

# Educational Technology Committee

## November 19, 2020

### Notes (approved January 28, 2021)

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Name	Location	PR/EX	Name	Location	PR/EX
Jamey Nye (Co-Chair)	DO	PR	Jena Trench (Co-Chair)	DAS	PR
Pamela Bimbi	ARC-DE	PR	Lori Beccarelli	ARC	PR
Alice Dieli	ARC	PR	Lori Hokerson	ARC	
Kale Braden	ARC-Adm		David Weinshilboun	CRC	PR
Markus Geissler	CRC	PR	Lance Parks	CRC	
Patrick Crandley	CRC-DE	PR	Stephen McGloughlin	CRC-Adm	
Caleb Fowler	FLC	PR	Jennifer Kraemer	FLC	PR
Morgan Murphy	FLC-DE	PR	Angela Prelip	FLC	PR
Matt Wright	FLC-Adm	PR	Kirk Sosa	SCC-Adm	
Wondimagegn Shewa	SCC		Kandace Knudson (Alt.)	SCC	PR
P.J. Harris Jenkinson	SCC	PR	Brian Pogue	SCC	PR
Sheley Little	SCC	PR	Torence Powell, AVC	DO	
Tamara Armstrong, AVC	DO	PR	Mike Day	DOIT	PR
Tak Auyeung	LRCFT	PR	Jeff Karlsen	Librarian	PR
Marsha Reske	ARC-NV	PR	Guest: Julie Oliver	DAS-NV	PR
Guest: Nicole Woolley	OCDN-NV	PR	Guest: Greg Beyrer	CRC	PR
Guest: Andi Adkins-Pogue	CRC	PR			
Students:	Olivia Garcia-Godos Martinez and Imren Singh (PR).				

#### **Welcome**

The zoom meeting was called to order at 3:02pm by the co-chairs. New members from CRC were introduced.

#### **Approval of Notes from October and the Agenda**

The notes from the October meeting and the agenda for today's meeting were approved by consensus.

#### **Discussion Items**

##### **Cameras-On Taskforce DRAFT Recommendations**

The faculty co-chair presented the recommendation and discussion followed on the two options: (1) if the material being taught does not intrinsically require audio/video interaction with Synchronous and asynchronous options); and (2) if the material being taught intrinsically requires audio/video content with peer-to-peer interaction required and not interactive options. It was noted that the required use of webcams by students should be discouraged and that needs to be more strongly stated in the recommendation with examples given of the few times it might be required for all or part of a class

(such as a communication class/science lab classes). Suggestions to make the options more clear were made and for options for the student to “opt-out” of using a camera when needed. The recommendation from the Chancellor’s Office is a legal opinion; not a law so it is not enforceable. The General Counsel will review the final document for its legality and compliance with LRCFT contract. The legal exposure of faculty who REQUIRE cameras on for their courses was also noted. It was noted that the District covers those who are in compliance with the any adopted guidelines. The group is working to have guidelines by the end of the semester to share with faculty so the information is included in the spring semester’s syllabi if possible. The taskforce members will take today’s suggestions and incorporate them into the next draft.

### **CVC Ecosystem Funding Cuts – Cranium Café and Proctorio**

It was noted that the Chancellor’s Office will no longer cover the cost of Cranium Café and Proctorio. It was noted that the District will cover Proctorio’s cost through the Spring to maintain the colleges’ abilities to proctor exams. (\$7.50/per unique student). Discussion of continuing Proctorio after Spring and/or finding a replacement could be held in the Spring and the district would find the resources to support Proctorio or the new option.

It was noted that Proctorio is not 100% effective against cheating. And the district desires that everyone use the same product, but has no preference in the product selected. Test proctoring, academic integrity and authentic assessment are areas that could benefit from professional development opportunities.

It was noted that Cranium Café is available at the colleges, but only CRC is utilizing it. The VPSS have already decided to stop using the product and explore alternatives such as a tool in Zoom that is available, but allow for funding of CRC’s continued use of the product through spring.

### **Real-time Captioning**

Real-time captioning versus interpreters should be explored to see which service is offered and why at each campus. Members were asked to find out what happens at each campus to see if we are in alignment. DAPIC may be tasked with reviewing our processes. It was noted that since this is related to compliance (Section 508), it is left up to the individual college and that Real-time captioning is an accommodation, but it’s not always 100% accessible.

