SERRAO, *I diritti del minore con disabilità*, in *Giur. merito*, 2012, 757 ss.
[15] The participation of the person with disabilities in the educational process with teachers and peers who do not have disabilities is, in fact, an important socialisation factor and can contribute decisively to foster the potential of the disadvantaged person. Corte cost., 8.6.1987, n. 215, in *Giust. civ.*, 1988, I, 354. The provision of specialised teachers for this purpose is functional for the fulfilment of the forms of integration and support, which also have constitutional significance. Corte cost., 15.2.2000, n. 52, in *Giur. cost.*, 2000, 413.
[16] Further provisions, with a systematic scope, and therefore also relating to the education of minors with disabilities are laid down by Legislative Decree No. 62 of 3 May 2024, concerning the definition of the condition of disability, basic assessment, reasonable accommodation, multidimensional assessment for the elaboration and implementation of the personalised and participated individual life project. Life project is defined by Article 2(n) of Legislative Decree No. 62 of 2024 as the individual, customised and participatory project of the person with disabilities which, starting from his or her wishes, expectations and preferences, is aimed at identifying, in a unified existential vision, the formal and informal supports to enable the person to improve the quality of his or her life, to develop all his or her potential, to be

individual, as outlined in Article 14 of Law No. 328 of 2000, as amended by Legislative Decree No. 62 of 2024. Individuals with disabilities have the right to request the formulation of an Individualised Education Plan, as enshrined in the aforementioned legislation. The life project, which is aimed at achieving the objectives of the person with disabilities to improve personal and health conditions in the various spheres of life, facilitating social inclusion and participation in the various contexts of life on an equal basis with others[17], implies a unitary and overall vision of the various situations of the person with disabilities. This approach entails a comprehensive and integrated vision of the individual's diverse circumstances, thereby fostering a symbiotic relationship with the PEI, which pertains specifically to educational and didactic planning. The life project draws from the PEI and imbues it with potential solutions that address the unique needs of the individual, thus ensuring the fulfilment of their rights within a continuous and constructive cycle.

The PEI is subject to further regulation as outlined in Article 7 of Legislative Decree No. 66 of 2017[18]. Specifically, the PEI is to be formulated and endorsed by the operational working group for inclusion, as delineated in Article 9(10) of the aforementioned decree. The PEI is to be drawn up on an annual basis, no later than the month of October, and is subject to review and update in the event of new or supervening conditions that affect the person's functioning. Periodic checks are to be conducted throughout the year to ensure the PEI remains relevant and effective.

The Minister of Education, in agreement with the Minister of Economy and Finance, adopted, by Interministerial Decree No. 182 of 29 December 2020, pursuant to Article 7(2-ter), of Legislative Decree 66/2017, a national PEI model and related guidelines, as well as modalities for the allocation of support measures to pupils with

able to choose the contexts of life and to participate in conditions of equal opportunities with others. The life project is based on the multidimensional assessment, which outlines his or her functioning profile. Among the various areas in which it promotes the inclusion and participation of the person with disabilities, pursuant to Art. 18, par. 2 also includes education.

[17] Article 18(1) Legislative Decree No. 62 of 2024.

[18] M. COCCONI, *Il compimento del cantiere della c.d. Buona scuola*, in *Giornale di diritto amministrativo*, 2017, 461 ss.

disabilities[19]. This decree and its annexes were subsequently updated and corrected by Interministerial Decree No. 153 of 1 August 2023, which, in particular, intervened in the activities of the operational working group for inclusion, measures, models and guidelines.

The guidelines[20] pay particular attention to the proposal for the number of hours of support, which must be justified in the box of the PEI model. This proposal represents an important choice which, since it also has a significant impact on the public administration's expenditure commitments, must necessarily respect strict principles of fairness, equity and responsibility[21].

3. The Role of Damages

The subject of various disputes concerning the protection of the right to education of children with disabilities is the failure to provide specialised teaching staff for the number of hours of educational support set out in the PEI. The case illustrates that one of the most delicate parts of the PEI is the determination of the number of hours of support and the consequent implementation of the plan.

