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File identification

Archive resolution of the previous information no. IP 357/2021, referring to the Department of Education

Background

1. On 09/14/2021, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Department of Education, due to an alleged breach of the regulations on personal data protection.

Specifically, the person making the complaint explained that on 11/09/2020 the School (...) - dependent on the Department of Education - had given him to fill out "*a responsible declaration where we have to sign and indicate if nuestro hijo tiene (or not) a series of diseases*". The complainant added that in the same document there is a section in which the obligation to inform the school "*of the appearance of any case of covid in the family environment*" is mentioned.

Thus, the reporting person understands that requesting this information, both regarding the child (in relation to the diseases he may or may not suffer from), and regarding a third person in his family circle (if he has tested positive for covid) , would be contrary to data protection regulations.

The complainant did not provide the document to which he had referred in his letter (responsible statement), but if it provided a link through which it would be accessed; and stated that he had not submitted it filled out to the School.

2. The Authority opened a preliminary information phase (no. IP 357/2021), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts were capable of motivating the initiation of a sanctioning procedure.

3. On 09/17/2021, as part of this preliminary information phase, the Authority's Inspection Area made a series of checks via the Internet. Thus, the complaint form was accessed through the email address provided by the complainant.

This form, entitled "*Responsible declaration for the families of primary school students*", with the heading of the Department of Education, presents the following characteristics for the purposes that are of interest here:

a) You are asked to complete, among others, the following personal data: Father's, mother's or guardian's name and surname no. DNI/NIE/Passport, Name of the student/ai Course.

b) In section 1, it is indicated that, by signing the document, it is "*responsibly declared*" that the child of the person signing it has not submitted, "*during the last 10 days and at this time*:"

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

- *Does not present any symptoms compatible with covid-19 (fever, cough, difficulty breathing, malaise, diarrhea...) or with any other infectious condition.*
- *Has not tested positive for covid-19 or lived with people who are or have been positive*
- *He has not been in close contact with any person who has tested positive for covid-19 or who has had symptoms compatible with this disease".*

c) In section 2 you are asked to select (with a cross) one of the following two options:

- *"That my child does not suffer from any of the following diseases".*
- or,
- *"That my child suffers from one of the following illnesses and that I have assessed with his/ her doctor or pediatrician the suitability of resuming school activities":*

Each of the two options is followed by a list of diseases (the same in both options), which cannot be ticked individually.

- *Serious respiratory diseases that require medication or ventilatory support devices.*
- *Serious heart diseases.*
- *Diseases that affect the immune system (for example, those children who need immunosuppressive treatments).*
- *Poorly controlled diabetes.*
- *Moderate or severe neuromuscular diseases or encephalopathies."*

d) Section 5 of the form contains the following text:

"That I know the obligation to inform the educational center of the appearance of any case of covid 19 in our family environment, to inform our child of the PCR test being carried out".

e) In the form, preceding the information on personal data protection, the following wording appears:

"And, so that this is recorded, for the purposes of the incorporation of my son/ in school

_____,
_____, I sign this declaration
of responsibility".

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

Fundamentals of law

1. In accordance with the provisions of articles 90.1 of the LPAC and 2 of Decree 278/1993, in relation to article 5 of Law 32/2010, of October 1, of the Authority Catalan Data Protection Agency, and article 15 of Decree 48/2003, of February 20, which approves the Statute of the Catalan Data Protection Agency, the director of the Catalan Data Protection Authority.

2. Based on the background story, it is necessary to analyze the facts reported that are the subject of this file resolution.

The complainant complained, on the one hand, about the collection of minors' health data through the standardized form provided by the School ("responsible declaration"); and, secondly, the collection of data - including health data - of those people in the minor's family environment who would have tested positive for covid-19, and this without their consent.

First of all, it should be emphasized that the responsible declaration form does not include the identification of the person from the minor's family environment who would have tested positive for covid-19, nor is it required to provide this identification to the School. The form simply remembers the need to communicate to the School the eventual positive of people from the child's family environment, and this in order to safeguard the health of the educational community of the School in general and of the children in particular. Thus, making the School aware that a relative of the minor (who does not need to be identified) has tested positive for covid-19 constitutes, in effect, processing of personal data, but not of this third person - in to the extent that it is not identified - but of the minor himself, since this is obviously data that can be linked to this minor (who has a relative who has tested positive for covid-19).

