

Where's the Line? Community Colleges in a Virtual World

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Agenda

- Technology and Online Platforms
- Privacy
 - Student Privacy Rights
 - Employee Privacy Rights
- Participatory Governance Issues
- Unions and Negotiable Items
- Public Records Act Issues

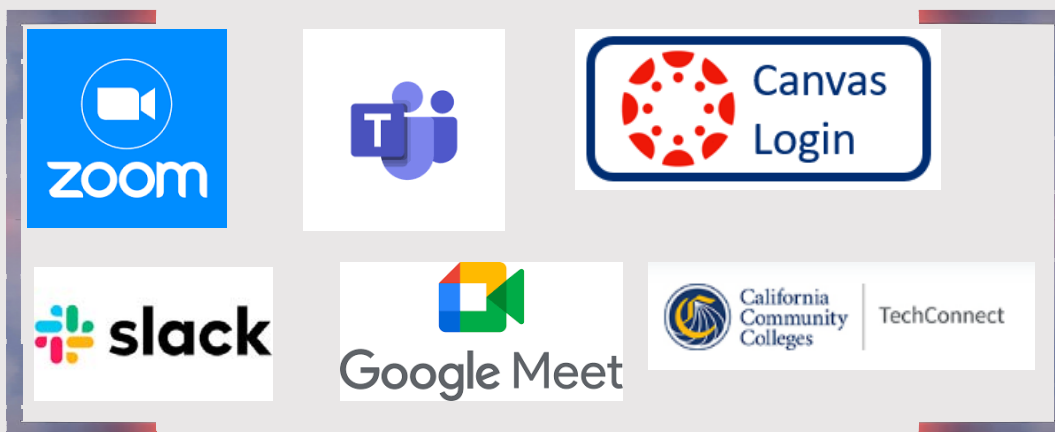
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Technology and Online Platforms



Technology Use Today



Benefits of New Technologies

- Maintain social connections
- Build communities
- Access wide variety of helpful and useful information
- Communicate effectively and often to target audiences, and obtain immediate feedback on delivery of services

Benefits of New Technologies

- Continue providing education to students
- Provide education to more students
- Staying connected with students
- Provide access to educational services:
 - Academic Counseling
 - Professor Office Hours
 - Other supports

Why Issues Arise

- Personal life overlaps with professional life
- Misunderstanding the impacts of the technology
- Misunderstanding legal rights and obligations
- Harm to reputation of the employer
- Liability to the district
- Change to culture and practices

Why Issues Arise

- Inappropriate communications with employees, students, or public served by the district
- Lack of policies and guidance
- Access to more information and recordings
- Disparity in understanding the ability and use of technology
- Everyone is watching and recording

Telecommuting Concerns

- Security features of Zoom, Google Meet, WebEx, etc.
 - Avoid Zoom-bombing
- Recording Meetings or Classes
- Disclosure of Confidential Information

Privacy in the Workplace

Two Types of Privacy Interests

- Informational Privacy: Confidentiality of personal matters
- Autonomy Privacy: Freedom over personal conduct

Sources of the Right to Privacy

By Law:

- U.S. & California Constitutions
- U.S. & California Statutes
- Common Law

By District Policy:

- Board Policies and Administrative Regulations



Standard of Review

Balancing Test:

Employee's Reasonable
Expectation of Privacy

vs.

Employer's Legitimate
Business Needs

When Does an Employee Have a Reasonable Expectation of Privacy?

- Objective standard
- Recognized by social norms as private
- Considering realities of the workplace

What is a Legitimate Business Need?

- Productivity
- Efficiency
- Supervision
- Control
- Safety
- Prevent improper or illegal use
- Prevent liability

Compliance with District's Policies and Procedures

- Employees must follow the District's own rules regarding confidentiality and protecting privacy
- Violation of District rules, regulations, or procedures can result in discipline
- Remind employees of District rules, regulations, and procedures.

Student Privacy: Federal and State Law



What is FERPA?

- A federal privacy law
- Applies to educational agencies
 - Funded by the U.S. Department of Education.
- Gives eligible students
- Certain rights re: education records
- Maintained by the postsecondary institution.



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Who is an Eligible Student?

- An “eligible student” is one who:
 - Reaches the age of 18 or
 - Is enrolled in a postsecondary institution
- Applies to current and former students
 - In person and distance learning

Student Rights Under FERPA

- FERPA provides a community college student the right to:
 - Inspect and review their educational records;
 - Request that the District correct records they believe are misleading or inaccurate; and
 - Consent to the release of information from their education record.

What is Personal Identifiable Information (PII)?

- Information distinguishes or traces an individual's identity
 - Student's name
 - Name of the student's parent or other family members
 - Address of the student or their family
- Exceptions apply

What is Directory Information?

- Information in an educational record
- Not generally be considered harmful or an invasion of privacy if disclosed.
- Not considered an "education record"
- Each District sets own definition of "directory info"

What is Directory Information?

