Legal Issues in Remote Instruction During the COVID-19 Pandemic
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For more TASB resources and links related to COVID-19, see TASB’s Coronavirus (COVID-19) Resources

The long-term closure of schools and the necessity for remote instruction presents 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 are doing 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.

The volume and speed of information about the impact of COVID-19 on public schools is overwhelming. This document reflects current information at the time of publication. For updates, we recommend that you regularly check the Texas Education Agency (TEA) COVID-19 Website, including the Instructional Continuity Planning Framework Website, and the United States Department of Education (U.S. DOE) COVID-19 Information and Resources for Schools and School Personnel.

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Basic Instructional Questions

1. Does our school district really have to provide remote instruction?

With Texas schools closed for the foreseeable future, it seems unlikely that a school district could complete its instructional year and receive full funding without providing at least some days of remote instruction. The Texas Education Code requires districts to operate for at least 75,600 minutes each year. The commissioner of education may allow districts to operate for less than the required minutes when a disaster or calamity has caused the closing of schools. Tex. Educ. Code § 25.081. Continued operation is essential, however, since school funding is based largely on districts’ average daily attendance (ADA).
**TEA’s School Finance FAQ** (Mar. 25, 2020) is required reading for school officials. The FAQ states that school systems will continue to receive funding if they are closed because of COVID-19 but continue to support students instructionally. The FAQ categorizes school days for purposes of instructional minutes and average daily attendance into four different categories as described below. See the TEA School Finance FAQ for more complete information.

<table>
<thead>
<tr>
<th>TEA Terminology</th>
<th>TEA Definition</th>
<th>ADA</th>
<th>Instructional Minutes</th>
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</thead>
<tbody>
<tr>
<td><strong>Closed, Temporary</strong></td>
<td>Short term closure (likely one week or less) during which not actively preparing for remote instruction. Non-instructional staff may be working, e.g., school cleaning activities</td>
<td>Closed days documented as non-instructional and eligible for a missed school days waiver</td>
<td>If instruction occurred in the week, minutes of instruction count toward 75,600 minutes of operation</td>
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<tr>
<td><strong>Closed, Preparing</strong></td>
<td>Normal operations ceased; staff working on-site, remotely, or both to prepare to deliver remote instruction. Non-instructional staff may also be working</td>
<td>Eligible for a missed school days waiver</td>
<td>Preparation does not count toward 75,600 minutes of operation</td>
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<tr>
<td><strong>Closed, Instructing</strong></td>
<td>Normal operations ceased; students receive instruction at home/off-site; staff working on-site, remotely, or both</td>
<td>Eligible for a missed school days waiver if supporting students instructionally</td>
<td>No minutes of operation accrue</td>
</tr>
<tr>
<td><strong>Open</strong></td>
<td>Districts that reopen at some point, but face absenteeism</td>
<td>Eligible for ADA, but may need low attendance waivers or file additional attestation of instructional support for absent students</td>
<td>Minutes of instruction count toward 75,600 minutes of operation</td>
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Given the length of the COVID-19 closure, most districts will need to request waivers in order to comply with the law and receive state funding. TEA has specific guidance regarding missed school day waivers (Mar. 27, 2020). Districts will need to submit an attestation that they provided parents and guardians with “educational resources and implementation assistance necessary to support an instructional program” during the closure. Districts that are closed and then reopen may also need to seek a waiver for average daily attendance. A district that reopen but has low attendance may receive attendance credit if the district submits a similar attestation that parents and guardians were provided resources and assistance for at-home instruction. Both waiver requests must be submitted by June 18, 2020.

2. **Is the district required to track student attendance during remote instruction?**

No. Districts are not required to track attendance in the Public Education Information Management System (PEIMS) after the last day of instruction before the district closed, as described in TEA’s School Finance FAQ (Mar. 25, 2020). While a district is Closed, Instructing, TEA requires the district to document that instruction was offered, but keeping attendance is not required.