Having established the above, what needs to be analyzed is the legality of the collection and processing of the minor's data - some of them health- related to the completion and subsequent delivery of the responsible declaration that the School has sent to parents/guardians.

In this regard, it must be said that this Authority has had the opportunity to pronounce on a matter almost identical to the one raised here in the archive resolution of the previous information no. 280/2020 (which can be consulted on the website www.apdcat.cat). In that case, the collection of minors' data through the "responsible declaration" form that the schools provided to parents/guardians for the 2020-2021 school year was also denounced, data processing that this Authority considered was legitimized by the exercise of a mission of public interest in connection with the public health and sectoral regulations applicable to the case, and therefore, said

treatment did not require the concurrence of the consent of the affected persons. Below are reproduced the considerations made by this Authority in the aforementioned file resolution, which would be fully applicable to the present case:

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

"(...) With regard to the treatment of minors' health data by marking the box relating to the fact that they have any of the pathologies related to the 2nd section of the "responsible declaration" (section c/ of the antecedent 1r).

As a preliminary matter, it should be noted that, according to the School, no family would have handed in a form in which the disputed box had been marked. As things stand, the School, as responsible for the treatment, would not have materialized the collection and treatment of health data through said form. Having said that, and considering that the aforementioned form was prepared by the Department of Education and provided to the schools that depend on it for distribution to families, it is more than likely that some other school center has collected through this "responsible declaration" health data of minors, so it is necessary to analyze whether this collection and treatment would have been lawful.

Article 5.1.a) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27 of 2016, General Data Protection Regulation (RGPD), establishes that all processing of personal data must be lawful, fair and transparent in relation to the interested party (principle of lawfulness, loyalty and transparency).

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based, either the consent of the affected person (letter a), or any of the other bases provided for in the same precept, such as when 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" (letter e).

As can be seen from Article 6.3 of the RGPD, the legal basis for the processing indicated in Article 6.1.e) must be established by the Law of the European Union or by the law of the Member States that applies to the responsible for the treatment. The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Spanish Constitution, that the rule of development, to be about a fundamental right, has the status of law.

In this sense, article 8 of Organic Law 3/2018, of December 5, on Data Protection

Personal and guarantee of digital rights (hereinafter, LOPDGDD) establishes the legal range of the enabling norm.

The twenty-third additional provision of Organic Law 2/2006, of May 3, on Education (LOE), established the following (in its current wording until 01/19/2021):

"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

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

results of their schooling, as well as 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 assume the consent for the treatment of his data and, in his case, the transfer of data from the center in which he had previously attended school, in the terms established in the legislation on the protection of data. 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. (...)."

Section 2 of this precept has been modified by Organic Law 3/2020, of December 29, which modifies Organic Law 2/2006, of May 3, on Education, in the following terms:

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 educational without express consent."

Therefore, this additional provision 23a of the LOE establishes - both in its current wording until 19/01/2021 (and therefore applicable when the data would have been collected in September/October 2020), as in the current -, a legal qualification for the processing of the data necessary for the exercise of the teaching and guidance function of the educational centers (6.1.e/ RGPD); which excludes the need for the affected person or their legal representative to give their consent for said treatment (6.1.a/ RGPD).

This without prejudice to the fact that, exceptionally (and a pandemic situation can be considered an exceptional situation for these purposes), another legal basis may apply, such as that established in article 6.1.d) of the RGPD ("the treatment is necessary to protect the vital interests of the interested party or another natural person"), which legitimizes the processing of personal data.

Nevertheless, for the processing of health data (art. 4.15 RGPD) to be lawful, it is not enough that there is a legal basis in article 6 of the RGPD, but that in accordance with art. 9.1 and 9.2 of this rule must meet a circumstance that lifts the prohibition of processing this special category of data.

Thus, article 9 of the RGPD provides that:

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

"1. The processing of personal data that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is prohibited, and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to the health or data relating to the sexual life or sexual orientation of a natural person.

2. Section 1 will not apply when one of the following circumstances occurs:

(...)

g) the treatment is necessary for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish measures adequate and specific to protect the fundamental interests and rights of the interested party;

(...)

i) the treatment is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health, or to guarantee high levels of quality and safety of health care and medicines or sanitary products, on the basis of the Law of the Union or Member States that establishes appropriate and specific measures to protect the rights and freedoms of the interested party, in particular professional secrecy.

(...)."

