



Texas Association of School Boards

Legal Services

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Serving Texas Schools Since 1949

Frequently Asked Questions about Remote Instruction

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For TASB resources and links related to COVID-19, see [TASB's Coronavirus \(COVID-19\) Resources](#)

Virtual and remote instruction is not new to Texas, but the urgent need to close schools and move all students to remote instruction during the COVID-19 pandemic presented a broad range of practical challenges and legal issues. TASB Legal Services offers this FAQ hoping to clarify key legal issues, while acknowledging that federal and state laws do not always reflect current technology, and that teachers and other school personnel often must do the best they can under difficult circumstances. As always, local choices should reflect the unique circumstances in each district and the advice of the district's attorney.

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Educators and Remote Instruction

1. May a district require a teacher's duties to include electronically communicating with students to deliver instruction?

Yes, in accordance with a district's employment contract and district policies. Many educators in Texas are employed under a contract providing that the district may assign or reassign the educator and make changes to responsibilities and duties at any time during the contract term. Thus, teachers may be asked to adapt to a new instructional delivery model. Understandably, the use of technology in a virtual environment adds new teaching challenges that require instructional modifications. The transition may cause some employees to seek reasonable accommodations as qualified individuals with disabilities. See TASB Policy DAA. Teachers are encouraged to work with their peers and supervisors to find solutions to ensure instructional continuity.

2. May a district require employees to use their personal devices to perform their duties, such as contacting students or delivering remote instruction?

No, a district should not insist that an educator use personal technology resources to provide instruction. First, Texas Education Code section 38.027 requires school district electronic communications policies to allow educators to decline to share their personal phone numbers or email addresses with students. In addition, state law defines an employee using his or her personal resources to perform school district functions as the temporary custodian of any school district records created or received by the employee. Tex. Gov't Code §§ 552.003(7), .004. This is a burden most school employees would want to avoid. Finally, requiring an employee to use personal resources in order to provide instruction could be considered a material change to the employee's conditions of work as envisioned by the employee's employment contract and school district policies.

Instead, districts should offer employees the option of accepting district-issued technology to facilitate working from home. In locations where that is not possible, some school districts have authorized employees to enter school facilities and work on staggered schedules that permit social distancing and limit the number of employees in a given space, in accordance with state and local orders and the superintendent's determination of essential school district functions.

For their own convenience, school employees may choose to use personal technology resources to make working from home easier. Districts may permit this, as long as employees understand that they are subject to school district policies regarding technology use and electronic communications with students at all times, regardless of who owns the technology resources.

3. What expectations for conduct may districts set for employees who have been asked to communicate electronically with their students?

Regardless of whether an employee uses a district-issued or personally-owned device, school employees must comply with district policy and employee standards of conduct when communicating with students electronically. Given the increase in one-on-one electronic communications among employees, students, and parents, now is a good time to remind staff about local policies and guidelines on electronic communications.

TASB Policy DH prohibits an employee from using electronic communications in a manner that constitutes prohibited harassment or abuse of a student; adversely affects the student's learning, mental health, or safety; includes threats of violence against the student; reveals confidential information about the student; or constitutes an inappropriate communication with a student, as described in the Texas Educators' Code of Ethics.

Additionally, many districts include specific restrictions related to electronic communication with students in their employee handbooks. For example, TASB's Model Employee Handbook prohibits an employee from knowingly communicating with students using any form of electronic communications, including mobile and web applications, that are not provided or accessible by the district, absent an exception. Employees are directed to limit communications to matters within the scope of the employee's professional responsibilities (e.g., for classroom teachers, matters relating to class work, homework, and tests), and employees are prohibited from knowingly communicating with students through a personal social network page.

Text messaging is worthy of special consideration. Under TASB's Model Employee Handbook, only a teacher, trainer, or other employee who has an extracurricular duty may use text messaging, and then only to communicate with students who participate in the extracurricular activity over which the employee has responsibility. Many districts require the employee to include at least one of the student's parents or guardians and/or the employee's supervisor as a recipient on each text message to a student.

Employees do not have a right to privacy with respect to communications with students or parents, and employees continue to be subject to applicable state and federal laws, local policies, administrative regulations, and the Texas Educators' Code of Ethics. Communications should occur through district-provided channels, or, if for any reason communications happen on personal devices, the employee must retain all messages with a student and provide the messages to the school district for appropriate record retention. Upon written request from a parent or student, an employee must discontinue communicating with the student through email, text messaging, instant messaging, or any other form of one-to-one communication.

4. If an employee is working from home and needs certain supplies or equipment, will the district reimburse the employee for the supplies?

If districts determine that employees need supplies or equipment at home to continue working, districts can accomplish this in a variety of ways. A district could distribute existing supplies by making the supplies available for pick up (using a sign-up schedule to avoid a crowd, perhaps) or transporting the supplies to employees' homes. Some districts may ship new supplies straight to employees' homes. A district might also authorize employees to purchase their own supplies with an allowance or by seeking reimbursement from the district. Such purchases should be approved in advance, documented with receipts, and accomplished in accordance with local purchasing guidelines and expense reimbursement policies, as applicable.

