



Policy Regarding the Use of Proprietary Materials in OEI Exchange Courses

Adopted by the OEI Steering Committee January 15, 2016

Policy

It is the policy of the Online Education Initiative (OEI) that colleges shall ensure that all applicable federal and state laws and regulations will be followed when instructors use proprietary materials in courses offered through the OEI Exchange. In particular, at a minimum, instructors shall ensure that when using proprietary materials all statutory and regulatory requirements are met regarding the following:

1. Accessibility

All required course components, regardless of where they reside (within the course management system or elsewhere) will be compliant with Section 508 and WCAG 2.0 (AA). This will require regular review of both courses and proprietary materials.

2. Regular Effective Contact/Regular Substantive Interaction

All colleges with courses to be offered in the Exchange must have a regular and effective contact policy. Furthermore, all courses to be offered in the Exchange must adhere to their locally defined policies.

3. The Family Educational Rights and Privacy Act (FERPA)

All online courses offered by colleges through the Exchange are compliant with FERPA.

4. Instructional Materials

All courses offered by colleges through the Exchange are compliant with the requirements of Title 5 §59400 regarding required instructional materials.

Background

While it is the Online Education Initiative's (OEI's) practice to respect faculty autonomy with respect to the use of instructional materials employed in OEI Exchange courses, it is also the OEI's responsibility to ensure that student needs are met and all applicable regulations and laws are adhered to. In order to ensure students receive appropriate guidance upon accessing an online course in the Exchange, the OEI has adopted the "OEI Policy Regarding Minimum CMS Use By Exchange Courses." The policy presented here, the proposed effective practices document referenced below, and the "OEI Policy Regarding Minimum CMS Use by Exchange Courses" are intended to address issues related to ensuring the

quality and legality of online instruction that may not be effectively addressed in the OEI Course Design Rubric or that deserve additional emphasis. In some instances, these documents may be duplicative.

As it is a goal of the OEI to promote the provision of a high quality online learning experience for all students in the California community colleges that adheres to all regulatory and legal guidelines, the OEI has developed the following policy regarding the use of proprietary materials. In this context, “proprietary materials” is a reference to elements of an online course that are not the intellectual property of the faculty member. Vendor services, open educational resources, and publisher-provided content are common examples of proprietary materials. While the principle focus of this document is on ensuring that courses are compliant with all relevant regulations and laws, further guidance for faculty may be warranted. An effective practices paper, focused on approaches to integrating proprietary materials into online instruction is planned. It is anticipated that this document will be developed in collaboration with the Academic Senate for California Community Colleges and will offer recommendations for local policy development and adoption.

There are four critical components to this policy, some relating to elements of the OEI Course Design Rubric and others linked to regulation, laws, and/or accreditation standards. These components include:

1. Accessibility

All required course components must be accessible.

- a. Per the OEI Course Design Rubric, “Course materials are compliant with Section 508 and WCAG 2.0 (AA) and can be effectively used with equal ease by all students.”
- b. Per Title 5 regulations, §55200, “...instruction provided as distance education is subject to the requirements that may be imposed by the Americans with Disabilities Act (42 U.S.C. § 12100 et seq.) and section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794d).”

2. Regular Effective Contact/Regular and Substantive Interaction

- a. Per Title 5 regulations, §55204, “Any portion of a course conducted through distance education includes **regular effective contact** between instructor and students, through group or individual meetings, orientation and review sessions, supplemental seminar or study sessions, field trips, library workshops, telephone contact, correspondence, voice mail, e-mail, or other activities.”
- b. Per accreditation standards/federal regulations, “Distance education is defined, for the purpose of accreditation review as a formal interaction which uses one or more technologies to deliver instruction to students who are separated from the instructor and which **supports regular and substantive interaction between the students and instructor, either synchronously or asynchronously.**”

3. FERPA

Ensuring compliance with the Family Educational Rights and Privacy Act (FERPA) can be complicated in the event that proprietary resources are employed that engage students outside of the course management system and create education records that are maintained by an entity that does not have a contractual relationship with the college.

4. Required Instructional Materials

The requirements of Title 5 §59400 and local policies and procedures regarding required instructional materials shall be followed. This applies to electronic materials accessed through the purchase of an access code, per Title 5 §59400(c):

- a. Title 5 §59400(c) Where instructional materials are available to a student temporarily through a license or access fee, the student shall be provided options at the time of purchase to maintain full access to the instructional materials for varying periods of time ranging from the length of the class up to at least two years.

The terms of the license or access fee shall be provided to the student in a clear and understandable manner prior to purchase.

- b. Furthermore, Per Title 5 §59400(b) students cannot be required to pay for access to electronic materials “designed primarily for administrative purposes, class management, course management or supervision.”

References and Resources

OEI Course Design Rubric

<https://sites.google.com/site/coursedesignrubricoeifinal/>

Accreditation

Excerpts from ACCJC’s “Guide to Evaluating Distance Education and Correspondence Education” (p. 2 – 3)

<http://www.accjc.org/all-commission-publications-policies>

Definition of Distance Education

“Distance education is defined, for the purpose of accreditation review as a formal interaction which uses one or more technologies to deliver instruction to students who are separated from the instructor and which **supports regular and substantive interaction between the students and instructor, either synchronously or asynchronously**. Distance Education often incorporates technologies such as the internet; one-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices; audio conferencing; or video cassettes, DVDs, and CDROMs, in conjunction with any of the other technologies.