3. **What if a student does not actively participate in remote instruction? Is he or she truant?**

Because the district does not take attendance while Closed, Instructing, failure to attend is an academic, not disciplinary or juvenile justice, issue. The student’s lack of participation may be reflected in grades, grade-level promotion, or award of credit, as determined by local grading guidelines. No student’s grade should be penalized, however, because the student lacked the opportunity or resources to complete the assignment. See TEA’s Guidelines on Grading (Mar. 25, 2020). Ideally, the district should work with the student and family to reduce barriers to remote learning.

4. **How does the cancellation of STAAR and end-of-course exams affect promotion and graduation?**

Pursuant to Governor Abbott’s declaration, districts are not required to administer state assessments, including the STAAR or end-of-course (EOC) exams. The requirement that students pass these exams in grades 5 and 8 for promotion to the next grade level (known as the Student Success Initiative) has also been waived for the 2019-20 school year. For students in grades 5 and 8, districts should determine promotion as they do for students in other grades. TEA has published Assessment Guidance (Mar. 26, 2020) related to the cancellation of STAAR, which includes a chart for how different EOC graduation dilemmas may be resolved. TEA has also published Guidance on Individual Graduation Committees (Mar. 24, 2020). For more information, see TASB Policy Services’ Grading, Graduation, and Class Rank – COVID-19 FAQs.
5. **What do districts need to change in grading and class rank policies?**

A school district is not required to change anything in its grading and class rank policies; however, many districts may want to take action to adjust their calculation of class rank and grading guidelines in light of the COVID-19 crisis. The transition to remote instruction may impact course availability, difficulty, and other modifications to the curriculum and instruction. Districts may wish to amend their class rank policy to adjust to these changes. For example, a district may choose to amend their class rank policies for the 2019-2020 school year or move all classes to pass/fail. TASB Policy Service has issued the *Grading, Graduation, and Class Rank—COVID-19 FAQ* to address common questions, including a sample board resolution for the temporary adjustment of EIC(LOCAL).

TEA has also issued *Guidance on Grading and Graduation Requirements* (Mar. 30, 2020). The guidance addresses grading policies, high-tech and low-tech options for completing work, credit by examination, and the legal requirement to provide notice of a student’s performance. TEA emphasizes that students should not be penalized for the method used to complete assignments or inability to access resources to complete the assignment.

6. **Does the 90% rule apply to remote instruction?**

No. The requirement that students attend 90% of the days the course is offered in order to earn credit for the course does not apply to courses taken in the current academic period. According to *TEA’s 90% Rule Guidance* (Mar. 26, 2020), these waivers will be applied automatically. Districts do not need to submit an application.

TEA notes in its *Guidance on Grading and Graduation* (Mar. 30, 2020) that the waiver does not apply to students who lack credit for days missed in a previous academic period. Districts should continue to provide opportunities for those students to demonstrate proficiency in the applicable course.

7. **Can students participate in UIL extracurricular activities over digital platforms?**

Yes, with limitations. In March, the University Interscholastic League (UIL) announced that all extracurricular games and contests were suspended until May 4, 2020. However, remote learning and coaching of UIL activities is allowed through electronic methods, including video and teleconferencing. Instruction and coaching should be limited to eight hours per week of activity, with a maximum of sixty minutes per day Monday through Friday. Districts can monitor the UIL’s *COVID-19 Information and Updates Website* for more updates.
Supporting and Supervising Educators During Remote Instruction

8. 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.

9. 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.
10. 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 sudden surge in one-on-one electronic communications between employees and 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 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 and 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.
11. 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

12. Must districts provide all students free access to technology resources?

Texas law does not explicitly require districts to provide students free technological equipment or internet access from home; however, the law does require providing students free instructional materials. Tex. Educ. Code § 31.001. If a district moves to a fully online distance learning model, this will raise the issue of equity. Some would argue that state law requires districts to facilitate access to its online classrooms for all students. See Tex. Educ. Code § 1.002 (requiring districts to provide equal educational services and opportunities to all individuals).

Districts may not charge a student for technological equipment purchased with the technology and instructional materials allotment. For more information on allowable fees for technology, see TASB Legal Services’ Charging Students for Instructional Technology.

