

## REFLECTIONS ON ACCESS TO THE FILE GENERATED AFTER A BULLYING CASE

## REFLEXIONES SOBRE EL ACCESO AL EXPEDIENTE GENERADO TRAS UN CASO DE ACOSO ESCOLAR

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### **Resumen**

El presente supuesto práctico se centra en el análisis, por parte del inspector de referencia de un IES, de la petición que realiza la familia de un alumno presunto acosador al expediente generado tras el protocolo de acoso escolar realizado por el centro para dirimir si efectivamente hubo acoso o no.

***Palabras clave:*** Acoso escolar, acceso al expediente, confidencialidad.

### **Abstract**

This case study focuses on the analysis, by the reference inspector of an IES, of the request made by the family of an alleged bullying student to

the file generated after the bullying protocol carried out by the center to determine whether or not there was indeed bullying.

**Keywords:** *Bullying, access to file, confidentiality.*

## INTRODUCTION

The present work develops a practical case of enormous interest in today's context, following the surge experienced in educational centers regarding requests from families for access to information generated through the protocols of school bullying, which unfortunately are on the rise. The education inspection must intervene by advising the center on how to proceed in these cases.

Educational institutions find themselves immersed in a complex set of regulations not directly related to education, and they seek guidance from the relevant inspection to avoid compromising the data protection inherent in this process. At the same time, they aim to reconcile this principle with the right of the concerned parties to access the file, as proclaimed by both the Law 19/2013, of December 9, on transparency, access to public information, and good governance, and the Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations. The situation is not straightforward, and an attempt is made to shed some light on it with the analysis that will be carried out next.

The Spanish Constitution, which serves as our framework of principles and values guiding all normative development in democratic societies, entrusts public authorities, in article 27.8, with the inspection and accreditation of the education system to ensure compliance with laws.

The Statute of Autonomy of the Principality of Asturias, in article 18, grants the autonomous community the competence for legislative development and implementation of education in its entirety, levels and degrees, modalities, and specialties, in accordance with article 27 of the Spanish Constitution and organic laws that, as per article 81.1 of the same, develop it, without prejudice to the powers attributed to the State by article 149.1.30 and the high inspection for compliance and guarantee.

Educational Inspection, as per article 148 of Organic Law 2/2006, of May 3, on Education, will act "on all elements and aspects of the education system, to ensure compliance with laws, the guarantee of rights, and the observance of the duties of those involved in teaching and learning processes, the improvement of the education system, and the quality and equity of teaching."

The Resolution of August 1, 2012, of the Ministry of Education, Culture, and Sports, approving the organization and functioning instructions of the Educational Inspection Service in the Principality of Asturias, establishes among the functions of educational inspection to "ensure compliance, in educational centers, with the laws, regulations, and other current provisions affecting the education system."

Therefore, considering the duty and obligation of educational inspection to safeguard the rights and observance of the duties of those involved in teaching and learning processes, in the exercise of its functions outlined in the Resolution of August 1, 2012, the request made by the family of a student alleged to be a harasser for access to the file generated in a school bullying protocol is being studied.

Among the actions entrusted to the Educational Inspection Service in the Resolution of September 5, 2023, from the Ministry of Education, approving the Action Plan of the Educational Inspection Service for the academic year 2023/2024, the designated inspector would be facing one of the so-called "incidental" or unplanned interventions, as mentioned, arising from a family's complaint.

## **BACKGROUND**

1. On March 20, 2023, Mrs. Francisca FFF, the mother of a 2nd-year ESO student at the "XXX" High School in Avilés, reported incidents that could constitute a potential case of bullying against her son.
2. March 31, 2023, a notification was sent to the Educational Inspection Service in accordance with the established protocol, providing details of the actions taken and the dismissive assessment made by the IES management.
3. On April 28, 2023, a request for access to the file generated following the school bullying protocol carried out by the school was received from the family, invoking the duty of transparency presumed of public administrations towards citizens.
4. Faced with these events, the designated inspector, during a visit to the IES on May 3 to supervise diploma issuance proposals, takes the opportunity to gather all the necessary data and documents for a subsequent study in the office and to advise the school and the family in accordance with applicable regulations.

