

CNS 11/2021

Opinion in relation to the consultation of a Foundation in the field of education on the obligation to keep the camera activated by students during online classes to guarantee the educational function.

A letter from a Foundation in the educational field is presented to the Catalan Data Protection Authority, in which it requests an opinion from this Authority in relation to the conduct of classes that are carried out in online format due to the pandemic situation, because all or some of the students must be confined at home.

The inquiry specifically asks whether students (whether they are under or over fourteen) can be forced to have the camera activated during online classes to ensure that the educational function is fulfilled and, if so, under what regulatory provision, recommendation or instruction.

The query also asks if students can refuse to have the camera activated, citing their right to image and/or privacy and the Foundation's obligation to respect this option.

Having analyzed the request, which is not accompanied by more information, in view of the current applicable regulations, and in accordance with the report of the Legal Counsel, the following opinion is issued.

I

(...)

II

The consultation explains that the Foundation owns several educational centers in Catalonia, and that due to the pandemic caused by Covid-19, some of the classes must be held in online format, because all the students or some of them must be confined at home. The Foundation considers whether it is possible to force students (whether they are under or over fourteen years old) to have the camera activated during online classes to ensure that the educational function is fulfilled, based on the provisions of the regulations for the protection of personal data.

Specifically, the Foundation asks the following:

"a) Whether students can be forced to keep the camera activated and, if so, under what regulatory provision, recommendation or instruction can this be done.

b) If the students can refuse to have the camera activated citing their right to image and/or privacy and the Foundation's obligation to respect this option."

With the consultation in these terms, it is necessary to start from the basis that, according to article 4.1) of Regulation (EU) 2016/679, of April 27, general data protection (RGPD), they are personal data. any information about an identified or identifiable natural person ("the interested party"); every person will be considered

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whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological identity, economic, cultural or social of said person;".

Therefore, the graphic image of natural persons, in this case, the image of students from educational centers that can be viewed during online classes, is personal information subject to the principles and guarantees of the data protection regulations (RGPD and Organic Law 3/2018, of December 5, on Protection of Personal Data and Guarantee of Digital Rights (LOPDGDD)).

Regarding the principle of legality of the treatment (art. 5.1.a) RGPD), article 6 of the RGPD provides the following:

"1. The treatment will only be lawful if at least one of the following conditions is met:

a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes; b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures; c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment; (...). e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment; f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child.

(...)." 

At the outset, it could be considered using the consent (art. 4.11 RGPD) of the parents or guardians of underage students or, where appropriate, of the students themselves if they are over 14 years old (art. 7 LOPDGDD), as a legal basis for capturing the image of minors when classes are held online due to the pandemic (art. 6.1.a) RGPD). In this case, however, it should be taken into account that the consent must be free (in addition to the other requirements established in Article 4.11 RGPD), that is to say, that the students could not suffer negative consequences in their educational process as a result of his refusal.

However, this is not the assumption raised in the consultation, so it is necessary to consider the concurrence of other legal bases that, from the perspective of the right to the protection of personal data, can enable this treatment and, if it is thus, to what extent or under what conditions could the treatment of students' images be considered lawful during online classes.

III

Article 6.1.e) of the RGPD provides that the legality of the treatment can be based on the need for the fulfillment of a mission carried out in the public interest or in the exercise of public powers by the person responsible for the treatment.

Add that, according to article 6.3 RGPD, the basis of the treatment indicated in section 1, letters c) and e), must be established by the law of the Union or the Member States that applies to the person responsible for the treatment . This same article 6.3 adds that: "The purpose of the treatment must be determined in said legal basis or, in relation to the treatment referred to in section 1, letter e), it will be necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the controller."

In relation to this, we refer to the provision of article 8 of the LOPDGDD, according to which the rule that enables the treatment must be a rule with the rank of law.

Educational legislation enables the processing of personal data necessary in the context of the educational function carried out by schools.

Specifically, the twenty-third additional provision of Organic Law 2/2006, of May 3, on Education (LOE), modified by Organic Law 8/2013, of December 9, establishes the following:

"1. Teaching centers may collect the personal data of their students that are necessary for the exercise of their educational function. Said data may refer to the origin and family and social environment, to personal characteristics or conditions, to the development and results of their schooling, as well as to those other circumstances whose knowledge is necessary for the education and orientation of the students.

2. The parents or guardians and the students themselves must collaborate in obtaining the information to which this article refers. The incorporation of a student in a teaching center will involve the treatment of his data and, in his case, the transfer of data from the center in which he had previously studied, in the terms established in the legislation on data protection. In any case, the information referred to in this section will be strictly necessary for the teaching and guidance function, and cannot be used for purposes other than education without express consent.