Student Access to Remote Instruction

1. Do school districts need to seek parental consent for students to use educational technology for remote instruction?

Most districts seek parental permission for the use of instructional technology at the start of the school year. If your district provided parental notification of the use of online resources, such as cloud-based software and access to the internet, no further parental consent is needed. For example, TASB Policy CQ(EXHIBIT) notifies parents that children will have access to a variety of technology resources through the district, including online research tools, software applications, and websites that have been selected by district staff. In addition, TASB Policy CQ(EXHIBIT) affirms that the parent has reviewed the district's technology resources policy, associated administrative regulations, and user agreement and acknowledges the parent's consent for the district to use online tools for instruction and other purposes.

2. Does online instruction create or reveal education records subject to FERPA?

When it comes to student privacy, the laws for teaching in an online environment are the same as teaching in a traditional classroom. Whether the teacher is offering a pre-recorded lesson for asynchronous instruction or giving live instruction via video conference, a teacher's online lesson is unlikely to generate education records subject to the protections of the Family Educational Rights and Privacy Act (FERPA). *See* 20 U.S.C. § 1232g. This is true even though other members of a student's household might overhear the online lesson. The U.S. DOE's Student Privacy Policy Office compares the use of video conferencing technology for online instruction while another family member is present to having that same family member visit the student in his or her physical classroom.

That said, in the online environment, teachers should be mindful to avoid revealing students' protected personally identifiable information (PII) during a lesson, absent specific parental consent. PII includes information that directly identifies an individual (e.g., full name, address, social security number or other identifying number or code, telephone number, email address, etc.) or data elements (like gender, race, birth date, or geographic indicator) that could be used to identify specific individuals in conjunction with other data elements, i.e., indirect identification. In addition, teachers should avoid discussing any potentially embarrassing information, like a student's disability or homeless status, during online instruction when the student may not be in a private place.

Also, as in a regular classroom, if a video recording or other record captures an incident involving personally identifiable student information (like an act of online bullying) that the teacher shares with the school administration (for purposes of discipline, for example) that recording becomes an education record protected by FERPA.

For more information, see guidance from the U.S. DOE’s Student Privacy Policy Office on [FERPA and Virtual Learning During COVID-19](#) and [Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices](#).

3. Is the school district responsible for risks inherent in the use of online platforms, such as hacking or “Zoom bombing?”

Generally speaking, school districts have immunity from liability for most personal injuries, including many risks in the online environment such as hacking and cyberbullying. That said, school districts should work with IT professionals to offer the most secure online options feasible under the circumstances.

The Federal Bureau of Investigation (FBI) has released an [article](#) on defending against video-teleconferencing (VTC) hijacking. Administrators are encouraged to review the FBI article and to take the following steps to improve VTC cybersecurity:

1. Ensure meetings are private, either by requiring a password for entry or controlling guest access;
2. Consider security requirements (such as the availability of encryption) when selecting vendors; and
3. Ensure VTC software is up to date.

If the district’s technology resources are hacked, the incident should be reported immediately, and the district should seek legal advice on whether the incident requires notification of a security breach. See TASB Policy CQB.

4. May a teacher record a live classroom instructional session to make it available to students who were unable to join the live session?

Yes. In Texas, parental consent to record a student’s voice or image is not required when an employee creates or allows the recording for a purpose related to regular classroom instruction. Tex. Educ. Code § 26.009; *see also Learned v. Princeton Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision 058-R10-07-2013 (upholding a district policy allowing students to record each other in class but striking down a portion of the policy that allowed students to record each other outside of the classroom). As with an in-person classroom environment, teachers should not share recordings containing student information outside of a secure virtual classroom or on any public website without specific parental consent or legal advice.

5. How should school employees respond if they become aware of misconduct while the school district is closed, but offering remote instruction? What discipline is available during a time of school closure?

While a school district is closed but conducting remote instruction, many school district functions are suspended and most disciplinary placements are unavailable. Nevertheless, school officials should not ignore reports of misconduct during this time.

First and foremost, the legal obligation of all school employees to report suspected child abuse or neglect remains in full force and effect. See TASB Policy FFG. Under the circumstances, district leaders should remind school employees of their ongoing reporting obligations and the related procedures.

School officials are also under an ongoing legal obligation to report certain criminal activity if it happens as part of “school-sponsored or school-related” activities, on or off school property. Tex. Educ. Code § 37.015; see TASB Policy GRAA. In addition, certain educator misconduct must be reported to the State Board for Educator Certification (SBEC). See TASB Policy DHB.