## **EVALUATION OF THE EVENTS**

The protocol for addressing potential cases of bullying in non-university educational centers in the Principality of Asturias aims to guide teachers and the rest of the educational community on how to deal with suspicions of possible bullying, thus promoting positive coexistence.

Not every behavior contrary to coexistence or severely harmful automatically implies the existence of a bullying situation. According to the provisions of the third section of the Circular from the Minister of Education and Culture regarding the instructions regulating the application of the Protocol for addressing potential cases of bullying in non-university educational centers in the Principality of Asturias, the following circumstances are considered necessary for such a situation to occur:

1. Repetition: It is an action that requires continuity over time. Repetition and frequency form the basis of the definition of bullying.

2. Intentionality: It is expressed in the conscious intent to cause harm, creating in the victim the expectation of being the target of future attacks.

3. Power Imbalance and Helplessness: There is an inequality of physical, psychological, and/or social power that creates an imbalance of forces in interpersonal relationships. The victim cannot find strategies to defend themselves and experiences isolation, stigmatization, and loss of self-esteem.

4. Personalization: The typical goal of bullying is usually a single victim, who ends up in a situation of helplessness.

If these four characteristics are not present, taking into account the circumstances of each case, the impact on the individuals involved, and the evolution of the situation over time, the aggression will be addressed according to the provisions of Decree 249/2007, of September 26, which regulates the rights and duties of students and rules of coexistence in non-university educational centers supported by public funds in the Principality of Asturias.

The instructions governing the application of the protocol for addressing potential cases of bullying in non-university educational centers in the Principality of Asturias, mentioned above, aim to regulate the use of the Protocol for managing cases of possible bullying detected among students in publicly funded educational centers in the Principality of Asturias.

The development of the protocol includes the following steps:

**Step 1.- Initial meeting. Preliminary decisions**

The school addresses, from the moment they become aware of a possible situation of school harassment, must carry out the following actions:

- Convene the family of the possible victim to hear their version of the events and discuss the urgent measures to be taken.

- Convene the head of studies, the person responsible for guidance at the school, the tutor of the individual allegedly experiencing school harassment, as well as any other person who could provide information, to form a follow-up team. This team will investigate and assess the reported facts and the information provided by its members. If the case does not meet the criteria for a situation of school harassment, the team will consider adopting educational and/or corrective measures as necessary and will conclude the school harassment protocol.

The school administration will communicate to the family the conclusions obtained from the conducted investigation and the measures taken.

## **Step 2 - Expansion of information and analysis. Adoption of emergency measures. Case evaluation**

If following the investigation conducted in the previous step, it is determined that there is a potential case of school harassment, the existing evidence will be forwarded to the education inspection. Confidentiality of the collected data will be strictly maintained at all times. If necessary, precautionary measures will be initiated to protect the potential victim. Subsequently, the school administration will conduct a new assessment. If the assessment is dismissive, the procedure outlined in Step 1 will be followed. It is emphasized that behaviors contrary to coexistence will be addressed with appropriate measures in accordance with Decree 249/2007, dated September 26. If the assessment is affirmative, the following step will be taken.