In addition, the U.S. DOE’s Office of Civil Rights (OCR) considers a student’s lack of access to technology as a factor when evaluating discrimination complaints under federal civil rights laws. A district must ensure that educational equity for all students remains a primary consideration in virtual instruction. For a webinar and fact sheet regarding expectations for website accessibility and protecting students’ civil rights during the COVID-19 response, see the OCR’s March 17, 2020 press release.

TEA has provided Guidance to Districts on Providing Internet to Students (Mar. 27, 2020). This resource provides information on free broadband and internet services as well as additional funding streams for districts. TEA also clarifies in its guidance on Instructional Continuity Planning (Apr. 7, 2020) that districts may use options other than virtual instruction, such as printed packets.
13. **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)-A 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)—B 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.

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

When it comes to student privacy, teaching class in an online environment is not much different from teaching in a traditional classroom. Whether the teacher is offering a pre-recorded lesson for “flipped” instruction or whether the teacher is engaged in an exchange 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.

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](#).
15. **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:

- Ensure meetings are private, either by requiring a password for entry or controlling guest access;
- Consider security requirements (such as the availability of encryption) when selecting vendors; and
- 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 follow the steps outlined in TASB Policy CQB on Cybersecurity.

16. **What if a parent does not want his or her student to participate in online videoconferencing?**

No state or federal law speaks directly to this issue, but given the uncertainty, if a parent refuses to permit his or her student to participate in online videoconferencing, we would recommend that the district offer an alternative.

Under FERPA, if videoconferencing will reveal information from a student’s protected education records, the parent has a right to decline participation; the parent may not be required to waive FERPA rights in order to receive instruction. See the U.S. DOE’s Letter to Agora (concluding that an online charter school’s requirement that parents consent to online instruction would violate FERPA if the software involved would allow student information to be released without parental consent). For the reasons discussed above, videoconferencing may not actually generate or reveal any FERPA-protected records, but a parent’s privacy concerns are nevertheless worth consideration.

Under Texas law, a parent is entitled to remove his or her child temporarily from a class or other school activity that conflicts with the parent’s religious or moral beliefs if the parent provides the teacher a written statement authorizing the removal of the child from the class or other school activity. Tex. Educ. Code§ 26.010. Privacy concerns may
not always rise to the level of “moral beliefs,” but districts should not dismiss parents’ online privacy concerns without due consideration. The easiest resolution may be for the district to offer an alternative to the online tool a parent finds objectionable.

17. **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.

18. **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, Instructing, 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. Child welfare officials report that the confining situation and the economic stress of the COVID-19 pandemic have led to a rise in incidents of child abuse. 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. For more information, see TEA’s COVID-19 FAQ: Discipline Guidance (Apr. 3, 2020).

Special Education and Other Special Populations

19. Is the district required to provide students with disabilities a free appropriate public education (FAPE) when school is closed during a pandemic?

Yes. The federal laws that require public schools to provide FAPE to students with disabilities do not include exemptions for public health emergencies or disasters. If a school district closes its schools entirely and is not providing educational services to any student, the district is not required to provide services only to students with disabilities. If the district is providing instruction for any students during a crisis, whether at an alternative location or through technology, the instruction must be available for all students. Once school reopens, the district will also need to make an individualized determination for each student who receives special education under the Individuals with Disabilities Act (IDEA) as to whether compensatory services are necessary as a result of any skills lost due to the closure.

If the district provides an educational program to students despite a closure, via online learning or other alternative method, then students with disabilities are entitled to equal access to the district’s programming as well as the provision of FAPE, meaning the specific program and services identified in each student’s individualized education program (IEP). In other words, if instruction is going on in any fashion, all state and federal laws regarding students with disabilities are in full effect.

As a practical matter, districts in areas affected by a closure or a shelter-in-place order will need to conduct admissions, review, and dismissal (ARD) committee and Section 504 committee meetings by teleconference, or other remote method, in order to determine how, and to what extent, the services identified in a student’s IEP or Section 504 plan can be provided. Under the circumstances, the district and parents may agree in writing to adjust a student’s services. Please note that, generally, changes to the special education and related services in a student’s IEP require school districts to follow the procedures set out in federal law. Districts should work closely with their school attorneys in these matters.
20. **Do special education timelines run during a pandemic?**

It depends. The state and federal rules that govern special education set out specific timelines for various procedures, including when to conduct an initial evaluation for special education eligibility. Under these laws, evaluation timelines are based on school days. If a school district is completely shut down, the timeline is not running. If the school is providing instruction on any day during a closure, however, that counts as a school day for purposes of conducting an evaluation. On March 16th, 2020 OCR issued a fact sheet acknowledging that evaluations might be delayed due to the current pandemic. There has been no formal relaxation or waiver of the evaluation timelines to date.