Education records do not include directory information:

- Student's name;
- Address;
- Telephone number;
- Date and place of birth;
- E-mail address;
- Participation in officially recognized activities and sports;
- Weight and height of members of athletic teams;
- Dates of attendance;
- Degrees and awards received (distinguish from grades);
- Most recent school attended;
- Major field of study

What is an Education Record?

- Maintained by an educational agency or institution or by a party acting for the agency or institution includes:
 - Written reports, handwriting, print, computer media, video or audio tape, film, and microfilm
 - Preserved, retained or kept by the institution
 - Does not include personal knowledge
 - Does not include information conveyed orally
- Defined broadly

What is an Education Record?

- Education Record includes:
 - Exams, transcripts, papers, etc.
 - Financial aid records
 - Disability accommodation records
 - Photographs
 - "Unofficial" files
 - Records that are publically made available elsewhere
 - Information that a student has publically revealed
 - Basically that personally identifies the student

What is NOT an Educational Record?

- The following records are **not** educational records:
 - Records kept in the sole possession of the maker and not disclosed to anyone except as a temporary substitute for another record.
 - Records of law enforcement units
 - Records related to an individual employed by the District

What is NOT an Educational Record?

- The following records are not educational records:
 - Treatment Records
 - Alumni records not relating back to time at school
 - Grades on peer-graded papers before they are collected and recorded by a teacher.

Disclosure of Education Records

- General Rule:
 - Students must sign written consent to disclose records to third parties
 - Permits electronic consent form

Disclosure of Education Records

- **School officials with legitimate educational interest**

- Generally, if review of a student record is necessary to fulfill professional responsibility
- Each college specifies own standards
- Includes outside contractors or students serving on committees
- Must be job related; Look to job description



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Case Study

Professor Star is conducting their lecture on Zoom. Students are required to have their cameras on during the lecture. Once all students are admitted, Professor Star notifies students that the lecture will be recorded and posted for their reference. All students are required to attend the lecture.

Is the recorded lecture an “educational record”?



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FERPA and Online Platforms

- Districts can use online platforms for virtual lectures under the **school official exception** so long as:
 - The provider performs an institutional service or function otherwise performed by district employees;
 - The provider meets the district's criteria set forth in the annual notification of FERPA rights;

FERPA and Online Platforms

- Districts can use online platforms for virtual lectures under the **school official exception** so long as:
 - The district has direct control of the use and maintenance of the education records or PII; and
 - The provider uses the education records or PII only for authorized purposes and does not redisclose.

Safety and Emergencies

- Where there is an “articulable and significant threat”
- Involving the health and safety of a student or other individuals
 - Does not require an actual emergency, just a threat of emergency
 - **Limited to exceptional circumstances**
- Disclosure limited to
 - “Appropriate parties”
 - Information to protect health or safety of the student or others

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Sexual Assault Victims

- Exception to consent requirement
- Arising from violent crime or non-forcible sex offense allegation
 - Notification to complainant & perpetrator
 - Results of disciplinary proceeding

20 U.S.C. § 1232g(b)(6)(A)-(B)

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Alcohol and Drug Abuse

Exception to consent requirement

- Violation of laws or rules pertaining to alcohol or controlled substances
 - Only applies to students under 21 years of age

When is a recorded lecture subject to FERPA?

- A video is an “educational record” when it:
 - Depicts a student
 - Used for disciplinary action
 - Shows a student in violation of local, state or federal law
 - Student the focus of the video (i.e., recording of a student presentation) or
 - Audio or visual content PII contained in a student’s education record

Recording Online Lectures

- A recorded lecture is an “educational record” if:
 - The recording directly relates to a student; and
 - Is maintained by the District or a party acting on the District’s behalf.

Online Platforms and PII

- Disclosure of directory information in an online lecture is permissible
- Written consent not required

Non-Student Participation

- Online lectures should be limited to students only
- Districts should limit or exclude non-students from observing virtual classrooms
- Disclosure of PII to non-students may trigger a disclosure

Recording Online Lectures

- If a recording is an educational record or contains PII, it can only be disclosed if the District obtained written consent from the students unless an exception applies.

Case Study

Professor Star requires students to identify themselves using their first and last name. Students are required to participate using their microphone or via chat. Students are not required to have their cameras on. Professor Star records the lecture and saves the chat records on their district computer.

Did Professor Star create an educational record?



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Case Study

Professor Star reviews the recorded lecture and chat discussion and discovers students were making threats to one another. Professor Star reports the students activity and provides a copy of the chat for discipline.

Students are notified of the disciplinary action.

Is the chat discussion an “educational record”?