3. In the treatment of student data, technical standards will be applied that guarantee their security and confidentiality. The teaching staff and the rest of the staff who, in the exercise of their functions, access personal and family data or which affect the honor and privacy of minors or their families will be subject to the duty of secrecy.

(...)."

Therefore, additional provision 23a of the LOE establishes a legal qualification for the processing of the data necessary for the exercise of the teaching and guidance function of the educational centers, which excludes the need for the student or, where appropriate , parents or legal representatives give consent.

This leads to considering the processing of students' personal data, including, where appropriate, their image, when necessary for the development of online classes, as part of the educational function of the Foundation's centers, lawful.

Based on this premise, the development of the educational function of the centers and the treatment of the image of the students to take classes online, must be contextualized in the pandemic situation, to determine if this treatment can be considered necessary for the educational function.

As can be seen, among others, from the document "Management of cases of COVID-19 in schools", available on the website of the Department of Education, it is clear that the Covid-19 pandemic has had a clear impact on educational field, which has led to the closure of educational centers in certain periods and the selective confinement in others, either of class groups or of some affected students.

Specifically, for example, article 9 of Royal Decree 463/2020, of March 14, which declared a state of alarm for the management of the health crisis situation caused by the COVID-19, established that:

"1. Face-to-face educational activity is suspended in all centers and stages, cycles, grades, courses and levels of education contemplated in article 3 of Organic Law 2/2006, of May 3, on Education, including university education, as well as any other educational or training activities taught in other public or private centers.

2. During the period of suspension, educational activities will be maintained through distance and "online" modalities, whenever possible."

Although at the time of issuing this opinion we are not in a context of general suspension of face-to-face educational activity, the pandemic situation means that, in certain cases, and following the protocols established by the health authorities, must avoid the attendance of students affected by covid-19 in schools during the period of time determined by the health authorities. Regarding these students, it is clear that the educational centers must maintain the educational activity.

It is necessary to mention article 9.3 of Decree Law 41/2020, of November 10, on extraordinary measures of a social nature in educational centers and in the field of leisure education and extracurricular activities to deal with the consequences of the COVID-19 (validated by Resolution 1098/XII, of the Parliament of Catalonia), according to which: "Educational centers must adopt alternative learning measures to face-to-face for those students who prove that they are in some of the statutory exemption cases for the mandatory use of the mask. (...)."

It is also necessary to mention section 14 of Resolution SLT/2875/2020, of November 12, which extends and modifies public health measures to contain the epidemic outbreak of the COVID-19 pandemic in the territory of Catalonia, according to which:

"1. Teaching activities, and socio-educational intervention activities for the care and training of children and young people with disabilities, special needs or a vulnerable situation (social-educational services and open centers), including school transport, must carry out in accordance with the corresponding sectoral plans approved by the Steering Committee of the PROCICAT Action Plan and the related regulations, rigorously applying prevention and health protection measures.

2. Educational centers must apply the teaching measures provided for in their organizational plans for the 2020-2021 academic year in order to reduce the face-to-face attendance of students in post-compulsory studies, that is, baccalaureate, training cycles of intermediate level and higher level training courses."

The "Action plan for the 2020-2021 school year", of the Department of Education and the Department of Health of the Generalitat, of July 3, 2020, to which the regulatory forecasts are referred, makes it clear that: "No student or teacher who has presented symptoms or has had close contact with someone who has presented during the last 14 days can participate in face-to-face classes."

Therefore, the health and educational authorities, through the aforementioned regulations and action plans, have established rules that in certain cases directly affect and condition students' attendance at schools, and that prioritize training in distance and online classes. Therefore, in these cases, educational centers must necessarily apply these alternative learning measures to the attendance of students at the school. In these cases, and from the perspective of data protection, schools would be able to process student data necessary for the teaching function, and to carry out online classes, among others, in effects that interest, the image of the students affected.

Thus, it seems indubitable that for online classes, it is lawful, for the purposes of Article 6.1.e) RGPD, that school teachers must be able to view and, therefore, treat the image of the affected students, to be able to communicate and interact with them and, ultimately, for the exercise of the educational function.

