

FAQ: Distance learning, data privacy and contractual issues for educators

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Disclaimer: This publication is for informational purposes only and is not intended as a substitute for specific legal or other professional advice. If you have specific questions about your legal or contractual rights, contact your Education Minnesota field representative. This guidance will be updated periodically based on new information and guidance, so please refer back to this link for the most current information.

1. Which laws govern the privacy of student data that may be captured or shared in the course of distance learning?

The federal Family Educational Rights and Privacy Act (“FERPA”) protects the privacy of student education records. 20 U.S.C. § 1232g; 34 C.F.R. Part 99. The Minnesota Government Data Practices Act (“MGDPA”) similarly protects “educational data,” which means data that is “maintained” by a public school (or a person acting for the school) and that relates to an individual student. Minn. Stat. § 13.32. The MGDPA also protects certain personnel data about district employees. Both laws prohibit the disclosure of student education records/education data to third parties without the written consent of a minor student’s parent or guardian.

2. Is it a FERPA or MGDPA violation if parents view or listen to real-time instruction of students in my class?

Not necessarily. Neither federal nor state law necessarily prohibit a parent from accessing a classroom to observe their child because this information is not considered an education record or educational data. Therefore, parents may similarly observe a classroom setting that is occurring via distance learning.

[Recent guidance](#) from MDE states, “[I]nformation about students that is based on what is happening more generally in the classroom is not necessarily subject to FERPA because it does not come from the student’s education record. Therefore, whether a parent may observe a classroom setting is a local decision, and educators should follow their local guidance about whether it is okay for parents to be present during a group education session.”

3. Are the data privacy requirements different for students with IEPs or special needs?

What additional steps should be taken for these students?

Allowing parents to have access to real-time video or audio of students receiving special education services will not violate FERPA, but the names of students who receive these services are considered private education records/student data. For this reason, schools and educators should take precautions to ensure that these names are not available to other students or parents without the prior consent of parents or guardians.

[MDE's guidance](#) on data privacy for special education students states:

If the school is providing services to a student in a way that does not disclose private information from the student's record, then the law does not apply. However, if the school has concerns that use of a video platform to provide services could contain and thus could reveal personally identifiable information, then the school should use a platform that incorporates security measures to ensure that private data is encrypted and that it cannot be accessed by individuals who do not have authority to access the data. Taking these steps will help the school comply with both FERPA and the Minnesota Government Data Practices Act, which requires schools to protect private data with appropriate security safeguards.

Schools can also address privacy concerns by informing parents about the proposed services and platform for delivery and seeking parent consent.

Special educators should also take any additional requirements recommended or required by their administration. If your district is not requiring the data privacy safeguards detailed above, we recommend sharing MDE's guidance with your supervisor or special education director.

4. What data privacy measures are other districts recommending for distance learning?

Out of an abundance of caution, some districts are requiring all educators using distance learning platforms to allow students and families the option to block the student's name and image from viewers other than the educator. For example, some platforms allow parents to block a child's image or enter "Student-1" instead of the student's actual name. This gives students and families concerned about data privacy an option to participate without having other parents view the student's information. If your district requires this, you should make sure that your platform has this capability.

MDE has also created [guidance](#) for districts and educators in selecting a distance learning platform.

5. Can my district require me to use security protocols that are not legally required?

Yes. School districts have the right to create and require educators to follow security protocols greater than what state or federal law requires. However, these protocols should be clearly established, consistently enforced and available electronically for staff to review. The benefits of these additional requirements should also be balanced against ease of access for students, parents and educators.

6. My district requires that all lessons for distance learning are recorded so students may access them later. Can they do this? Does this raise any legal concerns?

Districts vary on this point, and we recommend following all applicable district policies and administrator directives you receive. Some districts require recording so students with limited access to internet or technology may access them at a later time. Other districts are discouraging or prohibiting educators from maintaining any recordings of their classes whatsoever. Districts have the authority to make these decisions, but as stated above, the expectations should be clearly communicated and fairly enforced.