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Best Practices

- Develop rules for online lectures
- Develop rules regarding observation of lectures by non-students
- Develop and obtain a written consent from students to allow the disclosure of PII during lectures



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Best Practices

- Have a process in place to identify students who have declined to consent.
- Review the district's service contract with online platform providers and know how records are stored.
- Review student conduct policy and ensure it provides for discipline related to online courses



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California Law

- Other privacy laws related to student records:
 - Article 1, section 1 of the California Constitution
 - Educational Code section 76200 et. seq.
 - Title 5 of the California Code of Regulations, section 54600, et seq.

Education Code

- Educational Code section 76200 et. seq.
 - California's "student records" privacy law
 - Generally mirrors FERPA's requirements
 - But, state law may provide greater privacy protections than FERPA
- Compliance with both state and federal law is required.

Education Code: Student Record

- The Educational Code:
 - Terminology: uses the term "Student Records" versus FERPA "Educational Records"
 - Unlike FERPA, allows districts to define "student records"



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Education Code: Directory Information

- The Educational Code:
- No enumerated list of directory information
 - District must define
 - May be disclosed without permission
 - This must be identified in an adopted policy.



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Education Code: What is a Student Record?

- Information directly related to an identifiable student;
- Maintained by district or required to be maintained by district employees; and
- Includes handwritten records, print, tapes, film, microfilm.

Best Practice

Practice Tip: In evaluating whether a record may be disclosed without student consent, always look at both state and federal law. Then, apply the rule that is most protective of student privacy.

Online Platforms Provided Use by CCC

- Chancellor's Office
 - Access to technology resources
 - Canvas
 - TechConnect ZOOM
 - TechConnect Cloud
 - Tackling the Digital Divide
 - Chromebooks for students
 - Internet Hot Spots for students



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No Exclusive Right to Record Lectures

- Students do not have an exclusive right to record lectures
- Professor consent required
- Limited exceptions apply
- Violators are guilty of a misdemeanor

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Participatory Governance Issues



Legal Requirements

- Education Code section 70901 et seq.
- Title 5
 - Providing students, classified, and faculty the right to participate
- Board Policies adopting legal obligations



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Impact of Online Platforms

- Academic Senate
 - Title 5, Section 53200
- Continued duty to discuss distance education courses with Academic Senate
 - Both curriculum
 - Training requirements??



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Union Issues



Legal Requirements

- Duty to Negotiate only the matters within the scope of representation which include:
 - Matters relating to wages,
 - Hours of employment, and
 - Other terms and conditions of employment

Governing Authority

- State law
- Collective Bargaining Agreements
 - No provisions related to the pandemic
 - Pandemic didn't change bargaining requirements
 - Telecommuting
 - Return-to-work

Duty to Negotiate

- **Subjects of Bargaining**
 - **Operational Changes due to COVID**
 - **Safety conditions**
 - Implemented by the employer or
 - Requested by the Bargaining Unit
 - **Distance Learning**
 - Management right – how we implement programs and services
 - Duty to negotiate impacts and effects

Mandatory COVID-19 Vaccination/Testing Policies

- **Permissible to establish mandatory COVID-19 Vaccination requirements**
 - **Apply to both students and employees**
 - **Duty to negotiate impacts**
 - **Duty to engage in the interactive process**
 - Disability/Medical Condition
 - Religious Beliefs

Return-to-Work

- Consider and develop criteria
- Must comply with local and State regulations
- Discuss with labor groups
- MOUs



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Public Records Act Issues



Public Records Act

- Applies to community college districts
- Allows members of the public to access public records
- Public records includes any writing relating to the conduct of the public's business prepared, owned, used, or retained by the district

Gov. Code, § 6252.

Public Records Act

- Writings includes emails and text messages sent by public officials or public employees on their **personal** accounts
 - Must involve "official business"
- PRA Exceptions Apply
 - e.g., personnel files, balancing test, privilege, etc.

City of San Jose v. Superior Court of Santa Clara County (2017) 2 Cal.5th 608

Public Records Act Requests - Application to Student Records

- Student records under both state and federal law are exempt under the CPRA.
- District employees must protect student/educational records.
- Its important to know what records are protected against disclosure.



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Online Platforms: Guidelines for Employers

- Employers should be aware:
 - Union activity online may be protected
 - Text messages and social media may be subject to PRA
 - Duty to preserve communications subject to state and federal e-discovery rules
 - Employee use of devices and email off-duty may also have FLSA implications



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Best Practices for Employers

- Have an acceptable use policy that prohibits employees from using social media to violate policies or laws
- Have a process for PRA requests
 - Including personal devices and accounts
- Keep policies up to date
- Be specific



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Best Practices for Employers

- Inform employees of applicable policies
- Train employees on acceptable use
- Enforce employee violations consistently
- Maintain firewalls to prohibit access to certain websites



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Social Media Passwords

- We cannot require employees, applicants or students to
 - Disclose username and password
 - Require access in our presence; OR
 - Divulge personal social media content

Labor Code, §980; Ed. Code, § 99121



Thank You

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