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To: MTA Local Presidents
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From: Jennifer MacDougall, Staff Counsel
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Cc: Merrie Najimy, MTA President
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Date: April 9, 2020

RE: K-12 Distance Learning – Student and Educator Privacy and Mandated Reporting

MANDATED REPORTING

1. If I witness behavior in a student's home during distance learning that raises a reasonable suspicion of abuse or neglect, am I required to report this?

In general, under G.L. c. 119, § 51A, a mandated reporter must immediately report to the Department of Children and Families ("DCF") when he or she reasonably believes that a child under the age of 18 has been abused or neglected by a caregiver. A caretaker can be a parent, step-parent, guardian, babysitter, or family member in charge of taking care of the child.

Mandated reporters, which includes educators and education support professionals, must report directly to DCF or to their principal (or the person the principal has designated to handle these issues). Mandated reporters are immune from liability if the abuse or neglect is ultimately unsubstantiated if the report was made in good faith but they can face liability for failing to report or deliberately filing a false report.

Mandated reporter obligations continue during this period of distance learning. For instance, mandated reporters who observe caretaker abuse or neglect during videoconferencing are obligated report such abuse or neglect as described above.

STUDENT PRIVACY

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

The federal Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g; 34 CFR Part 99, protects personally identifiable information contained in students’ education records from unauthorized disclosure. Personally identifiable information includes direct identifiers (such as student or other family member’s name) and indirect identifiers (such as student’s date of birth, place of birth, mother’s maiden name). See 34 CFR § 99.3 (definition of “personally identifiable information”). Disclosure may be made only with consent unless an exception to FERPA applies. The Massachusetts Student Record Regulations, 603 CMR 23.00, are consistent with FERPA and its federal regulations. Educators do need to be aware that FERPA applies to the disclosure of personally identifiable information during videoconferencing and use of other online platforms for distance learning.

Relatedly, the Children’s Online Privacy Act (“COPPA”), 5 U.S.C. §§ 1501-1506; 16 CFR Part 312, requires that web-based tools and application providers obtain parental consent in order for children under the age of 13 to use web-based tools and applications. COPPA is less of a concern for educators when using district-supplied platforms because the onus is on application providers and school districts to ensure consent is obtained.

3. Does FERPA permit a school district to use video conferencing software or other virtual learning software applications to conduct distance learning?

Yes. FERPA contains an exception that, if certain criteria are met, school districts may disclose education records, or personally identifiable information contained in those records, to the providers of video conferencing software or other virtual learning software applications without consent. The onus is on the school district – not educators – to confirm whether this exception has been met for approved platforms or applications in order to conduct distance learning.

4. Does FERPA provide guidance on distance learning platforms?

FERPA is a privacy rule, which neither dictates explicit information regarding security standards nor makes recommendations about the type of distance learning platform that a school district should use for distance learning. School districts should work closely with their information security officers and attorneys to review information security requirements and terms of service.

5. May a school district require that all distance learning lessons be recorded so students may access them at a later time?

School districts have the authority to make decisions regarding whether distance learning lessons are recorded for students to access at a later time, but expectations should be clearly communicated and fairly enforced. Districts vary on whether recordings are required, and we recommend following all applicable district policies and administrator directives. We recommend that local associations negotiate over the scope of how such recordings may be used.

6. Are live videoconferences and recordings of distance learning subject to FERPA?

A live video of an entire classroom or group of students is not automatically subject to FERPA. However, video or audio recordings may be considered education records under FERPA if the recordings directly relate to a student. Some examples of videoconferencing or distance learning that may implicate FERPA include:

- a videoconference or recording of a distance learning lesson that depicts a student having a seizure (because the depicted health emergency becomes the focus of the video)
- a videoconference or recording of a faculty meeting or parent/teacher conference during which a specific student's grades are discussed (discussion contains PII from the student's education record)

A live or recorded video is not directly related to a student if the student's image is incidental or captured only as part of the background.

7. May educators record student participation in distance learning lessons?

Educators should not record students for non-educational purposes. Any educational-related recording of students should be done at the District's direction and in accordance with District's policy. Issues regarding parental consent for such recording should be raised with your local association to be discussed with the District.