While real-time video of an entire classroom or group of students is not automatically subject to FERPA or MGDPA, video or audio recordings may be considered private education records/educational data if they are “directly related to a student,” meaning they are focused on one particular student giving a presentation, or if they serve as the basis for a subsequent disciplinary action. If you do maintain video or audio recordings that capture students, you should be aware that these recordings could become the subject of a data request.

7. What distance learning platform should I use? What if I do not have the technology I need to perform distance learning effectively?

MDE has [created guidance](#) for districts and educators in selecting a distance learning platform. We strongly recommend that educators not make these decisions independently, but rather in collaboration with their department, grade-level team and/or their administration.

Most districts have already purchased or are in the process of purchasing a specific platform for educators to use. The selection of this technology is likely not a mandatory subject of bargaining, but educators who have concerns glitches or other inadequacies with a required technology, or who lack the technology necessary to effectively perform distance learning can be assisted through organizing support from their union.

Education Minnesota has compiled an extensive list of resources and recommendations for distance learning by educators who have considerable experience in this area, [available here](#). This includes distance learning platforms and lesson plans. In addition, we have developed [specific guidance](#) for educators on how to design and implement distance learning that meets MDE's expectation of equitable access and delivery.

8. I am concerned about videos of my classes being shared on the internet or social media without my permission, or being seen by people who are not my students or their parents/guardians. What can I do to prevent this?

As is the case in your classroom, your school district may not be able to completely safeguard you from having your image or your instructional materials shared beyond their intended audience. Our recommendation to “teach as though you are always being recorded” is even more necessary in this period of distance learning.

At the same time, school districts can and should support educators' legitimate privacy concerns by adopting policies prohibiting the unauthorized recording and/or dissemination of videos, images, or other data captured in the course of distance learning. Ask your district if they have such a policy. If they don't, you may want to work with your local leadership and/or Education Minnesota field representative to propose that the district adopt one.

We also recommend that districts create a written agreement for students (and/or parents/guardians, depending on age) to sign or click, containing the language below or something similar.

The following content is for educational purposes only. By accessing this material, I agree not to share this content with anyone not enrolled in the class or assisting an enrolled student. Unauthorized distribution of any distance learning content, including sharing video recordings or screenshots on the internet or social media, is strictly prohibited and could result in disciplinary action and/or the suspension of a student's access to certain distance learning materials.

Districts are not legally required to have such a policy or protocol, but school districts do have an obligation to take reasonable measures to protect the privacy of students and staff. As with school district policies prohibiting recordings in the classroom, this type of notice will make it easier for the district to justify disciplinary action or other consequences for a student or parent/guardian who records or shares distance learning content without an educator's permission.

9. What should I do if I learn that my lessons or image have been shared without my permission?

If possible, take screenshots or document the unauthorized sharing of this content as soon as possible and provide it to your administrator. Once you have done this, contact the company where the content has been shared. Social media platforms like Facebook, Twitter and Instagram all have ways of reporting inappropriate or abusive content so that it can be investigated and removed if it violates the company's terms of use.

Districts vary in how they respond to these incidents based on the severity of the conduct and the policies they have in place. Your union may not be able to force your administration to take a particular response, but if you believe your administration has not responded to unauthorized use of your content appropriately, contact your local union or Education Minnesota field representative for assistance.

10. What should I do if I accidentally shared data or content with students or parents who should not have received it?

Given that distance learning and the associated technology is new for many educators, the possibility of accidentally sharing the wrong data or content with students or parents is high. [MDE's guidance](#) on distance learning recommends that before sending any communication to students or parents electronically, make sure that you confirm:

- *You are sending what you intend to send (the right document and/or content).*
- *You are sending to the person you intend to receive the information.*
- *The intended recipient is authorized to receive the information.*
- *You are using a secure and/or encrypted method of communication.*

If in doubt, ask your supervisor. School districts may need to consult their own legal counsel to determine whether sharing specific content is legally permissible.

If you have accidentally shared something you did not intend, or to an unintended recipient or recipients, promptly attempt to recall the message or send a follow-up message asking the recipients to please disregard and delete. Next, promptly notify your supervisor of the mistake. We cannot guarantee that self-reporting will shield you from any disciplinary consequences, but in many cases, being forthright and proactive will reduce the likelihood of any disciplinary action against you.