Administrative doctrine and jurisprudence have addressed this aspect[22]. One of the most debated aspects concerns the criterion for distinguishing the jurisdiction

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[19] Cf. Cons. Stato, 26.4.2022, n. 3196, in *DeJure*; T.A.R. Lazio, sez. III *bis*, 14.9.2021, n. 9795, e T.A.R. Lazio, sez. III *bis*, 10.6.2021, n. 6920, in *Fam. e dir.*, 2022, 177 ss., with note by R. GELLI, *Piano educativo individualizzato e sostegno all'alunno disabile*.

[20] Allegato B: *Linee Guida concernenti la definizione delle modalità, anche tenuto conto dell'accertamento di cui all'articolo 4 della legge 5 febbraio 1992, n. 104, per l'assegnazione delle misure di sostegno di cui all'articolo 7 del D.Lgs 66/2017 e il modello di PEI, da adottare da parte delle istituzioni scolastiche.*

[21] Guidelines, page 56.

[22] Cf. L. VALLE - C. VITAGLIANO, *op. cit.*; M. RAMAJOLI, *Sui molteplici criteri di riparto della giurisdizione in materia di servizi di sostegno scolastico alle persone con disabilità*, in *Dir. proc. amm.*, 2020, 275 ss.; E. SERRAO, *op. cit.*, 765 s.; M. LOTTINI, *Scuola e disabilità. I riflessi della sentenza 80 del 2010 della Corte costituzionale sulla giurisprudenza del giudice amministrativo*, in *Foro amm. TAR*, 2011, 2403 ss. See T.A.R. Molise, sez. I, 19.6.2020, n. 174, in *Foro amm.*, 2020, n. 4, 646 ss., with note by F. APERIO BELLA, *Sul difetto di giurisdizione del giudice amministrativo e sulla giurisdizione ordinaria in ordine a una controversia riguardante la mancata erogazione delle ore di sostegno scolastico approvate nel Piano Educativo Individualizzato (PEI)*; T.A.R. Lazio, Roma, sez. III *bis*, 15.6.2013, n. 6011, in *Corr. mer.*, 2013, 1216 ss., with note by E. ZAMPETTI, *Disabilità ed istruzione. La questione delle ore di sostegno*; T.A.R. Sardegna, 16.11.2012, n. 991, in *Danno e resp.*, 2013, 82, with note by G. GIOIA, *Alunno disabile e numero di ore di sostegno inferiore al dovuto*. Cf., albeit for partly different issues, Cons. Stato, 21.4.2010, n. 2231, in *Giur. cost.*, 2010, 1827 ss., with note by F. MADEO, *Insegnante di sostegno:*

of the administrative judge from that of the ordinary judge. According to the orientation of the Unified Sections of the Supreme Court of Cassation, expressed in Judgement No. 25011 of 2014 - but not always shared, especially by the administrative judges, who do not abandon the older orientation according to which all disputes on the subject are assigned to the administrative jurisdiction[23] - the administrative judge is competent for disputes relating to the phase prior to the formalisation of the PEI, while the ordinary judge is competent for disputes arising after its adoption and relating to its actual implementation. This solution is based on the assumption that, although everyone enjoys the fundamental right to education, the right to a specific support service only arises in the pupil's mind after the PEI has been definitively drawn up, whereas before that moment his legal situation corresponds to a mere legitimate interest and the exercise of discretion by the public administration is possible[24].

