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**MEMORANDUM**

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| DATE: | April 13, 2020 |
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| TO: | Mark Jenkins, Director,  Educational Technology and Open Education  State Board for Community and Technical Colleges |
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| FROM: | Dave Stolier, Sr. Assistant Attorney General |
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| SUBJECT: | **Recording Remote Learning on Web-Conferencing Tools – Application of FERPA and Privacy Statutes** |

You referred a question to us from one of the colleges which raises concerns about the use of online web-conferencing tools, such as Zoom, to conduct and record college classes. We have received variations on the question from different institutions, but have often been supplied with very little factual information that would be essential to performing a detailed analysis. In addition, sometimes the question is asked in a way that lumps together both virtual classrooms and remote meetings of various types. The answers likely differ based on several factors. The following questions must be asked and answered in order to assess the risks of any particular recorded activity: what is the purpose of recording the activity? how is the recording is going to be used? does the recording contain personally identifiable information (PII) from student records? who will view the recording? and how long it will be kept?

For the moment, I assume that recording a classroom session is strictly for purposes of allowing enrolled students who missed the live class to catch up. But I’m not sure that is a valid assumption in all cases. Without more facts, I am wary of appearing to endorse defaulting to recording everything that occurs on Zoom or other virtual platform. There should be a reason for recording the class or meeting and some standard protocols should be established. Pending receipt of specific factual information, here are some general principles.

The three legal areas most asked about in relation to video recording of online classrooms and meetings are FERPA, the state privacy law (RCW 9.73), and the personality rights statute (RCW 63.60), which generally governs use of a person’s likeness or photo. Taking them in reverse order, obtaining releases akin to photo releases under the personality rights statute is not necessary in a classroom setting as there is an exception for educational activities: **“For purposes of RCW 63.60.050, the use of a name, voice, signature, photograph, or likeness in connection with matters of cultural, historical, political, religious, educational, newsworthy, or public interest, including, without limitation, comment, criticism, satire, and parody relating thereto, shall not constitute a use for which consent is required under this chapter.**” See RCW 63.60.070 (1) (emphasis added).

Under RCW 9.73.030, it is unlawful to electronically transmit or intercept any private communication or private conversation without first obtaining consent of all participants in the communication/conversation. This statute is most likely to apply to a conversation in a one-on-one meeting between an instructor and a student where there is some reasonable expectation of privacy. There are no reported court decisions applying this statute to a classroom or a school lecture. But, a classroom should be presumptively considered not to be a private setting. There should be no reasonable expectation that conversations in a classroom are private, whether the class is held in a traditional classroom or online.

If there should be an online meeting where there may be an expectation of privacy, consent of the parties involved is easily obtained. The statute provides that “**consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.**” So, if in doubt as to whether a communication or conversation to be recorded is private, the recording party may announce (on the recording) to others that the matter is being recorded. This is one example of why it is important to establish standard protocols that would govern the recording of meetings to be able to demonstrate legal compliance.

**Application of FERPA.** As you know, FERPA prohibits disclosure of PII without consent of the student. There is some recent guidance from the Student Privacy Policy Office (SPPO) in the US Department of Education on application of FERPA to online classes. SPPO has mostly repackaged some older guidance but also conducted a recent webinar in response to questions arising from the COVID-19 emergency. A PDF of an FAQ PowerPoint presentation from March 30, 2020 can be viewed at <https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPAandVirtualLearning.pdf>. The slides help to clarify and focus the older guidance.

In applying FERPA to Zoom or other virtual classrooms, we need to start with FERPA basics. Again, FERPA prohibits disclosure of personally identifiable information from student records. A “student Record” is defined as (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. (20 U.S.C. 1232g(a)(4)(A); 34 CFR § 99.3 “Education Record”). This definition would need to be applied to any video recording of a meeting or classroom. Generally a real-time classroom, whether face-to-face or virtual, would not meet the definition of a record that is maintained. However, once the institution records a video of a class, it has generally satisfied the “maintained by the institution” element of the definition of student record. **Colleges should also be aware that recording a class creates a public record that will be subject to record retention schedules and requests for review under the state Public Records Act.**

Next we need to analyze whether or not the recording is directly related to a student. From pulling together bits of previous guidance, in most instances the answer will be no. In Letter to Mamas, the USDOE allowed a parent to observe a child’s classroom without violating FERPA rights of other children. “FERPA does not protect the confidentiality of information in general; rather, FERPA applies to the disclosure of tangible records and of information derived from tangible records.” Letter to Mamas, 2003.