First of all, it must be said that the same additional provision 23a of the LOE could enable the processing of health data to the extent that its processing was necessary to adequately carry out the educational and guidance action, and in this sense this Authority pronounced in its opinion CNS 4/2017 (available on the Authority's website, www.apdcat.cat).

In this same line, it is necessary to cite article 21.n) of Law 12/2009, of July 10, on education (LEC), which expressly provides for the right of students to "enjoy healthy conditions and accessibility in the educational field". In this case, it is even more obvious that it is essential that the centers have the necessary data to be able to guarantee the right of their students to healthy conditions in the educational environment.

But beyond what is foreseen in the rules transcribed above that would enable, in general, the collection and processing of health data by the centers, provided that their collection is necessary to comply with the educational and guidance function and/or to guarantee students' rights; one cannot fail to notice the absolutely exceptional moment (months of September-October 2020, in the midst of a pandemic) in which families were asked to fill out and submit the "responsible declaration" through which it was possible for the centers the collection of minors' health data.

In this context, it is appropriate to mention Organic Law 3/1986, of April 14, on special measures in the field of public health, which determines in its article 1 that: "the health authorities of the different Public Administrations may, within the scope from above

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

competences, adopt the measures provided for in this Law when so required by health reasons of urgency or necessity".

And article 3 of this same rule explains that: "In order to control communicable diseases, the health authority, in addition to carrying out general preventive actions, may adopt the appropriate measures for the control of the sick, of people who are or have been in contact with them and the immediate environment, as well as those who are considered necessary in case of risk of a transmissible nature".

In similar terms, Law 18/2009, on public health, in its article 55.1.j), provides that:

1. The health authority, through the competent bodies, can intervene in public and private activities to protect the health of the population and prevent disease.

To this end, you can:

- a) Establish surveillance systems, communications networks and data analysis that allow detecting and knowing, as quickly as possible, the proximity or presence of situations that may have a negative impact on individual or collective health.
- b) Establish the requirement for registrations, authorizations, prior communications or responsible declarations for facilities, establishments, services and industries, products and activities, subject to the conditions established by article 61 and, in any case, in accordance with the sector regulations . (...)

2. The measures referred to in section 1 must be adopted respecting the rights that the Constitution recognizes to citizens, especially the right to personal privacy, in accordance with what is established by the regulations for the protection of personal data and with the procedures that this regulation and the other applicable regulations have established, and having the mandatory authorizations."

Therefore, in matters of risk of disease transmission, epidemics, health crises, etc., the applicable regulations have granted "the health authorities of the different Public Administrations" the powers to adopt the necessary measures to safeguard essential public interests in situations public health emergency.

It will therefore be these competent health authorities who must adopt the necessary decisions, and the various persons responsible for the treatment of personal data who will have to follow these instructions, even when this involves the treatment of health data.

Resolution SLT/1429/2020, of June 18, by which basic protection and organizational measures are adopted to prevent the risk of transmission and promote the containment of SARS-CoV-2 infection (in force on the date that the data subject to the complaint would have been collected in September-October 2020) determined the basic prevention measures, which had to be completed with sectoral action plans drawn up and approved within the framework of the Action Plan of PROCICAT for emergencies associated with emerging communicable diseases with high risk potential. In this sense, the following was established:

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

"1.2. Specific sectoral plans and organizational protocols

1. The measures provided for in this Resolution must be completed with the sectoral activity plans that must be drawn up and approved in accordance with the provisions of the Confinement Transition Plan ratified by the Government on April 25 2020

2. In any case, sectoral plans must be drawn up in relation to the following areas of activity:

(...)

c) Teaching centers.

(...)

4. The persons in charge of the various activities are responsible for adapting the conditions of their exercise to the measures and forecasts contained in the corresponding sectoral plan".

1.3. Protection of the vulnerable population

In general, without prejudice to the protection and security measures established in this Resolution and in the sectoral plans referred to in section 1.2, the persons in charge of the various activities are responsible for establishing organizational measures that guarantee preferential attention that minimizes the time spent inside the premises or establishments and that facilitate their mobility inside these, for vulnerable people in accordance with the criteria of the health authorities, or when due to their personal characteristics cannot wear a mask in accordance with the established in the section. 2.2.2 of this Resolution.