The teacher must be able to have visual contact with the students, for the purposes of identifying the student and confirming their remote attendance in the class. Not only that, but, in principle, and without prejudice to the considerations that will be made later, the visualization of the student by the teacher during the class allows a more agile interaction with the students in order to facilitate and make viable the development of the

For all the above, the treatment of the image of students who have to take classes online due to the pandemic can be considered a lawful treatment (eg art. 6.1, section e) RGPD), given the obligation of the educational centers to ensure and guarantee the educational function in relation to the affected students (additional provision 23a LOE), and the fulfillment of a mission in the public interest by the centers (LEC), taking into account the forecasts established by the health authorities and educational in the context

Therefore, from the point of view of data protection regulations, the Foundation could urge the affected students to keep the camera activated during the online class, thus allowing the teacher to maintain visual contact with the student who does not you can follow the classes in person.

However, as we will see below, the fact that there is a legal basis for processing the students' data, specifically their image, to take classes online without requiring consent, does not exclude the necessary compliance with the rest of the principles or obligations of the data protection regulations.

IV

The principle of minimization requires that those responsible process only personal data that is "adequate, relevant and limited to what is necessary in relation to the purposes of the treatment" (art. 5.1.c) RGPD).

Starting from the regulatory framework studied, and placing the consultation in the specific context of the pandemic and the need to prioritize online classes, the Foundation, as the person responsible for the treatment, should determine in

application of this prin

in some cases the normal development of the online class makes it unnecessary to maintain constant visualization with the student by the teacher.

For these purposes, as has been said, it is reasonable to consider that at the beginning of the session, the teacher must be able to have visual contact with the student, to confirm their attendance in the online class. From the perspective of data protection regulations, and taking into account the context in which the treatment takes place (carrying out the educational function by the school), this treatment cannot be considered disproportionate.

Based on this, regarding the maintenance of the activated camera throughout the class, although it has already been stated that in general it can be considered a treatment with a sufficient legal basis and, therefore, an enabled treatment, it may not be necessary in some cases.

Thus, it would be necessary to take into account, among others, the factor of the age of the students, to determine if the correct development of the online class makes it necessary for the student to keep the camera activated, allowing the teacher to view the your image continuously.

In this sense, it may be that in relation to younger students, the teacher needs to check that the student follows and understands the explanations correctly, and for this reason it may be relevant that the teacher maintains continuous visual contact with the student. On the other hand, in other groups of older students, in some cases the use of chat can also be an appropriate mechanism for the teacher's interaction with the students who follow the class online.

Thus, in those cases where through the chat the teacher can properly interact with the students during the class without the reinforcement of visual contact with the student, it would not seem essential that the students should keep the camera connected throughout the course of the class

It may also depend on the nature of the activity. In participative type activities, it may be more relevant to continuously have the image of the students, in other types of activities a one-off viewing through the camera may be sufficient.

It should be borne in mind that the continuous capture of the student's image can be highly invasive, bearing in mind that not in all cases can it be guaranteed that the space where the student is is exclusively available to the student, but other members of the coexistence unit can interact there. This is even more evident in the case that the sound was kept on continuously (although in this case the effects can be minimized by establishing the use of headphones with a microphone).

In any case, it is worth insisting that in those cases where the normal development of the teaching activity makes continuous visual contact with the student more advisable, to ensure the correct monitoring of the class by the students, the treatment of the image should be considered lawful, from the perspective of personal data protection regulations.

On the other hand, and taking into account the principle of proportionality inherent in the principle of minimization, it would be necessary to rule out, for example, the recording of the students, since this may involve a more invasive treatment than the mere visualization of the image of the students, unless due to the situation it is necessary to record it (for example, if due to the pandemic situation a student cannot attend class and

take an oral exam via video conference, it cannot be ruled out that the recording of the exam is necessary for its subsequent review by the teacher).

In relation to the possibility of recording the images, we refer to the considerations of Opinion CNS 17/2020, of this Authority, in which different issues relating to the processing of data in the university environment and in the context of a pandemic are raised .

In any case, from the perspective of data protection and the principle of minimization, we note that it does not seem that in general it is necessary to record the image or the voice of the students for the normal development of a class on line. It will require an analysis by the Foundation, from the perspective of privacy by design and by default (art. 25 RGPD), regarding the purpose of the recording, the cases in which the teaching function may require it, or the retention time of the images.

For all that has been said, since the mere display of the image is a less intrusive treatment for the protection of students' data than the recording of images, and given the context of the treatment (the development of the teaching function in the context of a pandemic), the Foundation could generally require students to keep the camera activated not only at the beginning of the class in order to establish a first contact with the teacher, but also during the course of it, if type of class to be held is necessary for the development of the class. This, without prejudice to the fact that in some cases, the alternative possibilities (use of the chat) make it possible to make the class sufficiently viable and agile, so that it would not be necessary to keep the camera activated throughout the class.

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The query also "Whether the students can refuse to have the camera activated by alleging their right to image and/or privacy and the Foundation's obligation to respect this option."