“A photo or video should not be considered directly related to a student in the absence of [certain] factors and if the student’s image is incidental or captured only as part of the background, or if a student is shown participating in school activities that are open to the public and without a specific focus on any individual.” <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa>. The same guidance distinguishes the above scenarios from other situations where a video would be considered directly related to a student, such as:

• A school surveillance video showing two students fighting in a hallway, used as part of a disciplinary action, is directly related to the students fighting.

• A classroom video that shows a student having a seizure is directly related to that student because the depicted health emergency becomes the focus of the video.

Additionally, the directory information exception in FERPA permits certain PII from education records which an educational institution has designated as directory information to be disclosed during classroom instruction to students who are enrolled in, and attending, a class. In 2009, the regulations were amended to specifically provide that a student may not use the right to opt out of directory information disclosures to prevent disclosures of a student’s name, identifier, or institutional email address in a class in which the student is enrolled. 34 CFR §99.37(c)(1). This is further evidence that there is no expectation of confidentiality of identity within a classroom. A student enrolled in a class and viewing a video of the class after the fact would be accessing no more PII through the video than she would have had she attended live.

All of the foregoing supports the following question and answer from the March 30, 2020 SPPO Webinar:

Q: Due to our transition from holding in-person classes to virtual lessons, is it permissible to record classes and share the recording of the virtual classes to students who are unable to attend?

A: Yes -assuming the video recording does not disclose PII from student education records during a virtual classroom lesson or appropriate written consent is obtained if PII from the education record, FERPA would not prohibit the teacher from making a recording of the lesson available to students enrolled in the class.

If the recording does end up containing PII, then the issue becomes more complicated and FERPA’s nondisclosure provisions may apply.

**Summary.** Although there is a certain circularity to some of the guidance, generally speaking, a recording of a classroom likely does not implicate FERPA rights where no student is made the specific focus of the recording and no other student records are disclosed. The other side of the coin is that a recording could end up implicating FERPA rights if the video makes a specific student the focus of the video (e.g., recording of a student presentation), or visual content of the video otherwise includes personally identifiable information contained in a student’s education record. See slides 23-26 in the March 30, 2020 FAQ document linked above. Therefore, the content of the video matters more than the medium used to deliver the instruction. The foregoing is all predicated on the assumption that the video is not being viewed by persons outside of the enrolled students and the instructor.

When it comes to student-faculty meetings rather than classrooms, FERPA likely does apply. “A video recording of a faculty meeting during which a specific student’s grades are being discussed is directly related to that student because the discussion contains PII from the student’s education record.” <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa>

The March 30, 2020 slides offer the following suggestion: “Schools may wish to include instructions for students participating in the virtual classroom regarding not sharing or recording any PII from education records that may be disclosed in the virtual classroom or to obtain prior written consent to permit any such sharing of PII from education records.”

Here is an example of a notice that one (non-Washington) institution is providing for students taking online classes. Note, this is an example only and not an endorsement:

Our class sessions will all be audiovisually recorded for students in the class to refer back and for enrolled students who are unable to attend live. Students who participate with their camera engaged or utilize a profile image are agreeing to have their video or image recorded. If you are unwilling to consent to have your profile or video image recorded, be sure to keep your camera off and do not use a profile image. Likewise, students who un-mute during class and participate orally are agreeing to have their voices recorded. If you are not willing to consent to have your voice recorded during class, you will need to keep your mute button activated and communicate exclusively using the "chat" feature, which allows students to type questions and comments live.

This notice alone should not be mistaken for a “written consent” sufficient to disclose PII under FERPA, nor would it be sufficient under RCW 9.73 to consent to record a private conversation. But, I do think that notice to students is appropriate as a matter of transparency and good policy. I also do not know whether giving the students permission to withhold their voices will serve the pedagogical purposes in each class or whether students may feel that their education is being hindered because they are hesitant to participate fully in class. I think it illustrates a need for specific facts about how a class is being conducted and the online platform being used.

Finally, another SPPO FAQ webinar slide echoes consideration of the factual questions I posed at the beginning of this email:

• Will the video recording be maintained as an education record, and is it directly related to a student?

• What, if any, PII from education records, did the video recordings capture?

• With whom is the school sharing the video recordings?

• How is the school protecting from unauthorized disclosure video recordings that qualify as education records or that contain PII from education records?

I hope the foregoing information is helpful.