Therefore, if, after the finalisation of the PEI, the school administration does not fulfil its obligation to adequately provide the interventions corresponding to the identified needs, the right of the person with disabilities to equal opportunities in the use of the school service can be said to have been violated and, since there is no corresponding reduction in the educational offer for pupils with no disabilities,

possibile la presenza per tutte le ore di frequenza scolastica dello studente disabile grave; Trib. S. Angelo d. Lombardi, 22.2.2004, in *Dir. fam. e pers.*, 2006, 127 ss., with note by S. VARONE, *Il diritto all'integrazione scolastica degli alunni disabili fra vincoli normativi e criteri di riparto della giurisdizione*. Instead, in relation to the Individualised Care Plan, see Cons. giust. amm. Sicilia, 15.1.2020, n. 114, in *Foro amm.*, 2019, 1938 ss., with note by N. POSTERARO, *Sulla giurisdizione del Giudice Amministrativo nel caso di controversia avente a oggetto la contestazione dei provvedimenti riguardanti l'attuazione del Piano assistenziale individualizzato (PAI) in favore di persona diversamente abile*.

[23] T.A.R. Sicilia, 3.12.2014, in *Dir. civ. cont.*, 17 december 2014, affirmed administrative jurisdiction over the right of persons with disabilities to educational support. A. PLAIA, *Il TAR Sicilia e il TAR Toscana smentiscono il «revirement» delle Sezioni Unite e ribadiscono la giurisdizione amministrativa in tema di diritto al sostegno scolastico del disabile*, *ivi*. Cf. Cons. Stato, sez. VI, 4.1.2016, n. 7, in *Dejure*.

[24] Cass., sez. un., 25.11.2014, n. 25011, in *Nuova giur. civ. comm.*, 2015, I, 361 ss., with note by A. VENCHIARUTTI, *Incertezze sulla giurisdizione in tema di tutela giudiziaria delle persone con disabilità vittime di discriminazione*; in *Giur. cost.*, 2015, 1475, with note by F. GIRELLI, *Quale giudice per gli alunni con disabilità?*; in *Foro it.*, 2015, I, 951 ss., with note by A. PALMIERI and commented by E. SCODITTI, *I diritti fondamentali fra giudice ordinario e giudice amministrativo*.

indirect discrimination can be claimed, for which the ordinary courts have jurisdiction[25].

Among the remedies that the system provides against discrimination are the tools set out in article 28 of Legislative Decree No. 150 of 2011. It establishes that the judge may order the cessation of the prejudicial discriminatory behaviour, conduct or act and take any other appropriate measure, including against the public administration, to eliminate its effects. In addition, in the case of minors, an action for damages, including non-pecuniary damages[26], may be brought by those exercising parental responsibility[27].

In fact, whenever an inviolable personal right is infringed, compensation for the non-pecuniary damage suffered can be found in accordance with the provisions of article 2059 of the Civil Code, according to the constitutional interpretation[28]. Once again, this is the expansive vision of the compensation remedy, ready to gather ever new requests and to be constantly adapted to the innovations brought to the system by changes in society[29].

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[25] In the same sense Cass., sez. un., 28.2.2017, n. 5060, in *Foro it.*, 2017, I, 1229.

[26] Particularly noteworthy in these cases is the compensability of existential damage, which takes the form of damage resulting from the loss of the possibility of "promotion of the person", arising both from the impairment of the child's rights towards the family and from the impairment of the child's rights towards the educational and health institution. E. SERRAO, *op. cit.*, 767.

[27] With reference to the position of the private school, see Cass., sez. un., 20.4.2017, n. 9966, in *Fam. e dir.*, 2017, 1081 ss., with note by R. GELLI, *Sostegno all'alunno portatore di* handicap *nella scuola privata paritaria*. The non-implementation of the PEI is, moreover, not the only hypothesis for which the application of the compensation remedy is envisaged. Cons. Stato, 12.2.2024, n. 1373, in *Fam. e dir.*, 2024, 899 ss., with note by R. GELLI, *Progetto di vita del minore disabile: il ritardo dell'ente è fonte di responsabilità civile*; T.A.R. Calabria, Reggio Calabria, 5.10.2023, n. 748, in *Giornale di diritto amministrativo*, 2024, 113 ss., with note by M. BOMBARDELLI, *Il progetto individuale per le persone disabili e il danno da ritardo nella sua adozione*.

