

## File identification

Resolution of sanctioning procedure no. PS 8/2022, referring to the IES (...), of the Department of Education .

## Background

1. 09/16/2020 , the Catalan Data Protection Authority received a letter from a person who filed a complaint against the IES (...) of the Department of Education (hereinafter, the 'IES), due to an alleged breach of the regulations on the protection of personal data .

Specifically, the person making the complaint (Mr. (...)) states that he is the father of a student who, in the 2019-2020 school year, was in the first year of high school at the IES, and in relation to this, he complains about these two facts:

- a. First of all, that on 12/01/2020 he learns, because his son explains it to him, that "*During the first term it was projected in public, to the rest of the students, several times and for a while perhaps more than three quarters of an hour, a list with the names of the students, including my son's, next to which it said "Autism Spectrum".* In relation to this, the person reporting here states that his son, before this happened, was not aware of said diagnosis (...) that "*we had never told him because we wanted him to develop without labels*". As a result of these events, on 28/01/2020 the complainant here meets with the psychopedagogue and the director of the IES, where they inform him that the student's tutor has denied the events. The meeting closes "*postponing some explanations of the facts*". On 07/09/2020 he received a response from the director of the IES with the following text "*With what the teacher expressed and the infeasibility of taking other actions with sufficient confidentiality in the telematic context of the confinement that we have had during the In recent months, I have closed the intervention informing the Inspection of the process.*"
- b. Secondly, the complainant here complains that at the end of the year he had no news about his son's grades. When you claimed said grades from the IES, the center informed you that all communications and grades are sent to the email address included in the course registration form, however, that in your case , by mistake, have been sent to a different email address, which belongs to another IES family. On 02/07/2020, a teacher confirmed to him that throughout the school year, from the IES "*they had been sending everything (qualifications included from (...) to another family)*".

2. The Authority opened a preliminary information phase (no. IP 276/2020), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to 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 susceptible to motivate the initiation of a sanctioning procedure.

3. In this information phase, on 21/09/2020, an email from the person making the complaint was received through the APDCAT contact box. In said e-mail, he reports that the education inspector, to whom he had brought the facts reported here, has communicated that the transfer of his son to another public institute has been accepted. Finally, he points out the

possible difficulties in " *collecting testimonies from children, also minors* ", and states that his priority is that events like what happened " *should not happen again and the center had to take measures and, because , apologize.*"

4. On 11/10/2020, the reported entity was required to report, among others, on the following points:

- If the IES knew the health information relating to the child of the person here reporting a possible diagnosis of " *autism spectrum* ", and in this case, if his guardian would have had access to this information.
- If during the first quarter of the school year 2019-2020, on different occasions, a list with the names of the students, where next to the name of the child of the person reporting here put " *autism spectrum* ", and, in that case, identify the legal basis that would legitimize this processing of personal data.
- The actions carried out by the IES to verify the accuracy of the facts reported regarding the projection of the controversial list during class.
- If the IES was sending the communications and notes relating to the complainant's child to a different email address than the one the complainant had stated on the enrollment form, and if this had been the case , what reasons would explain this action.

5. On 11/24/2020, the IES responded to the above-mentioned request in writing in which it stated the following:

- That " *The knowledge of the diagnosis of "autism spectrum" among the institute staff came when the student's father informed the tutor (...) on October 2, 2019. The father of the student informed the tutor by email of the ASD diagnosis on October 2, but does not present medical documentation.*"
- That " *The student's registration form made in the summer of 2019 does not state that the (...) has ASD.*"
- *After enrollment, the family submitted a grant request containing a diagnosis of Developmental Disorder, compatible with ASD without specifying it or appearing in the document. This documentation was presented to the secretariat (...), is transferred to the guidance department (...) and is presented to the CAD (...) (members of the Guidance Department) and (XXX) (coordinator pedagogic), the EAP is transferred to verify the documentation signed by the EAP reference person in our center (XXX), signed by this director, and the guidance department sends the documentation to the Territorial Services where inspector XXX signs it. All this process without the center's teaching staff having access and without the Guidance Department or other staff of the institute having direct access to the CESMIC diagnosis. (I attach a report from the Orientation Department).*"
- That " *After having the interview with the Head of the orientation department in January, the father provides him with documentation that accredits the ASD of (...) (diagnosis signed by CESMIJ), so the only information regarding that the student suffered from ASD*

*prior to the complaint made in January to which the tutor had access, was the father's email of October 2."*

