



October 19, 2020

Legal Opinion 2020-12: Online Class Cameras-On Requirements

Multiple Community College stakeholders have asked the following question.

Whether it is it permissible for California community college faculty to require students to keep their cameras on during live synchronous online instruction?

Answer:

While there is no express prohibition against faculty requiring students to attend live online synchronous classes with their cameras on, an indiscriminate cameras-on requirement risks violation of student privacy rights under the California Constitution, and potentially implicates other federal and state privacy and civil rights laws. However, if there are circumstances where full audio and visual student participation is essential to instruction, a carefully tailored cameras-on requirement might be appropriate. Community college districts should adopt policies to address these issues to ensure faculty and students are fully informed and that it respects concerns related to personal educational privacy, access, and equity.

#### **A. Background**

The COVID-19 pandemic, and the social and physical distancing it has required, has caused a large-scale transformation from in-person to live synchronous online instruction at all California community college campuses through at least the fall 2020 semester. With this change in the delivery of instruction, some faculty have instituted a practice of requiring students to keep their cameras on during such classes. As we understand it, the purpose of the

cameras-on requirement is to enhance the interactive nature of an online class, provide the faculty member with visual feedback during instruction, and facilitate the taking of attendance.

Many students object to this practice as an unacceptable intrusion into their living circumstances, which not only burdens their personal privacy but highlights existing equity gaps between students. Moreover, not all students have the technological resources to reliably maintain a video presence during their classes.

The College of the Canyons has adopted a policy statement that strongly disfavors a cameras-on requirement. (See Guidance for Synchronized Classes at College of the Canyons (Guidance), Aug. 18, 2020.)<sup>1</sup> The Guidance also illustrates the many reasons students oppose keeping their cameras on: they lack cameras, have limited Internet connectivity, have minor children with their own privacy concerns, are homeless,<sup>2</sup> and lack a private place to attend class. (Guidance, third unnumbered page.) The Chancellor’s Office has also been informed that cameras-on requirements may trigger anxiety in students.

## **B. Analysis**

The practice of requiring cameras to be on during live synchronous online instruction creates a potential conflict between the academic freedom of faculty to design and teach a course of study on the one hand, and on the other

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<sup>1</sup> The Guidance is available at <https://onlinenetworkofeducators.org/wp-content/uploads/2020/08/Guidance-for-Synchronous-Classes-at-College-of-the-Canyons-8-18-20.pdf>, last visited Oct. 18, 2020.)

<sup>2</sup> It is notable that the California Legislature recognized this year that homelessness presents a particular barrier to academic success and amended various sections of the Education Code to add homelessness as an “extenuating circumstance” for students who receive financial aid but have failed to maintain “satisfactory academic progress.” (Asm. Bill 2416 (2019-2020 Reg. Sess.), §§ 1-7.) Faculty and community college districts should bear this in mind while considering the burdens a cameras-on requirement would place upon students.

hand student privacy rights and concerns related to the other barriers identified in the College of the Canyons' Guidance. The laws that inform how to weigh these competing and important public policy considerations are discussed below.

**1. Academic freedom is an important foundation of higher education but is not absolute, and may be limited by community college districts to advance other competing policy interests**

Faculty<sup>3</sup> academic freedom to determine the mode of instruction is a bedrock principle, rooted in the First Amendment. The United States Supreme Court has recognized that to maintain an “atmosphere which is most conducive to speculation, experiment and creation,” a university must be able to determine “who may teach, what may be taught, [and] how it shall be taught.” (*Regents of University of California v. Bakke* (1978) 438 U.S. 265, 312.) But academic freedom is not without boundaries, and may need to bend to administrative demands: “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, on autonomous decision-making by the college.” (*Regents of Univ. of Mich. v. Ewing* (1985) 474 U.S. 214, 226 n. 12, underscoring added.) Accordingly, the Board of Governors has authorized community college districts to regulate academic freedom through “a policy statement on academic freedom” and “procedures . . . regarding the role of academic senates and faculty councils.” (Cal. Code Regs., tit. 5, § 51023.) Thus, community college faculty members’ rights to academic freedom are not absolute, and do not exist in a vacuum.

The regulation of academic freedom has already occurred in the distance learning context, where title 5 and local policies are both implicated. For example, faculty must be “prepared to teach in a distance education delivery method consistent with local district policies and negotiated agreements.” (Cal. Code Regs., tit. 5, § 55208(b).) In addition, “distance education includes regular effective contact between instructor and students, and among

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<sup>3</sup> “Faculty’ means those employees of a community college district who are employed in positions that are not designated as supervisory or management . . . , and for which minimum qualifications for hire are specified by the Board of Governors.” (Cal. Code Regs., tit. 5, § 53200.)

students, either synchronously or asynchronously, through group or individual meetings, orientation and review sessions, supplemental seminar or study sessions, field trips, library workshops, telephone contact, voice mail, e-mail, or other activities.” (§ 55204(a).)

Here, the decision to engage in distance education in the first instance, and the method of delivery, is a local decision based on specific circumstances, whether it takes place during or after the COVID-19 pandemic. Similarly, academic freedom must be weighed against a college’s right to establish policies that support and aid their students educationally, mentally, emotionally, and physically.