11. Can I sell lessons or materials I develop for distance learning if I create them outside my duty day?

We understand and appreciate that educators have spent significant time and effort developing distance learning content, including video tutorials and lesson plans. You are right to be proud of your work, and you have the right to share it with others, providing that what you share does not include any private student data. There are many great platforms for educators to view and share their distance learning materials, and we have created a resource with some of the best networks [here](#).

However, under federal copyright law, any materials or content you develop for distance learning classes are considered the property of your school district, even if you create these materials outside of your duty day or go above and beyond what is required for your job. Consequently, if you attempt to sell these materials to others, the school district may have a legal claim on any profits you receive. More commonly, you might face disciplinary action from your district for violating policies prohibiting the sale of course materials or using the district or school's name to imply an endorsement.

Some districts do allow educators to sell instructional materials, but they have detailed procedures for seeking administrative permission and severing any legal rights or responsibilities the school may have in the content.

12. Can my administrator require that I teach in “real time” instead of having pre-recorded lessons available for students to download?

Yes. Although the governor's [Executive Order 20-19](#) requires school districts to “allow for remote work or telework to the extent possible” during the distance learning period, this does not mean that school districts must allow educators to create their own schedules. The same order also directs MDE to provide guidance to school districts in implementing distance learning.

While school districts are not required to submit distance learning plans to MDE, and MDE does not mandate any particular schedule or format for distance learning, the department has created a [distance learning plan template](#) that asks school districts to consider a number of questions, including “*How are we ensuring students receive daily interaction with their licensed teacher(s)?*”

Educators will likely not be able to provide the same type of interaction with and between

students through distance learning that they can provide in a classroom, but districts can expect educators to have ongoing interactions that include opportunities for students to ask questions and receive real-time feedback.

13. How do I perform distance learning effectively while also supervising my own children at home?

Many working families are adjusting to the reality of working from home while also supervising and facilitating the distance learning of their own children. We recognize that this will be particularly challenging for educators responsible for real-time distance instruction that cannot be paused or interrupted as easily as other remote work.

We encourage educators to work collaboratively with their colleagues, administrators and union leadership to address these challenges. If you have children or relatives in the home who are sick and need care that makes distance instruction impossible, you should be able to use available sick leave and be relieved of distance learning expectations.

Furthermore, as of April 1, if you are unable to telework due to a need to care for a child under 18 whose school or childcare provider is unavailable, you can access partially paid parental leave under the newly enacted **Emergency Family and Medical Leave Expansion Act**. These days are paid at 2/3 of your salary or wages, subject to a \$200 per day cap. This is available to both paraprofessionals and teachers who have a bona fide reason for the leave. For more specific details, please contact your Education Minnesota field representative.

If you are told that you must create distance learning plans or materials even though you are sick or caring for a sick family member, or on parental leave, contact your union representative. This may be a reasonable expectation for a limited absence, but not for an unexpected absence due to illness or multiple days when you are on a paid or unpaid leave of absence.

14. I am struggling to teach certain content or grade level standards in a distance learning format. What should I do?

Some activities or units you have traditionally taught or planned to teach will need to be modified, postponed or eliminated due to distance learning. Educators should use their professional judgment in making these decisions, in collaboration with their colleagues and administration.

Education Minnesota has compiled [resources for educators](#) to develop new ways to deliver standards based content through distance learning, including AFT's "Share My Lesson," and

NEA's "Ed Communities," which are available at no additional cost to all Education Minnesota members.

If you are not able to find the resources you need for your particular content area, we recommend discussing these challenges with a trusted colleague or union representative for assistance in raising these concerns with your administration. It is far better to raise and document these concerns early on instead of being questioned later about not providing the type of instruction your administration expected you to provide.

15. Am I required to take and report attendance for distance learning? Am I allowed to modify attendance or grading policies during the distance learning period?