- That " *The teacher denied orally and in writing (document attached) this accusation and expressed his discomfort that led him to feel harassed."*
- That " *the student (...) did not express this complaint at any time to the tutor or to any other teacher/or member of the management team."*
- That " *During the months of confinement, we did not consider it feasible to use the telematic means of video conferences or e-mails to make further inquiries in the students' environment in order not to meet the confidentiality requirements required for a process of this type, because precisely it would have been contrary to the principle of protection of student data. Face-to-face interviews were also not possible as this personal director was declared a COVID risk and could not attend the institute in person. In this situation I considered the process closed and communicated the circumstances to the family ."*
- That " *With the face-to-face situation at the center that we have recovered in the 2020 - 2021 academic year, I have been able to do two interviews with students from the class and they have stated that there was never any kind of screening of students' personal data during the tutorials, and that information of this type was dealt with individually with the tutor without disseminating it to the class group."*
- That " *In relation to the sending of communications to a different e-mail address than the one that the father of (...) had stated on the enrollment form, we must state that this circumstance occurred."*
- That " *The family's mail (...) was entered incorrectly from the secretary due to the confusion of the address of a 1st year student of ESO B surnamed (...) with that of (...) which is 1st of BAT B. "*
- That " *on June 26 we received an email from the father of (...) claiming not to have any information from the center, a fact that we received with perplexity, (we are talking about almost nine months), and we quickly realized the error in the family mail and we reply with apologies and attach the grade report of the 3rd assessment and the continuous final assessment ."*
- That " *prior to this incident (...) the procedure for collecting and processing family data was modified to avoid manual transcriptions by the centre's secretariat. We have incorporated a digital application into the management of pre-registration and registration to do the procedure online and not have to get into situations of administrative errors ."*

**6.** On 11/17/2021, also during this preliminary information phase, a new request is made to the IES, through which it is required to provide the documentation referred to as attached documentation in his written reply, but which he does not attach.

**7.** On 15/12/2021 , the IES complied with this requirement, and the following documentation was provided:

- Report of the IES orientation department, dated 19/11/2020, addressed to the " Area Inspector " of the EDU Department. In said document it is reported that " *at the time of enrollment the family did not provide any documentation in this regard*", and that it is at the beginning of the school year when " *we are informed of a new addition from the INS (...) and they ask the processing of the MEC scholarship. This grant provides information on the assessment opinion of the degree of disability with a deficiency due to Developmental Disorder .* "
- Statement by the teacher (...) denying the facts reported, and adding that " *the academic qualifications and personal data of the students are private information, which is not the responsibility of anyone except the student himself.* "
- Secretary's report of the educational center, which reports, among others, the following:

*" The family's email (...) was entered incorrectly from the secretary: the address of a 1st year ESO B student with the last name (...) was used.(...) . The start of this error is October 10, the date from which informative letters are sent (departures, dates of in-person delivery of bulletins in the 1st assessment, communications about digital plans during confinement). ..).*

*All students at the center have a corporate email address with which they can access the center's classroom , and maintain correspondence with the tutor and the rest of the teaching staff. In this case the student (...) can maintain contact with the tutor and the teaching team of the 1st year of high school, and therefore follow all kinds of information, especially the written communication of the results of the 2nd assessment, as well as the dates of exams, grades, etc... of the 3rd and final assessment.(...)*

*At the end of June, specifically on June 26, we receive an email from the father of (...) claiming why he does not have any information from the center, a fact that we receive with perplexity (we are talking almost nine months), and we quickly realize of the error and we reply with apologies and attach the report card of the 3rd evaluation and the continuous final evaluation.*

*We would also like to point out that the described procedure for collecting and processing family data has been modified. We have incorporated a digital application to manage the pre-registration and enrollment process online. (It is also contemplated to do the management in person with a prior appointment at the centre's secretariat). With both procedures the data is entered personally by the families and the addresses are stored directly without intermediaries by groups. (...)"*

**8.** On 10/03/2022, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the IES (...), of the Department of Education, for an alleged violation provided for in the Article 83.5.a), in relation to Article 5.1.f); all of them from Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (hereinafter, RGPD). This initiation agreement was notified to the imputed entity on 03/15/2022.

**9.** The initiation agreement explained the reasons why no charge was made with respect to other reported facts, specifically, that relating to the tutor's action of projecting in the

classroom, in front of all the students and on several occasions, a list where the names of all the students appeared, and where the annotation " *Autism spectrum* " appeared next to the name of the complainant's son.

In this respect, it should be noted that, despite the fact that the reporting person stated that his child was aware of the referred diagnosis without the direct transmitters of this information being the parents, the truth is that with the information available it was possible to determine without a doubt that the IES, and specifically the tutor of the son of the complainant here, was the source of the eventual leak. That is why, given the lack of evidentiary elements or sufficient rational indications that would allow the commission of an infringement to be imputed, and taking into account that the sanctioning administrative procedure is particularly guarantor due to the consequences that can result from it derive, and that the principles of presumption of innocence and *in dubio pro reo* are fully applicable, it was agreed to archive the actions of prior information related to the facts referenced.