At this point it is not superfluous to point out that section 14 of Resolution SLT/2875/2020, of November 12, which extends and modifies the measures in the field of public health for the containment of the epidemic outbreak of pandemic of COVID-19 in the territory of Catalonia, and which annulled Resolution SLT/1429/2020 mentioned above in that it opposed it, maintained the obligation to carry out certain activities, among others the teachers, in accordance with the corresponding sectoral plans approved by the Steering Committee of the PROCICAT Action Plan and related regulations.

The "Action plan for the 20202021 academiyear for schools in the context of the pandemic", of the Department of Education, approved by the Technical Committee of the PROCICAT Plan for emergencies associated with emerging communicable diseases with high risk potential on 3 July 2020, determined the following:

"Requirements for access to educational centers

(...)

In the event that the student has a chronic illness of high complexity that may increase the risk of severity in the event of contracting the SARS-CoV2 infection, it will be assessed jointly - with the family or guardians and their medical team reference – the implications when resuming the educational activity face-to-face at the educational center. Although evidence is scarce, diseases considered at risk for complications of COVID-19 are:

^y Severe respiratory illnesses that require medication or respiratory support devices.

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

- ʻ *Serious heart diseases.*
- ʻ *Diseases that affect the immune system (for example those children who require immunosuppressive treatments).*
- ʻ *Poorly controlled diabetes.*
- ʻ *Moderate or severe neuromuscular diseases or encephalopathies.*

Control of symptoms

Families, or directly the student if he is over 18, must take responsibility for the state of health of his sons and daughters. At the beginning of the course, they will sign a declaration of responsibility through which:

- ʻ *They will state that they are aware of the current pandemic situation with the risk that this entails and that, therefore, they will adhere to the measures that may be necessary at any given time.*
- ʻ *They undertake not to take the child or adolescent to the educational center in the event that he or she presents symptoms compatible with COVID-19 or has presented it in the last 14 days and to immediately notify the school officials in order to be able to take the appropriate measures.*

Families will be provided with a symptom checklist (see Appendix 1). The family and/or the student must notify the center if they have a fever or any other symptoms. If the epidemiological situation required it, the implementation of other additional measures could be considered, such as taking the temperature on arrival at school".

With regard to the specific provision of this Plan regarding the joint assessment between the center and the family of the desirability of a minor who presents any pathology that makes him vulnerable to covid-19 resuming the educational activity in person, it is obviously, in order to comply, each center in question must know this information, which must be provided by the family itself.

Finally, it is not superfluous to demonstrate that through the "responsible declaration" only the data relating to whether the minor presented any of the diseases that are related in said declaration would have been collected, without the possibility of marking them individualized, thus complying with the principle of data minimization, provided for in article 5.1.d) of the RGPD.

In view of all the above, from the point of view of data protection, the collection and processing of the minor's health data through the "responsible declaration" was lawful on the basis of articles 6.1.e) and 9.2.g) ii) of the RGPD, in view of the public health and sectoral regulations examined. (...)"

To all the above, and to the extent that the transcribed analysis was carried out for the 2020-2021 school year, it is necessary to add certain regulations and action plans applicable to the 2021-2022 school year, which would validate the lawfulness of the treatment of the data subject to discussion for the current school year, without the need to obtain the consent of the affected persons.

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

Thus, Resolution SLT/2751/2021, of September 9, which extends and modifies public health measures to contain the epidemic outbreak of the COVID-19 pandemic in the territory of Catalonia - in force at the beginning of this school year 2021-2022-, which left without effect, as far as it was opposed, Resolution SLT/1429/2020 of June 18, by which basic protection measures are adopted and organizational measures to prevent the risk of transmission and promote the containment of SARS-CoV-2 infection, determines in section 13 that, among others, teaching activities *"must be carried out in accordance with the corresponding sectoral plans approved by the Steering Committee of the PROCICAT Action Plan and related regulations, rigorously applying prevention and health protection measures"*.

The *"Action plan for the 2021-2022 academic year for schools in the context of the pandemic"*, of the Department of Education, approved by the Technical Committee of the PROCICAT Plan for emergencies associated with emerging communicable diseases with high risk potential, determines the below, in a similar way to the Action Plan for the 2020-2021 academic year transcribed above:

"4.2.4. Requirements for access to educational centers

- *Absence of symptoms compatible with covid-19 (fever or fever over 37.5 °C, cough, difficulty breathing, sore throat*, runny nose*, fatigue, muscle pain and/or headache, stomach with vomiting or diarrhea, loss of smell or taste in older children and adolescents) or with any other infectious condition.*
- *No cohabitants or close contact with confirmed positive or compatible symptomatology in the previous 10 days.*

** As sore throats and runny noses (with or without mucus) are very common in children, they should only be considered potential symptoms of covid-19 when there is also a fever or other manifestations of the list of symptoms.*

In the event that the student has a chronic illness of high complexity that may increase the risk of severity in the event of contracting SARS-CoV2 infection, it must be assessed jointly - with the family or guardians and your reference medical team—, the implications when resuming educational activity face-to-face at the educational center.