[28] Corte cost., 11.7.2003, n. 233, in *Nuove leggi civ. comm.*, 2004, 13 ss., with note by A. THIENE, *L'inesorabile declino della regola restrittiva in tema di danni non patrimoniali*; in *Resp. civ. e prev.*, 2003, 1036 ss., with note by P. ZIVIZ, *Il nuovo volto dell'art. 2059 c.c.*; in *Giur. it.*, 2003, 1777 ss., with note by P. CENDON - P. ZIVIZ, *Vincitori e vinti (... dopo la sentenza n. 233/2003 della Corte costituzionale)*; in *Corr. giur.*, 2003, 1028 ss., with note by M. FRANZONI, *Il danno non patrimoniale, il danno morale: una svolta per il danno alla persona*; in *Danno e resp.*, 2003, 939 ss., with notes by M. BONA, *Il danno esistenziale bussa alla porta e la corte costituzionale apre (verso il "nuovo" art. 2059 c.c.)*, G. CRICENTI, *Una diversa lettura dell'art. 2059 c.c.*, G. PONZANELLI, *La Corte costituzionale si allinea con la Corte di cassazione*, A. PROCIDA MIRABELLI DI LAURO, *Il sistema di responsabilità civile dopo la sentenza della Corte costituzionale n. 233/03*, O. TROIANO, *L'irresistibile ascesa del danno non patrimoniale*.

[29] S. RODOTÀ, *Il problema della responsabilità civile*, Milano, Giuffrè, 1964. Cf. P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, IV, *Attività e responsabilità*, 4ª ed., Napoli, Edizioni Scientifiche Italiane, 2020, 305 ss. M. FRANZONI, *La responsabilità civile una lunga storia ancora da*

However, although compensation can have a deterrent function, it is a remedy that intervenes only after the harmful event has occurred. In the multi-functionality that characterises civil liability[30], compensation has its own limitations[31]: not only does it not achieve the objective of precaution and prevention, but it is also irrelevant to the satisfaction, in the strict sense, of the interests underlying the right that has been infringed[32]. The protection offered by this remedy covers a spectrum ranging from compensation, from a compensatory point of view, to punishment, where one can speak of punitive damages[33], but it does not retreat to the realisation of the right itself. It redistributes - and perhaps even sanctions - but it does not make the holder obtain what the infringed right would have recognised. But this unfolds precisely in the non-implementation of the right, in the violation of other rules, in the lack of cooperation, in the inadequacies of the system. The observation takes shape here in relation to the right to education of the child with disabilities, but it can also be applied to other subjective situations corresponding to the rights of the person.

In other words, not only does the compensatory remedy not guarantee and directly implement the right to education, but it is also unable to prevent its non-implementation or inadequate implementation[34]. The same cannot be said, at least in part, for other types of protective instruments, in the variety of judicial measures that can be taken, such as an order to cease discriminatory conduct, but even these forms of protection, of a judicial nature, generally access an ex post facto guarantee of the right and do not prevent the injury itself. To prevent this from happening, the work of a good administration is needed in such circumstances, one that has resources and uses them properly, always bearing in mind the fundamental role of the rights of

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scrivere, in *Contr. e impr.*, 2021, 1103 ss. offers a historical and evolutionary reconstruction, also on a socio-economic level.

[30] G. ALPA, *Ingegneria sociale e amministrazione del danno*, *quindici anni di dottrina della responsabilità civile*, in *La responsabilità civile*, I, directed by Alpa e Bessone, Torino, Utet, 1987, 6 ss.

[31] Cf. C. SALVI, *La responsabilità civile*, 3ª ed., in *Trattato Iudica - Zatti*, Milano, Giuffrè, 2019, 313 ss.

[32] Cf. P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, IV, *Attività e responsabilità*, cit., 318 ss.