Taking and reporting attendance may be more challenging in a distance learning setting, but educators should follow all school district policies with respect to attendance taking and reporting. MDE's most recent [guidance](#) on student attendance states:

Ensure your attendance and absence policy accommodates for the implementation of your distance-learning model. Clearly communicate expectations to students, staff and parents. All students should follow individual district, school, or charter school policies and guidelines for excused absences. Please exercise caution before starting the truancy process. Please coordinate with your county on any decision.

This guidance strongly suggests that districts adopt a modified attendance policy during the distance learning period. In addition, MDE has created a [waiver form](#) so that students may continue to report students as enrolled even though they are absent for more than 15 days if the absence is due to a COVID-19 related illness.

MDE has not issued any guidance on grading policies to date, so any modifications are to be determined at a district or building level. Before making any significant changes to your grading policy, such as moving to a pass/fail system, make sure that you have the permission of your administration to do so.

16. Can my administrator require me to report to the school building during the distance learning for in-person meetings, trainings or other activities?

Based on the governor's executive orders, the only staff who should be required to report to school buildings during the distance-learning period (currently March 30-April 30) are staff providing child care, nutrition, transportation and custodial services. [Executive Order 20-](#)

[19](#) states, “During the Distance Learning Period and per applicable labor agreements, school districts and schools must allow for remote work or telework to the extent possible. To the extent that it is necessary for teachers and staff to be physically present in school buildings, school districts and schools must provide conditions for staff in compliance with MDH Guidance on social distancing.” (Para. 9.)

Requiring instructional staff to report to the building during the distance learning period is contrary to Executive Order 20-19, above, as well as the governor’s “[Stay-at-Home](#)” [Executive Order, 20-20](#). A district would need a strong and unique reason for requiring instructional staff to report to a building during the distance learning period. We have seen some districts direct staff to report to the building periodically during the distance learning period to connect with students or meet with administration, which we believe is in violation of the Executive Orders and [MDE guidance](#).

If you or your colleagues are being directed to report to work during the distance learning period for reasons other than supporting the district’s childcare or nutrition programs, contact your local leader and/or Education Minnesota field representative for assistance.

17. Can my administrator require a distance learning schedule that denies me preparation time, a duty-free lunch or that extends my duty day beyond what is provided in the contract between my district and my union? What should I do if this is happening?

No. While some modifications in the instructional schedule are appropriate to accommodate distance learning, the district cannot require you to teach beyond the duty day defined in your collective bargaining agreement, nor can it deny you a duty-free lunch or preparation time (for licensed educators) without the agreement of your local union. The Executive Order 20-19, which mandates distance learning, states in paragraph 10 that work assignments must be “consistent with applicable labor agreements.”

Some districts have entered MOUs or MOAs with staff unions that modify certain provisions of the contract during the distance learning period. This may be warranted, but educators should also consider asking for more flexibility from the district in return.

If your district has given you a teaching schedule that conflicts with your contract and there is no MOU in place modifying or suspending the contract, contact your union leadership to discuss the possibility of filing a grievance.

18. If I am asked to teach a colleague’s class or classes, am I entitled to additional

compensation?

This will depend on your local collective bargaining agreement, and a number of other factors, such as:

- whether it is one class or the entire day or week of classes,
- whether you are being expected to make your instruction available to another class or to also be available for questions and to evaluate student work,
- whether the additional instruction meets the definition of an overload in your contract, and
- whether the additional instruction is allowing you to receive your contractual preparation time and duty-free lunch.

If you are asked to assist with another teacher's class or classes and you believe you should be receiving additional compensation, discuss the matter with your building representative first, since they will have the best insight on your contract and what is being asked of other educators in your building.

19. Are there paraprofessionals or ESPs who are available to help me with any of my distance instruction or to help me communicate with students and parents?

Whether your district is required to provide paraprofessional support will be determined by the IEPs of the students you teach. If you have ideas for ways that paraprofessionals or other ESPs in your school can support you and your students in distance learning, we encourage you to request this support from your administration. Executive Order 20-19 requires districts to “utilize available staff who are able to work during the Distance Learning Period,” including ESPs, and districts will be more likely to assign them meaningful work if teachers and other educators give them ideas.

