

“Children Front and Centre”

Data Protection Consultation Document

Submission by Mason Hayes & Curran LLP

1. Mason Hayes & Curran LLP welcomes the publication of the 14 Fundamentals for a Child-Oriented Approach to Data Processing (the Fundamentals) by the Data Protection Commission (DPC) in December 2020.
2. We make this submission in our capacity as Ireland's leading provider of legal services to the Education Sector to include primary, post primary and tertiary level. We have consulted with a number of leadership organisations to include the Irish Primary Principal's Network (IPPN) and the National Association of Principals and Deputies (NAPD).
3. We understand the object of the fundamentals is to drive improvements in standards of data processing. The introduction of child-specific data protection interpretative principles and recommended measures that will enhance the level of protection afforded to children against the data processing risks posed to them by their use of/ access to services in both an online and offline world is timely.
4. Children are very much front and centre of the data protection landscape in Europe, with Recital 38 of the GDPR stating that children merit specific protection when it comes to the processing of their personal data because they may be less aware of the risks, consequences and safeguards involved as well as their data protection rights. Where children are aware of the risks associated with the processing of their personal data, their age, maturity and developmental capacity will impact on their ability to be able to mitigate those risks.
5. In tandem, the Fundamentals will assist organisations that process children's data, by clarifying the principles, arising from the high-level obligations under the GDPR, to which the DPC expects such organisations to adhere. The DPC argue that both online and offline (where applicable), the Fundamentals should be complied with by all organisations processing children's data. This includes services that are directed at or is intended for, or are likely to be accessed by children.
6. In Ireland, for data protection purposes, a child is somebody under the age 18, in keeping with the definition of a child under the UN Convention on the Rights of the Child (UNCRC) as “a person under the age of 18 years.” The Data Protection Act 2018 provides for a digital age of consent at 16 for the purposes of Article 8(1) of the GDPR. Essentially this means that the processing of data of children under the age of 16, in respect of online services, shall not be lawful without parental consent.
7. The DPC considers that organisations should comply with the standards and expectations which are established in these Fundamentals when the services provided by the organisation are directed at, intended for or likely to be accessed by children. Section 1.3 of the consultation document states that “Offline, this applies to educational providers” clearly indicating that schools at all levels are subject to the Fundamentals.

8. Fundamentals, 5, and 6 will in particular impact on schools.
9. Fundamental (5) Information in every instance.

"Children are entitled to receive information about the processing of their own personal data irrespective of the legal basis relied on and even if consent was given by a parent on their behalf to the processing of their personal data". (Section 3 "Transparency and Children"). This it is respectfully submitted aspirational for a large cohort of students. We feel it is not feasible in primary schools due to the ages and maturity of the children. Consent should still continue to be sought and obtained from parents/guardians. In relation to post primary students, we should be mindful that the age of digital consent is 16 years. We do however believe that based on the maturity of some children less than 16 years, that school principals should seek consent on a case by case basis if the principal considers it appropriate. The default position otherwise should still continue to be sought that consent is sought and obtained from parents/guardians.

10. Fundamental (6) Child-Oriented Transparency

Privacy information about how personal data is used must be provided in a concise, transparent, intelligible and accessible way, using clear and plain language that is comprehensible and suited to the age of the child (Section 3 "Transparency and Children"). This Fundamental is desirable at post primary level but only appropriate at the higher primary levels.

11. Recommendations

- (a) More guidance on the issue of consent for students would be welcome.
- (b) The appointment of Data Protection Officers to support all schools should be recommended. Currently, Data Protection Officers are only available to support schools in the Education and Training Board schools and special schools. An example of the challenges facing schools is in relation to a Data Protection Impact Assessment ("DPIA"). The support of Data Protection Officers to support schools would be invaluable.

Article 35 GDPR states that a Data Protection Impact Assessment ("DPIA") must be conducted by a controller where a type of data processing, in particular using new technologies, is likely to result in a high risk to the rights and freedoms of individuals. The GDPR also sets out a number of specific instances in which controllers must conduct a DPIA. A DPIA describes a process designed to identify risks arising out of the processing of personal data and to minimise these risks as far and as early as possible. If required, a DPIA must be completed prior to the commencement of the relevant data processing. DPIAs are important tools for negating risk, and for demonstrating compliance with the GDPR.

- (c) Data Retention Schedules for personal data belonging to students should be the subject of guidance.
- (d) The immediate appointment of a Digital Safety Commissioner should be recommended.