[33] M. GRONDONA, *La responsabilità civile tra libertà individuale e responsabilità sociale. Contributo al dibattito sui «risarcimenti punitivi»*, Napoli, Edizioni Scientifiche Italiane, 2017; A. MALOMO, *Responsabilità civile e funzione punitiva*, Napoli, Edizioni Scientifiche Italiane, 2017.

[34] L. VALLE - C. VITAGLIANO, *op. cit.*

children, who are even more in need of protection and safeguarding because of their condition of disability. The effective guarantee of the right to education of children with disabilities is a way of taking care of the fragility of the person[35].

4. Protection of the Rights of Children With Disabilities. Between Pedagogy and Law

It is crucial to shift the focus from the injury and the necessity for remediation to the broader perspective on the protective mechanisms offered by the system, which is characterised by its complexity, dynamism, and unity[36]. This shift enables us to comprehend the virtuous interaction between the juridical and the meta-juridical. Consequently, the right to education becomes an integral part of a more extensive context. This enhances the dialogue between law and pedagogy, establishing it as a valuable resource[37].

In this perspective, the rights of children with disabilities are protected by an inclusive education system and the education for inclusiveness offered by that school[38]. This constitutes an approach to understanding education and instruction in the context of the protection of the rights of individuals. It conforms to the provisions of international and European Union law, as well as the guidelines set out in relevant soft laws acts. The aforementioned soft law acts are intended to ensure the effectiveness and implementation of the guarantees expressed in the various national legal systems.

As Dewey argued, schools have the potential to embody democratic principles[39]. The essence of school democracy resides in the liberty and

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[35] P. CENDON, *I diritti dei più fragili. Storie per curare e riparare i danni esistenziali*, Milano, Rizzoli, 2018.
[36] P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, II, *Fonti e interpretazione*, 4ª ed., Napoli, Edizioni Scientifiche Italiane, 2020, especially 59 ss.
[37] Cf. A. THIENE, *Dalla parte delle famiglie per un diritto minorile gentile*, in *Dir. fam. e pers*., 2023, 1315 ss.
[38] Q.v. S. CORSO, *Sui diritti della persona minore di età nella scuola. Il ruolo dell'educazione inclusiva*, in *Pampaedia (Bollettino As.Pe.I.)*, 2021, n. 193, 55 ss.
[39] J. DEWEY, *Democracy and education*, 1916, New York, Macmillan. Cf. L. BELLATALLA, *Il mio Dewey. Riflessioni sull'eredità deweyana*, 2016, Roma, Anicia.

empowerment of students, encouraging their active involvement. The democratic approach to teaching and education occupies a paramount position on the pathway to inclusivity. The recognition and acceptance of differences and diversity are fundamental to the expression of pluralism, a cornerstone of democracy. The significance of civic education[40] and its foundation in the Constitution can be discerned within this framework. The notion of an educational relation, characterised by the practice of perpetual introspection and self-improvement, learning and imparting knowledge, and reciprocity in education, has the capacity to engender inclusivity. This is particularly evident when education is conceptualised as a means of nurturing individuals[41]. An exemplary illustration of this phenomenon can be observed in the case of a child requiring support due to their personal circumstances, such as disabilities. In these cases, the PEI assumes both legal and pedagogical significance[42].

It is imperative that the school environment is free from all forms of discrimination, encompassing not only disability but also other pertinent considerations, both within the physical sphere and the digital domain of emerging technologies[43]. The commitment to non-discrimination is essential, yet it alone is insufficient; further efforts are required to ensure the promotion of individuality among all members of the community. Inclusion, therefore, is not merely integration or admission to a group, but rather the provision of opportunities for all individuals to express their abilities to the fullest extent, employing a choral approach[44].

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[40] The formal establishment of civic education in school curricula was achieved by Law No. 92 of 2019, which introduced a programme of study encompassing the Constitution of the Italian Republic, sustainable development and digital citizenship.

[41] R. MONTANI, *Fare il "possibile"*, in R. CALDIN e V. FRISO (ed.), *Pensare, Fare, Diffondere Cultura Inclusiva*, Padova, University press, 2012.

