

## Privacy and Remote Teaching @USM

With the widespread move of classes and exams to remote teaching environments it is important to revisit the relevance of these activities to FERPA and other privacy laws, particularly Maryland's "all-party permission law" for recordings. The Kirwan Center has received the following guidance and best practice recommendations from the Educational Affairs Division of Maryland's Office of the Attorney General.

### Stick with institutionally approved and licensed products.

Using institutionally approved and licensed products ensures that the tools have been fully vetted by your institutions' instructional technology and/or legal offices for FERPA compliance and adequate data security protocols. To the greatest extent possible, faculty should be encouraged to use these tools for all remote interactions with students and avoid, for example, having meetings with students through FaceTime, social media, or other non-institutional channels that may have questionable privacy practices or that release and share, without consent, information such as shared documents, video, and transcripts of meetings.

At the same time, institutions should review any contracts they have with third-party vendors providing information-related services to determine whether appropriate controls are in place for protecting student information that is accessed, maintained, or processed by the vendor. These contracts will likely already express the extent to which the vendor has been put on notice of the school's and the vendor's FERPA obligations and any additional requirements related to confidential information and record retention. Institutions should feel free to reach out to the OAG with any concerns on this front.

### Limit recordings. When you must record, observe best practices.

Use of virtual classroom environments that integrate audio and video recording implicate privacy laws that are relevant for both students *and faculty* in the remote teaching environment. If recording audio and video from a virtual shared classroom environment is not necessary, consider not making a recording. If recording is necessary, observe the following best practices and considerations:

- Record only the instructor's voice and image and limit student participation to text-based/chat features.
- If recording student images and audio is necessary, you should provide a verbal and visual notification of recording at the beginning of the activity and use a visual notification of recording during the entirety of the activity so late-comers are advised as well. If a participant continues to participate after being notified the activity is being recorded, their consent is implied.
- While a simpler notification may suffice, here is a sample notification that faculty might post or present orally: *"This class is being audio-visually recorded so students who cannot attend a particular session and wish to review material can access the full content. This recording will include students' images, profile images, and spoken words, if their camera is engaged and their microphone is live. Students who do not consent to have their profile or video image recorded*

*should keep their camera off and not use a profile image. Likewise, students who do not consent to have their voice recorded should keep their mute button activated and participate exclusively through alternative formats such as email or the chat feature.” (where available).*

- Maryland’s law regarding all-party consent would also apply to any student independently recording voice or image content from virtual classrooms. Institutions may wish to consult their own acceptable use and other policies to determine whether such conduct would violate those policies. If it would, institutions may wish to notify students to that effect, and also to note the existence of the all-party consent law. If student recording would not violate any campus policy, institutions may still decide to notify students that they would need to receive permission from their professor and all classmates to lawfully record this content.
- When possible, avoid storing recordings of students participating in online classroom settings on faculty’s personal devices. These recordings are likely to constitute “education records” under the meaning of FERPA and may also be subject to other privacy laws and institutional privacy and data retention policies. Accordingly, institutions should investigate ways to ensure that, to the greatest extent possible, recordings are maintained on servers belonging to their institution or its vendors.

### **Limit the use of “surveillance-based” proctoring tools.**

Use of “surveillance-based” proctoring, where a human proctor observes the student via webcam while taking an exam, may also implicate student privacy concerns. To the extent that surveillance-based proctoring of exams is deemed necessary, it should also be accomplished through institutionally approved and licensed vendors of proctoring products, as discussed above. Here again, institutions may wish to review their agreements with these vendors and should feel free to reach out to the OAG for support with this effort.

### **Be aware of special consideration for students in the EU.**

Lastly, any students who have relocated to the European Union may be covered by the European Union’s General Data Protection Regulation, which grants additional privacy rights. In-house counsel and OAG attorneys are able to assist institutions in further assessing this risk and determining any steps institutions may be able to take to mitigate this risk.