8. May non-students observe live or recorded distance learning lessons?

Whether a parent or non-student may observe a distance learning lesson is a district decision and educators should follow local guidance about whether parents or other third parties may be present during a distance learning lesson.

Information about students that is based on what is generally happening during class is not necessarily subject to FERPA because it does not originate from the student's education record. If an educator does not disclose personally identifiable information from student education records during the live or recorded distance learning lesson, FERPA would not bar a non-student from observing a distance learning lesson.

If an educator has concerns regarding potential disclosure of personally identifiable information from student education records during a distance learning lesson, the school district could obtain prior written or electronic parent consent for such potential disclosure to avoid a FERPA violation. Educators should raise concerns over potential FERPA violations or the impact of parents and non-students viewing distance lessons with their local associations during negotiations over distance learning.

9. May an educator conduct a conference with a parent or student from home when other members of the educator's household are present?

As stated previously, if the educator is not disclosing personally identifiable information from the student's education record to the other household member(s) or obtains consent for potential disclosure in writing or electronically from the student's parent, the conference will not violate FERPA.

Information about students that is based on what is generally happening during class is not necessarily subject to FERPA because it does not originate from the student's education record. If an educator does not disclose personally identifiable information from student education records during the live or recorded distance learning lesson, FERPA would not bar a non-student from observing a distance learning lesson.

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

Given how quickly educators have had to adapt to distance learning and the associated technology, the possibility of accidental data sharing with students or parents is significant. Before sharing *any* data, educators should confirm the following:

- *you are sending what you intend to send (the correct 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; and*
- *you are using a secure and/or encrypted method of communication.*

When in doubt, consult your supervisor or administrator.

If you have accidentally shared something you did not intend to share, or to an unintended recipient, promptly attempt to recall the message (if you can) or send a follow-up message asking the recipients to disregard and delete. In some cases, such as accidental sharing of information during a live videoconference, recall is not possible. Next, promptly notify your administrator of the mistake. Self-reporting may not shield the educator from disciplinary consequences, but such proactive behavior could reduce the likelihood or severity of disciplinary consequences.

EDUCATOR PRIVACY

11. Which distance learning platform should an educator use?

Many districts have already purchased, or are in the process of purchasing, a specific distance learning platform. If your school district has selected a distance learning platform, we recommend that educators use that district-approved platform for distance learning. If an educator has concerns about the inadequacies of a particular platform, concerns regarding whether parental consent is required for students of a certain age to use a particular platform, concerns regarding a lack of necessary technology to effectively perform distance learning, educators should work with their local associations to negotiate these issues.

If your school district has not chosen a videoconferencing or virtual learning platform, we recommend that your local association negotiate the choice of distance learning platform with your school district. An educator could unwittingly violate FERPA by using a distance learning platform that has not been approved by the school district.

12. As an educator, how do I protect myself and my privacy during distance learning lessons?

If educators have privacy concerns about the use of distance learning platforms, these concerns should be raised with local associations and bargained with school districts. Districts have an obligation to take reasonable measures to protect the privacy of their staff.

In addition, we recommend the following:

- Be aware of your professional online presence – work in a neutral, professional space; dress in appropriate clothing; minimize multitasking; and conduct yourself as you would in your physical classroom.
- Establish a workspace in an area separate from other household members (if possible) to minimize distraction and interruptions.
- Some distance learning platforms provide for the option of a “virtual background” that educators may use to disguise their home space from student view.
- Follow your school district’s rules for online engagement at all times.
- Make all your personal online accounts private and establish professional accounts on all platforms and applications that you must access for distance learning.
- Ensure that nothing can be seen on screen that identifies an educator’s address (i.e., unique landmarks, mail with address in view, etc.).
- Close all windows not necessary for the lesson to prevent against accidental display of personal information or inappropriate matter.

Ultimately, just as in a physical classroom, a school district may not be able to completely safeguard an educator's privacy. Now, more than ever, we encourage educators to teach as though they are being recorded.

13. If the school district wants to record my distance learning lesson, am I obligated to consent?

The recording of distance learning lessons should be negotiated between your local association and school district to ensure that educator privacy concerns are considered and addressed. If a school district requires the recording of distance learning lessons and an educator refuses to consent to such recording, the educator may be subject to discipline.