Reports of student misconduct, including cyberbullying, should be documented and investigated as is reasonable given the current environment. School officials may attempt to follow provisions of their local student code of conduct and their bullying policy at TASB Policy FFI, but timelines may be affected by the school closure and many disciplinary placement options are unavailable at this time. School officials’ most effective response to allegations of online instruction may be to capture screenshots or other evidence and share it with parents, asking for their assistance in monitoring students’ online behavior. Pursuant to TASB Policy CQ, anyone who fails to comply with the district’s acceptable use policy is subject to being denied the privilege of future use of the technology. In the current environment, however, before denying a student access to online tools, school officials should ascertain that the student can be offered alternative opportunities for remote instruction.

Contracts for Educational Technology

1. What do districts need to know about student privacy and contracting with online educational technology (ed-tech) providers to deliver virtual instruction to students?

As districts implement virtual learning environments, it is important to remember that laws protecting the personally identifiable information (PII) in students’ education records remain in full effect. See 20 U.S.C. § 1232g (concerning confidential education records under FERPA); see also Tex. Gov’t Code § 552.114 (concerning confidential student information under the Texas Public Information Act, or PIA).

The U.S. DOE offers [guidance](#) on complying with FERPA when engaging with third-party service providers, including best practices and model terms of service, as well as other resources on its [Data Security website](#).

A school district may lawfully provide an ed-tech service provider access to confidential student record information under one of the following circumstances:

- The service provider is a “school official” for purposes of FERPA. For contracted service providers, parental consent is not required if the district directly controls the contractor’s use and maintenance of student PII and otherwise complies with FERPA’s disclosures conditions. 34 C.F.R. § 99.31(a)(1)(i)(B). Direct control is typically established through a written agreement, but sometimes may be established by district policy or in the annual notification to parents. Agreements should always require providers to secure student information in compliance with all federal and state laws protecting student confidentiality.
- The service provider seeks only “directory information” in accordance with the school district’s local policy. See TASB Policy FL.
- The school district obtains parental consent for the student’s use of the technology.

Of course, if a school district is merely providing information about an ed-tech opportunity to parents who can avail themselves of the option, then the service provider would not be receiving any personally identifiable student record information from the school district.

Copyright Issues

1. May teachers read books and stories by other authors over the internet?

Yes, as long as the content is in the public domain, falls within the “fair use” exception to copyright, meets specific instructional exemptions, or has been licensed to the district.

Although we might suppose that concepts of “fair use” should be stretched to accommodate the hardships of the current situation, federal copyright law continues to govern instructional choices during this period of distance learning.

Under federal copyright law and exceptions for classroom use, teachers generally do not have to obtain permission if performing or showing a copyrighted work in the course of “face-to-face teaching activities” in a classroom or similar place devoted to instruction, provided the work was legally obtained by the teacher. This exemption encompasses many instructional activities relating to a wide variety of subjects. 17 U.S.C. § 110(1). The TEACH Act extends similar exceptions to materials used in distance learning. 17 U.S.C. §§ 110(2), 112(f).

Under current circumstances, the classroom exception may also apply to copyrighted content used as an integral part of a class in a virtual classroom with students officially enrolled in that class. According to the U.S. Copyright Office, however, this exemption would not apply if the read-aloud is purely for recreation or entertainment purposes, even if there is cultural value or intellectual appeal. Therefore, if certain technological requirements are met, educators may read a copyrighted story or portion of book as a virtual lesson in the same manner as in an in-person lesson. Of course, it is always safest to have unequivocal consent from a copyright holder.

Another option for teachers who are uncertain that they are authorized to read copyrighted content online on a public platform is for the teachers to find the same or similar content read online by the author or another licensed individual. During the COVID-19 pandemic, numerous authors went online to share personal readings or licensed famous personalities to read their works online.

For one attorney's opinion shared by the U.S. Copyright Office, see [TEACHing from a Distance and Copyright Considerations](#) (Mar. 17, 2020).

2. Since students are unable to access physical textbooks at school, may a teacher make copies of the entire textbook and electronically share the copies with students?

Copying an entire textbook, rather than a portion, is risky without specific permission from the textbook publisher. Teachers often claim the "fair use" exception under federal copyright law when reproducing or duplicating copyrighted works for purposes such as criticism, comment, classroom teaching, scholarship, or research. However, if challenged, whether use is actually fair will be judged by the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use on the value of the copyrighted work. 17 U.S.C. § 107.

Reproducing an entire textbook is likely to exceed the scope of the fair use exception. Additionally, because a teacher would not typically review the entire textbook in a regular classroom setting, it may be risky to rely on the classroom exception.

Some districts have found that publishers are willing to provide licenses for copies of textbooks online for a limited duration of time during the pandemic.

For common questions about the fair use exception, see [Can I Use Someone Else's Work? Can Someone Else Use Mine?](#) from the [U.S. Copyright Office's FAQ website](#).

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/services/legal-services/tasb-school-law-esource/instruction/documents/faq-about-remote-instruction.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoollawesource.tasb.org.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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