**10.** In the initiation agreement, the accused entity was granted a period of 10 working days to formulate allegations and propose the practice of evidence that it considered appropriate to defend its interests.

**11.** On 03/29/2022, the IES made objections to the initiation agreement .

**12.** On 27/04/2022, the person instructing this procedure formulated a resolution proposal, for which he proposed that the director of the Catalan Data Protection Authority admonish the IES (...), of the Department of Education, as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f), all of them of the RGPD.

This resolution proposal was notified on 04/27/2022 and a period of 10 days was granted to formulate allegations.

**13.** On 05/09/2022, the accused entity submitted a statement of objections to the resolution proposal.

### **proven facts**

The IES (...) of the Department of Education, used throughout the 2019-2020 school year an email address that did not correspond to the person making the complaint here, to send him communications and academic qualifications relating to his child, student of the IES. This allowed the third person who received these emails, also a relative of another student of the IES, to know, among other communications, the grades academics of the complainant's son.

According to the information provided by the IES, the first communication sent to the wrong email address is on 10/10/2019 and the last on 06/26/2020, at which time the IES rectifies the email address linked to the student's parents.

### **Fundamentals of law**

**1.** The provisions of the LPAC, and article 15 of Decree 278/1993, according to the provisions of DT 2a of Law 32/2010, of October 1, of Catalan Data Protection Authority. In

accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

**2.** The accused entity has made allegations both in the initiation agreement and in the resolution proposal. The first (...) were analyzed in the resolution proposal, but even so it is considered appropriate to mention them here, given that the allegations made before the resolution proposal reproduce part of the allegations made before the initiation agreement. The set of allegations made by the accused entity are then analysed.

In this regard, it should be noted that the allegations that the accused entity made both before the initiation agreement and in the resolution proposal, focus on exposing a series of circumstances that it considers to exonerate or mitigate the his responsibility for the facts reported and considered proven.

As a premise, it is necessary to indicate that, according to the definition of article 4.7 of the RGPD, the IES holds the status of responsible for the treatment of the personal data of the reporting person, which were collected at the time that enrolled his son as a student at the center. In this regard, it should be noted that, in the Department of Education's record of treatment activities, it is determined that the person responsible for the treatment of students in schools owned by the Department of Education is the director of the school. Therefore, as the person responsible for the treatment, the HEI must comply with the provisions of the RGPD - among others, the principles relating to the processing of data -, and must be able to demonstrate that it complies (art. 5.2 RGPD) .

Having established the above, it is necessary to enter the substance of the allegations presented by the entity. First of all, the IES points to a deficit of administrative staff assigned to the IES, as the main circumstance that led to the occurrence of "*the mistake in the introduction of the student's email to the family's email register*". Also, that the said mistake was not detected in time because the reporting person did not complain or alert the IES about the lack of communications until the end of the year, and that even so, the student participated to those activated like the rest of the students . This lack of communication on the part of the affected student or his family to inform that he did not receive communications from the center, and how this influenced the IES not detecting the error in the person's email address complainant, is the main manifestation in which the allegations of the IES are focused in the resolution proposal. Finally, the IES in its allegations also points out that the third person who received the e-mails with the communications and academic qualifications linked to the son of the reporting person, also did not report this incident. Well, the first thing to indicate is that, without ruling out that factors outside the will of the HEI, such as the situation of lack of staff invoked, could have led to the error in the introduction of the email data into the system , or they could have contributed to the fact that the error in the e-mail data that resulted in the reporting person not receiving communications from the IES, was not detected or corrected in time, as it is that the parents of the student did not complain until the end of the course, that the student could have become aware of the communications through other channels ( e.g. the Classroom program as indicated by the IES in the response to the request), or that the final recipient of the e-mails, the family of another student, had not alerted about the situation, the truth is that none of these circumstances exonerate the IES, which is the entity that, after all, introduced incorrectly the email data in the database of the high school Therefore, as the person responsible for the processing of the data, he was responsible for ensuring that its processing was in accordance with the data protection regulations, and, in this sense, he had to act with the utmost diligence to prevent events from

happening such as those that are the subject of the present procedure, which involved a violation of the principle of data accuracy and, consequently, a violation of the principle of confidentiality. As things stand, none of these circumstances distort the reality of the proven facts or the correctness of their legal qualification, because as the entity itself acknowledges, the IES incorrectly entered the email data into the system and throughout the school year sent the communications and academic grades of the complainant's son to the family of another student.

At this point, it should also be noted that the circumstances invoked by the IES in its defense could have been taken into account in the case of imposing a possible monetary fine, however, this is not the present case, therefore, for the nature of the infringing subject, the data protection regulations provide that infringements will be sanctioned by means of a non-pecuniary sanction, as set out in the 4rt legal basis. This same foundation also includes the assessment of the corrective measure instituted by the IES to prevent events such as those proven from being repeated in the future.