[42] T. ZAPPATERRA - D. FANTOZZI - M. SANNIPOLI (ed.), *Formare insegnanti ed educatori inclusivi. I curricoli formativi per la disabilità nello scenario attuale*, in *Annali online della didattica e della formazione docente*, v. 15, n. 25, 2023.

[43] A. THIENE - E. MARESCOTTI (ed.), *La scuola al tempo dei* social network, in *Annali online della didattica e della formazione docente*, v. 9, n. 13, 2017.

[44] T. ZAPPATERRA, *Progettare attività didattiche inclusive. Strumenti, tecnologie e ambienti formativi universali*, Milano, Guerini e associati, 2022.

The idea of chorality suggests that the school is not alone in its efforts, but rather is complemented and benefitted by the collaboration of the family, especially in the context of relational and affective literacy[45]. In accordance with Art. 7, l. 92/2019, the school enhances its cross-curricular teaching of civic education and raises students' awareness of responsible citizenship by strengthening its collaboration with families.

The return to civil law is thus made in the context of family law[46], with the rights of the person with disability being enhanced within the family, the social formation in which their personality takes shape, in consideration of the status of the child[47]. The legal framework has undergone significant changes with the enactment of Law No. 219 of 2012, which has led to the removal of the previous distinction between legitimate and natural children and the establishment of a uniform *status filiationis*[48]. An important development in the Civil Code is the introduction of a statute of the child's rights, as outlined in Article 315 *bis*. This statute encompasses various rights for children, including the right to education, upbringing, and moral assistance from their parents. It is crucial to emphasise that these rights are to be exercised in a manner that respects the child's abilities, natural inclinations, and aspirations[49].

A more effective protection of the rights of the person with disabilities, including the right to education, can perhaps be achieved with the help of the public

[45] On the relationship between school and family, E. MARESCOTTI - A. THIENE (ed.), *La relazione tra Scuola e Famiglia nel segno del superiore interesse del minore. La responsabilità genitoriale tra diritti e doveri, sostegno e formazione alla genitorialità, interazioni con le istituzioni educative*, in *Annali online della didattica e della formazione docente*, 2018, v. 10, n. 15-16.

[46] Cf. G. DI ROSA, *I termini giuridici della funzione educativa nell'attuale quadro delle relazioni tra genitori e figli*, in *Actualidad Jurídica Iberoamericana*, 2022, 806 ss.

[47] P. PERLINGIERI, *I diritti del singolo quale appartenente al gruppo familiare*, in *Rass. dir. civ.*,1982, 72 ss., now in ID., *La persona e i suoi diritti. Problemi del diritto civile*, Napoli, Edizioni Scientifiche Italiane, 2005, 425 ss. Cf. R. SENIGAGLIA, Status filiationis *e dimensione relazionale dei rapporti di famiglia*, Napoli, Jovene, 2013.

[48] C.M. BIANCA, *La legge italiana conosce solo figli*, in *Riv. dir. civ.*, 2013, 1 ss.

[49] M. MANTOVANI, *Lo stato di figlio. Artt. 231 -249*, in *Commentario Schlesinger*, Milano, Giuffrè, 2022.

institution[50], through dialogue and support for the families, to realise this right to moral assistance. Or, to use the words of Cesare Massimo Bianca, right to love[51].

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[50] Cf. P. ZATTI, *Tradizione e innovazione nel diritto di famiglia*, in G. FERRANDO, M. FORTINO e F. RUSCELLO (ed.), *Famiglia e matrimonio*, I, in *Trattato di diritto di famiglia*, directed by P. Zatti, 2ª ed., Milano, Giuffrè, 2011, 3 ss., especially 29 ss.; ID., Familia, familiae - *declinazioni di un'idea. I. La privatizzazione del diritto di famiglia*, in *Familia*, 2002, 9 ss., especially 36 ss.

[51] C.M. BIANCA, *Istituzioni di diritto privato*, Milano, Giuffrè, 2014, 775.

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