Although the evidence is scarce, in children, diseases or conditions at risk for complications of covid-19 are considered:

- *diseases that affect the immune system (for example those children who require immunosuppressive treatments);*
- *serious respiratory diseases (cystic fibrosis, bronchopulmonary dysplasia, severe asthma...);*
- *serious heart diseases (with hemodynamic repercussions and/or requiring medical treatment);*
- *others: type 1 diabetes with poor metabolic control, dialysis, sickle cell disease, severe obesity in teenagers (...).*

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

4.2.5. Symptom control

Families, or directly the student if he or she is 16 or older, must take responsibility for the state of health of their children or themselves. At the beginning of the course, they must sign a declaration of responsibility through which:

- *they must state that they are aware of the current pandemic situation, with the risk that this entails, and that, therefore, they will adhere to the measures that may be necessary at any given time;*
- *undertake not to take the child or adolescent to the educational center in the event that he or she presents symptoms compatible with covid-19 or has presented it in the last 10 days and to immediately notify the school officials, so that they can take the appropriate measures.*

*Families will be provided with a symptom checklist (see Appendix 1). The family or, where applicable, the student himself or herself, must notify the center if they have a fever or any other symptom. If the epidemiological situation required it, the implementation of other additional measures could be considered, such as taking the temperature on arrival at school.
(...)"*

As an additional element to all of the above, it should be mentioned that in the document "*Management of covid-19 cases in educational centers. Course 2021-2022*" of the Department of Education, also approved by PROCICAT, in its annex 1, a link is provided so that the centers can access the models of "*informative letters and authorizations to families*", among which the "responsible declaration" model that is the object of the complaint is included.

And, lastly, and with regard specifically to the data that is declared responsibly in the "responsible declaration" model subject to analysis, relating to the fact that the minor "*has not tested positive for covid-19*", it is not superfluous here to bring together the provisions 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 COVID-19, specifically its article 8, which empowers the Department of Health to communicate to the management of the educational center the health data corresponding to the results of diagnostic tests for covid-19 of the students (data that Decree Law 20/2021, of September 14, amending Decree Law 41/2020, of November 10, on extraordinary measures of a social nature in educational centers and in the field of education in leisure and extracurricular activities to deal with the consequences of COVID-19 has extended to the communication of covid-19 vaccination data). Therefore, if the school can access this specific information directly from the Department of Health in accordance with the provisions of the cited Decree Law, it would be incongruous to question that parents/guardians/can declare

responsibly in this respect, and provide the same information that the school could already have through the Department of Health.

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

In short, in view of all that has been said, from the point of view of data protection, the collection and processing of the minor's health data through the "responsible declaration" is lawful on the basis of articles 6.1.e) and 9.2.g) ii) of the RGPD, in view of the public health and sectoral regulations examined.

3. In accordance with everything that has been set out in the 2nd legal basis, and given that during the actions carried out in the framework of the previous information it has not been accredited, in relation to the facts that have been addressed in this resolution, no fact that could be constitutive of any of the violations provided for in the legislation on data protection, should be archived.

Article 89 of the LPAC, in line with articles 10.2 and 20.1 of Decree 278/1993, foresees that the actions should be archived when the following is highlighted in the instruction of the procedure "a) *The non-existence of facts that could constitute the infringement*".

Therefore, I resolve:

1. File the actions of prior information number IP 357/2021, relating to the Department of Education.
2. Notify this resolution to the Department of Education and communicate it to the complainant.
3. Order the publication of the resolution on the Authority's website (apdcat.gencat.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with article 14.3 of Decree 48/2003, of 20 February, which approves the Statute of the Catalan Data Protection Agency, the denounced entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after its notification, in accordance with the which provides for article 123 et seq. of Law 39/2015. An administrative contentious appeal can also be filed directly before the administrative contentious courts, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, governing the contentious administrative jurisdiction.

Likewise, the reported entity can file any other appeal it deems appropriate to defend its interests.

The director,