14. I am concerned that my distance learning lessons have been, or will be, recorded and shared on the internet or social media without my permission. Do I have legal recourse? What can I do to prevent such unauthorized disclosure?

The Massachusetts wiretapping statute, G.L. c. 272, § 99, prohibits, among other things, certain *secret* recordings without prior consent. A recording is not secret if a participant to the communication actually knows the conversation is being recorded and continues to speak.

In the context of distance learning, many videoconferencing software and other virtual learning software applications will alert participants that someone has started to record the videoconference (through the videoconferencing platform). If an educator is alerted that a recording has started and does not want to be recorded, the educator should request that the participant stop recording. If the participant insists on recording the videoconference, the educator should close application and contact the local association and school district.

A distance learning platform obviously will not alert an educator if a participant records a videoconference with another recording device (i.e., iPhone). If an educator can see a participant recording a videoconference with a separate recording device, the educator should ask the participant to stop recording. If the participant will not stop recording, the educator should close the application and again contact the local association and school district.

Because a school district cannot protect educators from all secret recordings, it is possible that an educator may be secretly recorded during distance learning. A student who has secretly recorded an educator during a distance learning videoconference would be criminally and civilly liable for such secret recording. In addition, criminal and civil penalties apply for use of the secret recording by a third party. For instance, if a school administrator knows that a recording was secretly made and nevertheless tries to

discipline an educator for the contents of that recording, the school administrator would be criminally and civilly liable for such use.

Given the criminal penalties and civil liability at stake, school districts should support educators' legitimate privacy concerns in navigating distance learning by adopting policies that prohibit the unauthorized recording and/or dissemination of videos, images, or other data captured during the course of distance learning. Educators should inquire whether their districts have such policies. In the absence of such policies, educators should work with their local associations to propose adoption of such policies.

We recommend that local associations work with school districts to develop a written agreement for students (or parents and/or guardians) to sign or click, containing the language below or 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 required to adopt such policies or protocol, but they do have an obligation to take reasonable measures to protect the privacy of students and staff.

15. Can my district require me to be available by phone or email to students and parents?

While your school district may require you to communicate with parents and students in some capacity, educators should not be required to provide students and parents with their personal telephone number or to be available to communicate with students and parents at all hours of the day. We strongly recommend not providing your personal telephone number to students or parents.

In addition, we also recommend that educators avoid communicating with students and parents through personal social media messaging platforms. Doing so risks making all your communications on these platforms subject to review by your school district in the event of an investigation or in response to a record request.

We recommend that educators consult their Acceptable Use Policies and work with their local associations and school districts to negotiate protocols for communication with students and parents during distance learning.

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

We strongly recommend against using your personal computer, tablet, or cellphone for work-related purposes. Records created on any of these devices may be subject to disclosure. As can be the case with communication with students on social media platforms, the creation and storage of educational data on your personal devices may subject your personal devices to review by your school district in response to an investigation or data request.

If you have no other option but to use your personal device(s) for distance learning, we recommend segregating work-related documents and communications to specific file folders so you can quickly locate and produce work-related documents in the event of a records request.

EDUCATOR EVALUATION AND DISCIPLINE

17. Can distance learning lessons be used in evaluating me?

We recommend that local associations negotiate if or how distance learning may be used to evaluate staff. MTA field representatives have been developing “model language” around evaluations to assist locals in these negotiations.

18. Can I be disciplined for an incident that occurs in a distance learning platform?

While educators are likely new to the world of distance learning, they are still required to conduct themselves in a professional manner during such lessons. To the extent that an educator has violated a school policy or practice or behaved in a manner that is considered conduct unbecoming of an educator, the school district may seek to impose discipline. All discipline would be subject to the terms of the collective bargaining agreement and applicable state law and reviewed by the local association. We encourage educators to alert their local associations of such incidents so that the local association may provide assistance.

19. Are students subject to discipline for misbehavior during a distance learning lesson?

Student discipline likely is handled the same way in a distance learning platform as it is in a physical classroom or school building. An educator should bring all inappropriate student behavior to the attention of the appropriate administrator for further discussion and review.