Other timelines are based on calendar days, such as the 30-day period for holding an ARD committee meeting after an initial evaluation. These days run as normal, even during a school closure.

TEA has advised that school districts should consider using technology to the extent possible to hold ARD committee meetings, and/or meetings regarding a child’s eligibility or evaluation. If holding a meeting or completing an evaluation is not feasible, districts should document the reason and complete the activity when school resumes.

TEA has posted several guidance documents on its website related to special education, special populations, and COVID-19, including the U.S. DOE’s Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (Mar. 12, 2020). TEA’s Website also includes a COVID-19 Special Education Q&A (Mar. 26, 2020).

21. **What obligations does the district have for other special populations during the period of school closure?**

In addition to its resources for instructional continuity, TEA is maintaining the Special Education and Special Populations Website to provide guidance on the following student groups: students in residential programs, students with disabilities, ELL students, students experiencing homelessness, military-connected students, and students in foster care.

### Procuring Instructional Technology

22. **How can districts purchase the necessary resources to provide remote instruction?**

Generally speaking, all laws and policies related to competitive procurement and purchasing still apply. See TASB Policies CH(LEGAL) and (LOCAL). In addition to other methods of competitive procurement, a district may acquire computers and computer-related equipment, including software, through the Department of Information Resources.
(DIR) under existing contracts. Tex. Educ. Code § 44.031(i). For more information, see Cooperative Contracts for Remote Access and Remote Learning Tools, Products and Services on DIR’s COVID-19 Preparedness for Information Technology Website.

For information on delegation of purchasing authority to the superintendent and emergency purchasing, see TASB Legal Services’ Emergency Delegation of Authority to Superintendent.

Depending on the source of funding, additional requirements may apply to procurement and/or contracting. Consult legal counsel to ensure compliance with all requirements.

23. Can a district accept donations of technology resources?

In most cases, yes, but check TASB Policy CDC(LOCAL) for any criteria adopted by your district’s board of trustees. Also, review TASB Legal Services’ Donations To and From Public Schools: Legal Questions and Considerations.

By order dated March 18, 2020, the Federal Communications Commission (FCC) waived gift rules applicable to the E-Rate program until September 30, 2020. This permits service providers to offer, and eligible E-rate entities to solicit and accept, improved capacity, Wi-Fi hotspots, networking gear, or other things of value to assist schools, teachers, students, and school administrators during the coronavirus outbreak. By public notice dated March 23, 2020, the FCC Wireline Competition Bureau confirmed that closed schools may allow access to E-Rate funded services “to community members who access the internet while on a school’s campus” as long as the schools do not charge for the service.

24. What do districts need to know about 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.
An ed-tech service provider may lawfully access 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 service provider receives no personally identifiable student record information from the school district, but the school district tells parents about an ed-tech opportunity and parents avail themselves of the option.

- The school district obtains parental consent for the student’s use of the technology.

**Copyright Issues**

25. **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 have gone 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).

26. **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.

### Helpful Links to More TEA Guidance

- [COVID-19 Superintendent Response Checklist](#) (Mar. 25, 2020)
- [TELPAS and LPAC Guidance](#) (Mar. 22, 2020)
- [TEA Waiver Request to the US Department of Education on Use of Federal Funds](#) (Mar. 24, 2020)
• Use of the TxVSN, question 4 in the Instructional Continuity FAQ (Mar. 25, 2020)
• TEA Coronavirus Update: SAT, ACT, TSIA, and AP/IB Programs (Mar. 19, 2020)
• Additional SAT, ACT, TSIA, and AP/IB Programs Guidance (Mar. 26, 2020)
• Logistical Considerations for Paper-Based Packet Pickup (Mar. 23, 2020)