**3.** In relation to the facts described in the proven facts section, it is considered that they violate the principles of accuracy (Article 5.1.d of the RGPD) and data confidentiality (Article 5.1.f RGPD).

Firstly, article 5.1.d) of the RGPD regulates the principle of accuracy establishing that personal data will be *"accurate and, if necessary, updated; all reasonable measures will be taken to delete or rectify without delay the personal data that are inaccurate with respect to the purposes for which they are processed"*.

And, secondly, article 5.1.f) of the RGPD regulates the principle of confidentiality determining that personal data will be *"treated in such a way as to guarantee an adequate security of personal data, including protection against treatment unauthorized or illegal and against accidental loss, destruction or damage, through the application of appropriate technical or organizational measures"*.

During the processing of this procedure, the facts described have been duly certified in the section on proven facts, which are constitutive of the offense provided for in article 83.5.a) in relation to articles 5.1.d); and also, of an infringement provided for in the same article 83.5.a) in relation to article 5.1.f); all of them from the RGPD.

For its part, article 5 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter LOPDGDD) has regulated the duty of confidentiality in the following terms:

*"1. Those responsible and in charge of data processing as well as all the people who intervene in any phase thereof are subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.*

*2. The general obligation indicated in the previous section is complementary to the duties of professional secrecy in accordance with its applicable regulations.*

*3. The obligations established in the previous sections remain even if the obligee's relationship with the person in charge or person in charge of the treatment has ended."*

Likewise, article 13 of the LPAC, which lists a catalog of people's rights in their relations with public administrations, expressly includes in letter h) the right "*To the protection of personal data, and in particular to the security and confidentiality of the data contained in the files, systems and applications of the public administrations*".

Article 83.5.a) of the RGPD, typifies as an infringement, the violation of the "*basic principles of the treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9*", among which they contemplate both the principle of accuracy (art. 5.1.d RGPD), and the principle of confidentiality (art. 5.1.f RGPD).

For their part, these behaviors have also been included as a very serious infringement in articles 72.1.a) and 72.1.i) of the LOPDGDD, in the following form:

*"a) The processing of personal data that violates the principles and guarantees established by article 5 of Regulation (EU) 2016/679. (...)*

*i) The violation of the duty of confidentiality established in article 5 of this Organic Law."*

In the present case, however, it is considered that both violations are linked in the sense that one of the violations (the violation of the principle of accuracy) has led to the commission of the other (the violation of the principle of confidentiality).

In this sense, article 29.5 of the LRJSP provides that "*When the commission of one offense necessarily leads to the commission of another or others, only the penalty corresponding to the most serious offense committed must be imposed*".

In the present case, in which the two offenses committed are provided for in article 83.5.a) of the RGPD (which refers to both the violation of the principle of accuracy and the principle of confidentiality), the conduct described in imputed facts, due to their connection, should only be sanctioned for the violation of the principle of confidentiality, given that the violation of the principle of accuracy would be subsumed by the first violation.

**4.** Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 LOPDGDD, the competent data protection authority:

*"(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected.*

*The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."*

In terms similar to the LOPDGDD, article 21.2 of Law 32/2010, determines the following:



*"2. In the case of violations committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct its effects . In addition, it can propose, where appropriate, the initiation of disciplinary actions in accordance with what is established by current legislation on the disciplinary regime for personnel in the service of public administrations. This resolution must be notified to the person responsible for the file or the treatment, to the person in charge of the treatment, if applicable, to the body to which they depend and to the affected persons, if any".*

In the present case, however, it becomes unnecessary to require corrective measures for the effects of the infringement given that, on the one hand, the infringing conduct refers to an already accomplished fact, the sending of a series of e-mails to an erroneous e-mail address , which due to its instantaneous nature cannot be corrected by the application of corrective measures, and, on the other hand, the fact that the entity has adopted different measures in order to prevent similar events from being repeated in the future to those tested here, by establishing a system ( *instigated* ) in which it is the students' families themselves who, at the time of registration, enter in the system the electronic addresses where they want to receive the communications sent by the IES, and thus avoid " *the margin of error* " that could eventually be derived from the transcription of the contact data provided by the families on the paper form in the digital database.

For all this, I resolve:

**1.** Admonish the IES (...), of the Department of Education , as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f), both of the RGPD.

It is not necessary to require corrective measures to correct the effects of the infringement, in accordance with what has been set out in the legal basis 4rt.

**2.** Notify this resolution to the IES (...), of the Department of Education.

**3.** Communicate the resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.

**4.** Order that this resolution be published 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 articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003 , of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal 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, regulating the administrative contentious jurisdiction.

If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended in the terms provided for in article 90.3 of the LPAC.

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

The director,

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