Education Minnesota has developed a list of ways ESPs can be involved in distance learning, which is available [here](#).

20. Can my district require that I be available by phone or email to students and/or parents?

The most specific guidance from MDE is the [distance learning template](#), which asks, “How will we regularly communicate with families?” and includes the following additional considerations:

- How are families' perspectives and experiences centered in our communication plan?

- How are we communicating with families who speak a language other than English?
- How are we ensuring families understand our distance learning model? Use of the model? Student expectations?
- What are the platforms or apps that adults, students and families utilize the most? How can these be leveraged to get information to students and families?

While your district may require you to communicate with students or parents in some capacity, this could take a variety of forms, and **educators should not be required to provide students or families with their personal telephone number, or to be available to communicate with students or parents at all hours of the day.**

We strongly recommend not providing your personal telephone number to students or parents, nor do we recommend communicating with them through messaging platforms on your personal social media accounts. Doing so could make all of your communications on these platforms subject to review by the district in the course of an investigation or in response to a data practices request. If you do not have another means of communicating with students besides your personal device, [Common Sense Education](#) has a comprehensive list of messaging apps for educators to communicate with students and parents, many of which are free and do not reveal your personal phone number or commingle student data with your personal communications.

21. Should I use my personal device(s) for distance learning instruction?

We strongly recommend against using your personal cellphone, tablet or computer for work-related purposes. If you do, any records that are created or stored on these devices may be subject to disclosure under the MGDPA. As is the case with your communications with students on social media platforms, placing educational data on your personal devices may allow or require your school district to review your devices in response to an investigation or data request. Therefore, it is best practice not to use any personal devices for work related purposes.

If you have no other option than to use your personal device(s) for distance instruction, make sure you segregate your work-related documents and communications to specific file folders so that you can quickly locate and produce work-related documents in the event there is a records request.

22. Are any notes or records that I create in the course of distance learning off limits to parents? What should I do with these records when I am done with them?

Yes. Records that you independently keep on students, which you do not share with anyone else, are considered “desk drawer notes” – not government data – and not accessible as part of a data request. Under state law, such notes must be destroyed at the end of the school year in order to retain this protection.

23. If we are delivering or receiving physical materials from students during the distance learning period, what safety protocols should we follow?

MDE’s [distance learning guidance](#) states the following;

There have been many questions about the viability of COVID on surfaces. A recent study found that the COVID19 coronavirus can survive up to four hours on copper, up to 24 hours on cardboard, and up to two to three days on plastic and stainless steel. It is important to remember that those lab results are based on ideal conditions. There are many variables that effect the ability of the virus to survive and then transmit, including temperature, humidity, amount of virus present and many other factors.

School districts may wish to consider methods where staff pick up papers on Mondays, to ensure they have been in the building for at least 24 hours, without contact. They may also wish to allow a 24-hour period between when staff return paperwork prior to family pick up. This is not necessary, however.

Remind families to:

- *Wash their hands before handling and delivering homework.*
- *Delay turning in homework if someone in their home is experiencing a fever or cough.*

When working with student papers, staff should:

- *Wash their hands before and after working with papers from student homes.*
- *Avoid touching their faces while working with papers.*
- *Avoid working with papers that will be returned to students if they have a cough, shortness of breath or fever.*
- *Clean up papers and their work spaces when done.*
- *Avoid working with papers on family eating spaces.*

24. If I witness behavior in a student’s home that raises a reasonable suspicion of child abuse or neglect, am I required to report this?

Yes. All educators continue to have the legal responsibility of being mandated reporters during the distance learning period. This means reporting suspected child abuse or neglect by a person responsible for a child's care (parent or legal guardian) to the appropriate police department, county sheriff or local human services agency. Mandatory reporters are required to make an oral report as soon as possible, but no later than 24 hours, followed by a written report within 72 hours of learning of the suspected abuse or neglect. Your school may also require that you notify administration of any report, and you should contact your administration if you have questions about where to report, but reporting to administration does not relieve you of your obligation to make an external report as well.