

## FERPA Privacy Protections for Students related to COVID-19 Response

(Updated July 28, 2020)

### A. Department of Education Information

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In March 2020, the DoE (DoE) released guidance in the form of Frequently Asked Questions (FAQs) related to student privacy rights under FERPA in the context of school officials COVID-19 response efforts. This FAQs can be found at [\[HERE\]](#)

On March 30, 2020, the Student Privacy Policy Office of the DoE shared best practices to keep in mind when delivering virtual learning which can be found [\[HERE\]](#). The DoE guidance and resources are summarized below along with additional best practices.

### B. Virtual Learning Platforms and Privacy

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In a virtual classroom setting, the best privacy safeguard measure is to avoid capturing Personally Identifiable Information (PII) in a recording. If there is no PII then the recordings are not considered to be Education Records. Instructors should consider the type of student PII that might appear in a virtual setting and work to limit disclosure.

**If no PII is captured in a virtual lesson or recording, the content may be shared with non-participants.**

It is important to note that although a student's name could be directory information, their enrollment in a class is not directory information and must be kept private.

Specific guidance from the DoE regarding the recording of virtual lessons and sharing with other enrolled students requires that either no PII is captured in the recording or appropriate written consent prior to sharing with other enrolled students.

#### *Best Practices to Consider Before Recording Educational Sessions*

- Advise students not to share personal or contact information as they participate in virtual learning or communications in group settings.
- Personal discussions or communications involving the sharing of PII should take place in a secure, personal meeting (i.e. phone, personal Zoom meeting etc.)
- Instructors should communicate their participation and attendance requirements to students and advise that sharing of PII in group settings is not required and should be avoided. (See University FAQ's about Recording Educational Sessions with Zoom)
- If despite these safeguards, PII is inadvertently included in a recording or communication, the education record (i.e. recording with PII) should not be shared or disclosed without the impacted students' consent.

### C. General Consent Rule and PII

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Generally, under FERPA, the unauthorized disclosure of students' "education records" is not permitted. Education records include any information or data recorded in any medium, including but not limited to, handwriting, print, tapes, film, e-mail, microfilm, and microfiche, which is directly related to a student and maintained by the University or by a person acting for the University. Education records may include interactions with students like teleconference recordings, e-mails, and group chats etc. when containing

personally identifiable information (PII). When a record—or in combination with other available information—reveals the identity of an individual it is said to contain (PII). Students may provide consent to disclose education records that contain their PII to third parties.

More information on what is and is not included in an Educational Record is available [\[HERE\]](#).

*Best Practices to Consider **before** Sharing Student PII and/or education records*

- Obtain consent to disclose education records **before** disclosing to third parties.
- If a student does not give consent and disclosure of a fact contained in an education record is important, consider if the Health and Safety Exception applies.
  - Please contact the Registrar or Chief Privacy Officer if considering a [disclosure of information using the Health and Safety exception](#).
- Consider whether the objective of a disclosure can be met by providing relevant information, in an as limited as possible manner and/or in a de-identifiable manner. E.g. Sally Jones, a freshman living in ABC dorm, has X condition and is in critical care vs. a member of ABC residence hall community has tested positive or X condition.
- Please be aware that a student’s identity may be improperly revealed through a collection of disclosures and in combination with student directory or other publicly available information.

#### **D. University FAQ’s about Recording Educational Sessions with Zoom**

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**Question A:** “I plan to record my Zoom class sessions so that students in my class can view sessions outside of our meeting times. Is it alright for students who did not attend the class session to see the names of the students who attend the session?”

**Answer A:** Non-attending students seeing the attending students’ present in the class recording isn’t a violation of FERPA. It’s akin to students sitting in a classroom knowing each other’s names. The risk here occurs when recorded sessions are distributed to individuals who are not attendees. If you, as an instructor, are intending to record and distribute sessions this way, consent needs to be granted by each student beforehand OR it must be shared in a secure way using your D2L course site. Students must also understand that these sessions are not to be shared in any way with individuals who are not part of the class.

**Question B:** “How do I prevent Personally Identifiable Information about my students from being shared without their consent?”

**Answer B:** Recordings of class sessions should only be posted to your [D2L](#) course site, and NOT to any publicly accessible sites. Your syllabus should contain a statement that these recordings are part of the students’ educational record and should NOT be shared with anyone outside of the class.

**Question C:** “One of my students approached me privately with a concern about the recorded class sessions, wanting no record of her enrollment in the recordings. How can I handle this?”

**Answer C:** In Zoom recordings, you can hide participants’ names. Within the Zoom web portal (<https://arizona.zoom.us>) select **Settings** along the left-hand side, select **Recordings** tab at the top, and under *Advanced Cloud Recording settings* **uncheck** the “Display participants’ names in the recording”.

## E. Health or Safety Emergency Exception Allowing Disclosure

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In very limited situations, like to protect the health and safety of others, exceptions exist allowing the disclosure of education records of a particular student without consent.

The DoE has made clear in its FAQs that “FERPA permits educational agencies and institutions to disclose, without prior written consent, PII from student education records to appropriate parties in connection with an emergency, if knowledge of that information is necessary to protect the health or safety of a student or other individuals” *citing* 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 99.36. The “health or safety emergency” exception to FERPA’s general consent rule is limited, however.

### *Exception Requirements*

- Only available for the time that a health or safety emergency persists.
- Determination of the health or safety emergency may be made by local public health authorities, and university officials can rely on this determination when applying this exception.
- If the exception applies, still must consider disclosures without consent on a case-by-case basis, based on all factors and information available.
- When disclosure is made pursuant to this exception, school officials must record in the student’s education records (like in their health record), that such disclosure was made and articulate the basis for the disclosure. The record of disclosure should be made as close in time as practicable to the disclosure.

### *Disclosure Communications*

#### **Who and What?**

- Disclosure under the Health or Safety Exception is limited to “appropriate parties.” Parties that the DoE states are contemplated to be appropriate parties and can receive education records/PII without a student’s consent under this exception include: law enforcement, public health officials, healthcare providers, and parents of the student.
- In some cases, like where risk of exposure or threat is heightened, wider disclosure of the risk and its connection to an identified student may be necessary. According to the DoE, “[s]chool officials should make the determination on a case-by-case basis whether a disclosure of the student’s name is absolutely necessary to protect the health or safety of students or other individuals or whether a general notice is sufficient, taking into account the totality of the circumstances, including the needs of such students or other individuals to have such information in order to take appropriate protective action(s) and the risks presented to the health or safety of such students or other individuals.” Please consult with the Office of the General Counsel before making a disclosure with a student’s name or PII. In all cases, disclosures should be narrowly tailored to meet the need to protect the health or safety of students or other individuals while guarding as much of the student’s privacy as possible.
- Disclosure to the media is not appropriate under the Health or Safety Exception. All media inquiries should be directed to Chris Sigurdson.