### **Updates:**

- LRCFT Contract Updates – Distance Ed – negotiations will continue through the spring, but items that are moving forward and have been negotiated with faculty are: (1) a 15 hour training for minimum minimal competence online with a \$600 stipend for adjuncts and college service/flex credit for full-time faculty; and (2) the requirement that 100% of courses offered will be published in Canvas with a course shell and syllabus. Once a faculty member has taken the training and/or is currently teaching online (due to COVID), they are eligible to teach online throughout the district, but not guaranteed to be offered an online teaching opportunity. Adjuncts who are currently teaching online due to COVID, could take the training and be compensated, and full-time faculty could be encouraged to take the training to gain more confidence. It was noted that technology literacy of some faculty may also need strengthening.
- Los Rios Colleges Online – no report
- DAPIC – on schedule; have a list of specialist duties. Building faculty duties list and a survey was issued to help determine these duties.

- DOIT/LMS - 4700 course shells for Spring; 513 faculty evaluations have been initiated. Accessibility tool Popetech will be rolled out soon. It was requested that lead time be given to DOIT to implement any tool to replace Proctorio.
- FastTrack – no report.
- Library – a report of library activities was provided and noted the continued need of students to have access to physical collections at the library. They are working to find a way to offer this service to students, but other union groups would need be involved if they are offering this service due to COVID restrictions/decontamination needs.

**Colleges:**

- ARC – the college reported on activities at their campus.
- CRC – the college reported on their activities. Starfish and Zoom are options they are considering to replace CraniumCafe
- FLC – the college reported on their activities.
- SCC – the college reported on their activities.

**Future Agenda Items**

ARC Digital Media Proposal

Test Proctoring Software Recommendation for Best Practices

Meeting adjourned at 4:22p.



October 19, 2020

Legal Opinion 2020-11: Live Synchronous Online Classes and Real-time Captioning

The California Association for Postsecondary Education and Disability has asked the following question:

Is real-time captioning required in live synchronous online classes offered in California community colleges?

Answer:

An auxiliary aid or service is required if the class includes deaf or hearing impaired students. Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and relevant provisions of state law, require auxiliary aids or services to be provided to deaf and hearing impaired students to ensure they are able to participate in their educational program. In most cases, this requirement will be satisfied by the provision of real-time captioning in live, synchronous online classes. However, community colleges also must give “primary consideration” to the choice of aid or service requested by deaf or hearing impaired students, and weight such requests against the burdens they would impose upon the college program.

**A. BACKGROUND**

The COVID-19 Pandemic has caused California community colleges to move courses into an online format that often includes live, synchronous instruction. The California Association for Postsecondary Education and Disability (CAPEd) asks whether real-time captioning is required by law to ensure deaf or hard of

hearing students have an equal opportunity to participate in live synchronous classes.

There are a number of different technologies available to make audio accessible to deaf and hard of hearing students. The National Deaf Center on Post-Secondary Outcomes describes them as follows:

- “Offline captioning” refers to captions that are added in the postproduction process. Offline captioning allows for the most accurate captioning possible.
- “Real-time captioning” refers to captions that are created in real-time while an event is taking place. Due to the nature of some events . . . some captions must be produced live. This type of captioning has a higher rate of errors and should be used only when offline captioning is not possible.
- “Speech-to-text” is an umbrella term used to describe an accommodation in which spoken communication and other auditory information are translated into text in real-time. A service provider types what is heard and the text appears on a screen for the consumer to read.
- “Open captions” refers to captions that are part of the video image. They are always present and cannot be turned off.
- “Closed captions” refers to captions that are encoded in the video signal. They can be turned on or off.

(“*Why Captions Provide Equal Access: Tip Sheet*,” University of Texas, Nat’l Deaf Center on Post-Secondary Outcomes.)<sup>1</sup>

The question presented by CAPED focusses on live synchronous online classes. For purposes of this opinion, we assume that if these classes are being recorded, they are not being posted online and available to the general public, but the recordings are retained only for use by students enrolled in the class.<sup>2</sup>

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<sup>1</sup> Available at <https://www.nationaldeafcenter.org/resource/why-captionsprovide-equal-access>, last visited Oct. 18, 2020.