## **2. The Right to Privacy under the California Constitution**

The California Constitution specifically provides for a right of privacy this is implicated by the cameras-on requirement.<sup>4</sup> (Cal. Const., art. I, § 1.) A party asserting an unlawful invasion of privacy must establish that there is (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39–40.) The California Supreme Court has explained the application of this balancing text. When an intrusion into privacy is limited, and confidential information is shielded from disclosure beyond those who have a legitimate need to know, privacy concerns will be lessened. However, if sensitive information is not safeguarded, or if the competing objectives can be accomplished by alternative means with less impact on privacy interests, the protection of the right to privacy is heightened. (*Hill*, 7 Cal.4th at pp. 37–38.)

Applying these principles to live synchronous online classes, it should first be noted that students have a strong, constitutionally-protected interest in pursuing their educational goals. (Cal. Const., art. IX, § 1.) This interest applies

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<sup>4</sup> We have only addressed the state constitution because its right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326.)

to online education, whether during a pandemic or not. If a student is participating in a live synchronous online class from where the student lives, the student's legally-protected privacy interest will be high. The home is traditionally protected most strongly by the constitutional right of privacy. (*Tom v. City and County of San Francisco* (2004) 120 Cal.App.4th 674, 685.) And in the context of a full class of students, at issue is the sum of all attending students' privacy interests, not merely the interest of a single student. Balanced against the students' privacy interests in their living circumstances is the faculty member's academic freedom to determine the mode of instruction.

A requirement that cameras remain on will likely enhance the interactive nature of an online class, provide the faculty member with valuable visual feedback during the course of instruction, and facilitate the taking of attendance. However, it would appear to be the rare situation where the faculty interest would outweigh students' collective interests in pursuing an education, and their privacy interests in their living circumstances. While perhaps not ideal, the faculty members' interests in interaction, feedback, and attendance can all be accomplished by alternative means. Students who voluntarily participate with their cameras on will in most cases provide meaningful visual feedback. In addition, audio participation and the chat feature available in synchronous online platforms will allow interaction and attendance taking, while maintaining student privacy interests.

There may be circumstances when full audio-visual student participation is essential to instruction. In such instances, the balance of interests may be different than is described in the paragraphs above. And the use of virtual backgrounds, if available, could further diminish student privacy concerns. These situations will need to be evaluated on a case-by-case basis, bearing in mind the principles described above, and carefully tailoring how best to protect student privacy interests.

### **3. Family Educational Rights and Privacy Act (FERPA)**

FERPA protects the privacy of student education records, and may be implicated by recordings of online classes that contain student information. (20 U.S.C., § 1232g; 35 C.F.R. Part 99; see also Ed. Code, §§ 76200 et seq.) An

education record includes records, files, and documents that “(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” (§ 1232g(a)(4)(A).) Under the United States Supreme Court’s interpretation of FERPA, a video record of a live synchronous online class retained in a database would constitute a student record if the recording includes the student’s image or an audio recording that could be associated with the student. (See *Owasso Independent School Dist. No. I-011 v. Falvo* (2002) 534 U.S. 426.)

Accordingly, the recording of live synchronous online classes will be more likely to implicate FERPA if faculty are also requiring students to keep their cameras-on.<sup>5</sup>

#### **4. The American with Disabilities Act (ADA) and the Rehabilitation Act of 1973**

The ADA and the Rehabilitation Act protect the rights of disabled students, and may influence whether faculty may require cameras to be kept on during live synchronous online classes. (42 U.S.C. § 12131; 29 U.S.C. § 794.) Districts must ensure that disabled students are not denied “the benefits of [or] excluded from participation in” an educational program. (29 Code Fed. Regs. § 104.44(d)(1).) In the event that cameras-on requirements impact students with anxiety, or other mental disorders, community colleges will be required to accommodate the disability to ensure they are not discriminating against students based upon a disability. (28 C.F.R. § 35.130(b)(7); 34 C.F.R. § 104.44(a).)

Colleges are not required by the ADA to make adjustments that would result in a “fundamental alteration of the program,” or impose an “undue burden” on the college. However, allowing students to determine for themselves whether

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<sup>5</sup> Information about photos, video, and audio recording under FERPA can be found on the U.S. Department of Education web page: [FAQs on Photos and Videos Under FERPA](#). See also the Department of Education's guidance on [FERPA and Virtual Learning During COVID-19.pdf](#).

to use their cameras will not usually cause a fundamental alteration in the program, or cause an undue burden. The establishment of college policies will help ensure disabled students are not excluded from participation by the imposition of a cameras-on practice.

### **C. Recommendations**

Districts should adopt policies strictly limiting or prohibiting faculty from instituting cameras-on requirements in order to protect against violations of student privacy, balance academic freedom, and ensure compliance with FERPA, California’s student privacy law, and federal disability laws and their state analogs.

Colleges should adopt a cameras-optional approach that respects student concerns regarding privacy, access, and equity. Such a policy should address or include:

- Cameras should be presumptively optional for live synchronous online classes.
- If audio and visual student participation is essential:
  - Allow faculty to require cameras to be on, but only to the extent necessary, and with adequate notice to students;
  - Clearly identify the essential nature of video for instruction and consider a student’s privacy or technical objections and create a confidential “opt-out” mechanism that allows a student to decline video participation;
  - Encourage faculty to consider an alternative to video participation such as audio participation;
  - Encourage the use of electronic video backgrounds; and
  - Allow students flexibility to turn off their cameras or mute audio unless needed.
- Encourage the use of the chat feature for attendance and discussion.

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