## **Step 3 - Action plan in case of observing evidence of school harassment**

If, after the conducted study, it is determined that there are signs of school harassment, it will be promptly reported to the Education Inspection Service. An action plan will be initiated with the aim of resolving the case, including measures to protect the victim, corrective measures for the alleged harasser, actions involving the families, teaching teams, guidance department, and, if applicable, external agents. If there is evidence of criminal acts, the victim's family will be informed about the possibility of filing a complaint, and the families of the aggressors will be informed about the actions the school must take, namely, reporting the situation to the law enforcement authorities and, if necessary, to the Minor's Prosecutor's Office. Families of students directly involved will be informed, if necessary, that if there is evidence that any minor is in a situation associated with an inappropriate use of parental authority, as outlined in article 31.2 of the Law 1/1995 on the Protection of Minors, it will be reported to the Minor

Protection Service. Finally, it is noted that behaviors contrary or seriously detrimental to coexistence, whether or not related to school harassment, will be managed in accordance with Decree 249/2007, dated September 26.

#### **Step 4 - Report preparation and submission to the educational inspection service**

The most relevant data of the case, along with the decisions made, will be documented in a report. Once this report is compiled, it will be submitted to the Educational Inspection Service within a period of fifteen days, regardless of whether the existence of school harassment has been determined or not.

#### **Step 5 - Monitoring and evaluation of the school harassment situation**

The school will ensure compliance with the measures established in Step 3. Ongoing monitoring of these measures and their effectiveness will be conducted. The family will be kept informed of the case's progress, requiring coordination and communication between both parties. The corresponding follow-up report will be submitted within twenty-two days from the initiation of the actions described in Section 3 for analysis by the Educational Inspection Service.

#### **Step 6 - Communication to other authorities**

In cases of severity or when there are indications of a crime, the documented facts will be reported to the Public Prosecutor's Office in accordance with article 4, paragraph 1, of Decree 249/2007, dated September 26.



Similarly, if a situation of child vulnerability is detected, the school must report it to the Child Protection Service of the Principality of Asturias.

### **Step 7 - Conclusion of the Case**

Finally, the school administrations must inform the relevant education inspections about the progress and follow-up of the case after the measures have been implemented.

A corresponding record will be drafted for all meetings with families and the follow-up team.

Educational institutions will incorporate procedures into their coexistence plans to raise awareness throughout the educational community about bullying cases, making the action protocol known. Meanwhile, the Education Inspection Service will monitor all cases, evaluate the management carried out by the schools, provide guidance on any issues or doubts that may arise, and offer assistance with the processes and documents that need to be undertaken.

At this point, we will delve into the main topic of this case study, namely, the right to access the file generated in the bullying protocol, including the minutes of meetings with families and the follow-up team.

Indeed, there is an increasing number of cases where access to the file generated after a bullying incident is requested. The issue we are addressing is very delicate; the relevant documentation contains a wealth of sensitive data, and we cannot handle the corresponding requests lightly, even though the right to access is invoked under article 53 of Law 39/2015, of October 1, and the Law of the Principality of Asturias 8/2018, of September 14, on Transparency, Good Governance, and Interest Groups.

The idea behind implementing a bullying protocol is to clarify the events to determine if the reported situation can indeed be considered bullying or, conversely, if it is an isolated incident, which is not the same thing.

From the perspective of the educational administration, a bullying protocol can be considered as an informative file developed by the schools, which can be framed within article 55, paragraph 1, of Law 39/2015, of October 1. This article refers to actions prior to the initiation of the administrative procedure aimed at understanding the alleged facts and the individuals involved to conclude whether bullying has occurred or not.

Professor Encarnación Montoya Martín, as referenced, asserts that "it is a doctrine of the Supreme Court that preliminary actions, not being part of the sanctioning procedure, cannot be attributed the guarantees inherent to the latter."

A bullying protocol essentially encompasses the set of preliminary actions carried out by the educational administration to ascertain the existence or absence of bullying or behavior contrary to or severely harmful to coexistence.

In the previously described protocol, approved by the Instructions of March 16, 2018, and modified by the Circular from the Minister of Education on September 28, 2022, a series of annexes, minutes, and reports are established. Access to these documents is being requested, and we are reflecting on them due to the confidentiality that educational administrations must maintain regarding the sensitive data they contain, despite the obligation to transparency and citizens' right to access.