## **B. ANALYSIS**

The resolution of this question requires consideration of related provisions of federal and state law. Two federal laws are most relevant: Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on disability in any program or activity operated by recipients of federal funds (29 U.S.C. § 794.); and Title II of the Americans with Disabilities Act of 1990 (ADA) prohibits discrimination based on disability by public entities, regardless of whether they receive federal financial assistance (42 U.S.C. § 12131). The regulations implementing Section 504 and Title II are enforced by the United States Department of Education, Office of Civil Rights. In addition, state laws also impose obligations created by the Rehabilitation Act and the ADA upon state and local governmental entities. (Cal. Code Regs., tit. 5, § 55200.)<sup>3</sup> These laws are described below.

### **1. The Rehabilitation Act, Section 504.**

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in programs or activities that receive federal financial assistance from the U.S. Department of Education, including colleges, universities, and postsecondary vocational education and adult education programs. (29 U.S.C. § 794d; see also Cal. Code Regs., tit. 5, § 55200 [acknowledging that the ADA applies to distance education within the California Community Colleges].) To be protected under Section 504, a student must: (1) have a physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such an impairment; or (3) be regarded as having such an impairment.

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<sup>3</sup> Public posting of class recordings would raise additional issues under the Family Educational Rights and Privacy Act, California's student records privacy law (Ed. Code, §§ 76200 et seq.), and Section 508 of the Rehabilitation Act of 1973, which governs the electronic accessibility of publically-posted materials. These laws are not directly applicable to the issues addressed in this opinion.

Higher educational institutions must provide disabled students who qualify for Rehabilitation Act protection with necessary and appropriate academic adjustments and auxiliary aids and services to provide “an equal opportunity to participate in a school's program.” California community colleges therefore must provide their deaf and hearing impaired students with auxiliary aids or services to ensure they are not denied “the benefits of [or] excluded from participation in” an educational program. (29 Code Fed. Regs. § 104.44(d)(1).)

Relevant here, an auxiliary aid includes an “effective method[] of making orally delivered materials available to students with hearing impairments.”<sup>4</sup> (29 Code Fed. Regs. § 104.44(d)(2).) Real-time captioning, as defined by the National Deaf Center on Post-Secondary Outcomes, will often be an appropriate auxiliary aid to ensure access to an educational program for a deaf or hearing impaired student.

## **2. The American with Disabilities Act, Title II.**

The Americans with Disabilities Act of 1990 (ADA), imposes upon public entities, including state and local entities, similar obligations as Section 504 of the Rehabilitation Act, but does so without regard to the receipt of federal funds. (42 U.S.C. § 12100 et seq.) It also requires public entities to give “primary consideration” to the requests of individuals with disabilities to determine an appropriate accommodation to their circumstances. (28 Code Fed. Regs. § 35.160(a); see also Cal. Code Regs., tit. 5, § 55200 [acknowledging that the ADA applies to distance education within the California Community Colleges].)

Accordingly, the ADA also requires community colleges to provide appropriate auxiliary aids or services to deaf and hearing impaired students in live

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<sup>4</sup> Colleges are not required by the Rehabilitation Act “to provide [students] attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature” as an auxiliary aid. (29 Code Fed. Regs. § 104.44(d)(2).) Nor are colleges required to make adjustments or provide aids or services that would result in a fundamental alteration of the program, or impose an undue burden on the college.

synchronous online classes to ensure they have “an equal opportunity to participate” in classes. (28 Code Fed. Regs. § 35.160(a)(1).)

Under the ADA, the type of auxiliary aid or service that will be necessary to ensure effective communication of class content in real time may vary according to the method of communication used by the individual student, and according to the nature, length, complexity and context of the communication involved. To determine the appropriate auxiliary aid or service, the college must “give primary consideration” to requests of individual students with disabilities, and they must be provided in accessible formats, and in a way that is timely and protects student privacy and independence. (28 Code Fed. Regs. § 35.160(a)(2).)

It would appear that real-time captioning would in most cases constitute a timely and appropriate auxiliary aid or service to ensure participation by deaf and hearing impaired students in live online synchronous classes. Even so, colleges must also give “primary consideration” to a student request for an alternative auxiliary aid or service that could be provided without undue burden to the college or a fundamental alteration to the course. Accordingly, there may be situations where real-time captioning would not be appropriate to the circumstances of an individual student, but another aid or service would be preferable.

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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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