Although the capture of the image of the students who, in the context of the pandemic, have to follow classes remotely, does not involve the processing of personal data considered to be of special protection (art. 9 RGPD), we cannot ignore that the the fact that images of the students are captured in their homes can have a certain impact on the privacy of these people.

It should be borne in mind that the development of a face-to-face class during the school stage obviously involves continuous visual contact between the teacher and the students, without this representing an intrusion into the image or privacy of these, since the class it is carried out in the center itself, so the expectation of privacy in this sense is lower.

On the other hand, the online class takes place from the student's own home, a situation that brings other conditions to be taken into account (availability of a space of one's own by the student, sharing of this space with other people, etc.), which could in some cases affect, to a greater extent, the privacy of the minor.

It is also clear that it affects the right to one's image. However, according to article 2.2 Organic Law 1/1982, of May 5, on civil protection of the right to honor, personal and family privacy and one's image (LO 1/1982) "No se will appreciate the existence of intrusion into the protected area when expressly authorized by law (...)."

In any case, however, the data protection regulations provide that those affected, in this case, school students, can exercise their rights of access, rectification, deletion or opposition, among others, in relation to the processing of their personal data, in the terms provided for in the regulations, directly or through their parents or guardians if applicable (arts. 15 et seq. RGPD).

Specifically, in relation to the right of opposition, reference should be made to article 21 of the RGPD:

"1. The interested party will have the right to object at any time, for reasons related to his particular situation, to personal data concerning him being the object of a treatment based on the provisions of article 6, section 1, letters e) of), including the elaboration of profiles on the basis of these provisions. The person in charge of the treatment will stop processing the personal data, unless it proves compelling legitimate reasons for the treatment that prevail over the interests, rights and liberties of the interested party, or for the formulation, exercise or defense of claims. (...)."

When a data treatment is based on the provisions of article 6.1, sections e) or) of the RGPD, this rule provides that the affected persons must have the option to oppose the treatment, in this case, to the capture of his image during online classes, that is to say, in relation to the development of the teaching activity.

Consequently, given that in the case examined the processing of data may be based on article 6.1.e) of the RGPD, the affected students must be able to exercise their right of opposition, which must be attended to by responsible

Although the treatment may be lawful and not require the consent of the affected student, he must be able to exercise his right of opposition ("refuse to activate the camera", in the terms proposed by the consultation).

In the event that a student over the age of fourteen or their parents or legal guardians, if applicable, exercise the right of opposition with respect to the treatment subject to consultation, the Foundation must process the request and provide an appropriate response to the particular circumstances raised in each case, without undue delay and, in any case within the term of one more.

In this sense, article 21 RGPD requires that the right of opposition is based on reasons related to the particular situation of the person affected. Therefore, in the case we are concerned with the exercise of the right of opposition (the student's refusal to activate the camera during online classes), it must be based on these particular reasons of the student or his family environment, and it is on the basis of these reasons that the Foundation will have to determine whether it can oppose compelling legitimate reasons, as required by the RGPD, that justify the maintenance of the treatment. Otherwise, the person in charge must cease processing, and the student must be able to follow the class online without their image being captured.

In conclusion, and given that the RGPD recognizes the possibility for students to exercise the right of opposition, it must be concluded that in principle the Foundation can urge students to have the camera activated during the online class if it is necessary for the development of the class, without prejudice to the legitimate exercise of the right of opposition by those affected, which will have to be attended to and resolved in accordance with the regulations (art. 21 RGPD).

Finally, it should be remembered that, in application of the principle of transparency (art. 5.1.a) RGPD), and taking into account the particularities of data processing in the context of the pandemic, the Foundation must inform about the processing subject to consultation to the people affected, so that they can clearly know the purpose for which this 8 is intended to be carried out

processing, what is the legal basis that allows it to be carried out, and the possibility of exercising the rights provided for in the data protection regulations, among other issues, in the terms provided for in article 13 of RGPD, to which we refer.

In accordance with the considerations made in this opinion in relation to the query raised, the following are made,

Conclusions

The activation of the camera during online classes can generally be considered a lawful treatment, given the obligation of educational centers to ensure and guarantee the educational function in relation to the affected students and the fulfillment of a mission in public interest (eg art. 6.1.e) RGPD), and the forecasts established by the health and educational authorities in the context of a pandemic, without the consent of those affected being necessary. In any case, the principle of proportionality must be taken into account.

The Foundation can urge students to have the camera activated during the online class if it is necessary for their development, without prejudice to the possibility that the affected people can exercise the right of opposition in attention to their particular situation.

Barcelona, March 23, 2021