There is established doctrine regarding the non-access to a copy of the complaint by the accused party. Miguel Ángel Blanes, as referenced, argues that article 64.1 of Law 39/2015, of October 1, only establishes the right to be notified of the initiation decision. The denial of access to the complaint does not create defenselessness, and in any case, access could be granted while maintaining the anonymity of the complainant's personal data. However, it is necessary to note that if the initiation of the proceeding has not been agreed upon, the complaint is not part of any proceeding to which the interested party has the right to access, and therefore access to the complaint would not be permissible.

In the same vein, as referenced, Opinion 2012/0342 of the Spanish Data Protection Agency establishes that the accused party has the right to examine and obtain copies of the documentation of the sanctioning procedure in accordance with the provisions of articles 53, paragraph 1, letter a), and paragraph 2, letter a) of Law 39/2015, of October 1, in order to exercise their right of defense in the procedure. However, this will always occur when the complaint is part of the sanctioning procedure (as there are cases where the complaint is not incorporated into this procedure), given that it is always initiated *ex officio*, and the complaint is a simple prior communication. Therefore, when the complaint is part of the sanctioning procedure, in general, it is affirmed that the right of the accused party extends to knowing the content of the complaint but not the data of the complainant, especially in cases where the complainant has expressly invoked the confidentiality of their personal data in the complaint.

Only when it is necessary for the accused and/or the interested party to know the identity of the complainants for the exercise of the right of defense, should these identifying details of the complainant be provided.

This argument could be extended to the stage of preliminary proceedings, invoking access to the file to avoid falling into defenselessness, without prejudice to what is established in article 14, letter e), of Law 19/2013, of December 9, regarding the limits of this non-absolute right of access.

On the other hand, there is also the limitation imposed by article 15, letter d) of the aforementioned law, and the primacy of the best interests of the child established in article 2 and 22 quater, paragraph 3, of Law 1/1996, of January 15, on Legal Protection of Minors, partially amending the Civil Code and the Civil Procedure Law, article 6, paragraph 2, letter b) of Law 1/1995, of January 27, on the Protection of Minors, of the Principality of Asturias, and article 6 and 48, letter a) of Law 3/2005, of February 18, on Attention and Protection of Children and Adolescents, to the extent that it is usually minors who are involved in these situations.

Access will require the petitioner to demonstrate a legitimate interest, as established in the tenth additional provision of Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights.

## **CONCLUSIONS AND PROPOSALS**

In the light of the reflection made on the different applicable regulations to the bullying protocol, established in the Circular of the Minister of Education on September 28, 2022, modifying the Instructions of March 16, 2018, and the referenced bibliographic sources, it can be concluded that the confidentiality of the data contained in the reports and minutes generated in the process of a bullying protocol must be maintained at all times. In addition, regarding requests for access to the

mentioned information, the release of duly anonymized data will be carried out only when a legitimate and direct interest is proven, justifying the release in accordance with the provisions of Organic Law 3/2018, of December 5, without compromising the supremacy of the best interests of the child as per Organic Law 1/1996, of January 15.

## LEGISLATIVE REFERENCES

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- Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil.
- Ley 3/2005, de 18 de febrero, de Atención y Protección a la Infancia y la Adolescencia.
- Decreto 249/2007, de 26 de septiembre, por el que se regulan los derechos y deberes del alumnado y normas de convivencia, en su versión dada por el Decreto 7/2019, de 6 de febrero.
- Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno.
- Circular de la Consejera de Educación de 28 de septiembre de 2022 por la que se modifican las instrucciones de 16 de marzo de 2018 que regulan la aplicación del protocolo de actuación ante situaciones de posible acoso y ciberacoso escolar en los centros docentes no universitarios del Principado de Asturias.
- Ley 8/2018, de 14 de septiembre, de Transparencia, Buen Gobierno y Grupos de Interés.
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