Definition of Correspondence Education

Correspondence education means:

- (1) Education provided through one or more courses by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor;
- (2) **Interaction between the instructor and the student is limited, is not regular and substantive, and is primarily initiated by the student;**
- (3) Correspondence courses are typically self-paced; and,
- (4) **Correspondence education is not distance education.**

A Correspondence course is:

- (1) A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor. Interaction between the instructor and student is limited, is not regular and substantive, and is primarily initiated by the student. Correspondence courses are typically self-paced;

- (2) A course which is part correspondence and part residential training, the Secretary considers the course to be a correspondence course; and,
- (3) Not distance education."

(ACCJC sites the Federal Register 8/6/2009 as the source of the quoted sections above. Emphasis added.)

FERPA

The Family Educational Rights and Privacy Act (FERPA)

<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."

- Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.
- Parents or eligible students have the right to request that a school correct records, which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.
- Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):
 - School officials with legitimate educational interest;
 - Other schools to which a student is transferring;
 - Specified officials for audit or evaluation purposes;
 - Appropriate parties in connection with financial aid to a student;
 - Organizations conducting certain studies for or on behalf of the school;
 - Accrediting organizations;
 - To comply with a judicial order or lawfully issued subpoena;
 - Appropriate officials in cases of health and safety emergencies; and

- State and local authorities, within a juvenile justice system, pursuant to specific State law.

Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them. Schools must notify parents and eligible students annually of their rights under FERPA. The actual means of notification (special letter, inclusion in a PTA bulletin, student handbook, or newspaper article) is left to the discretion of each school.

FERPA Question and Answer Basics – excerpts from:

<http://familypolicy.ed.gov/faq-page?src=ferpa#t60n214>

What records are exempted from FERPA?

Exempted from the definition of education records are those records which are kept in the sole possession of the maker of the records and are not accessible or revealed to any other person except a temporary substitute for the maker of the records. Once the contents or information recorded in sole possession records is disclosed to any party other than a temporary substitute for the maker of the records, those records become education records subject to FERPA.

Generally sole possession records are of the nature to serve as a "memory jogger" for the creator of the record. For example, if a school official has taken notes regarding telephone or face to face conversations, such notes could be sole possession records depending on the nature and content of the notes.

Are educational agencies and institutions required to notify parents and eligible students of their rights under FERPA?

Yes. Educational agencies and institutions must annually notify parents and eligible students of their rights under FERPA. Specifically, schools must notify parents and eligible students of the right: to inspect and review education records and the procedures to do so; to seek amendment of records the parent or eligible student believes are inaccurate and the procedures to do so; to consent to disclosures of education records, except to the extent that FERPA authorizes disclosure without consent; and to file a complaint with FPCO concerning potential violations. Postsecondary institutions are only required to notify eligible students of their rights under FERPA.

What is an Education Record?

Education records are records that are directly related to a student and that are maintained by an educational agency or institution or a party acting for or on behalf of the agency or institution. These records include but are not limited to grades, transcripts, class lists, student course schedules, health records (at the K-12 level), student financial information (at the postsecondary level), and student discipline files. The information may be recorded in any way, including, but not limited to, handwriting, print, computer media, videotape, audiotape, film, microfilm, microfiche, and e-mail.

Is Your Use of Social Media FERPA Compliant (2014)

<http://er.educause.edu/articles/2014/2/is-your-use-of-social-media-ferpa-compliant>

FERPA and Social Media (2011)

<http://www.facultyfocus.com/articles/teaching-with-technology-articles/ferpa-and-social-media/>

"Questions of Data Ownership on Campus" (2014)

<http://er.educause.edu/articles/2014/8/questions-of-data-ownership-on-campus>

"Social Media Use in Higher Education: Key Areas to Consider for Educators" (2011)

http://jolt.merlot.org/vol7no4/rodriguez_1211.htm

Title 5 Regulations

§ 55200. Definition and Application

Distance education means instruction in which the instructor and student are separated by distance and interact through the assistance of communication technology. All distance education is subject to the general requirements of this chapter as well as the specific requirements of this article. In addition, instruction provided as distance education is subject to the requirements that may be imposed by the Americans with Disabilities Act (42 U.S.C. § 12100 et seq.) and section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794d).

§ 55204. Instructor Contact

In addition to the requirements of section 55002 and any locally established requirements applicable to all courses, district governing boards shall ensure that:

- (a) Any portion of a course conducted through distance education includes regular effective contact between instructor and students, through group or individual meetings, orientation and review sessions, supplemental seminar or study sessions, field trips, library workshops, telephone contact, correspondence, voice mail, e-mail, or other activities. Regular effective contact is an academic and professional matter pursuant to sections 53200 et seq.
- (b) Any portion of a course provided through distance education is conducted consistent with guidelines issued by the Chancellor pursuant to section 409 of the Procedures and Standing Orders of the Board of Governors.

§ 55206. Separate Course Approval

If any portion of the instruction in a proposed or existing course or course section is designed to be provided through distance education in lieu of face-to-face interaction between instructor and student, the course shall be separately reviewed and approved according to the district's adopted course approval procedures.

§ 59400. Required Instructional Materials

- (a) The governing board of a district may, consistent with the provisions of this subchapter, require students to provide instructional materials required for a credit or noncredit course, provided that such materials are of continuing value to a student outside of the classroom setting, and provided that such materials are not solely or exclusively available from the district.
- (b) Required instructional materials shall not include materials used or designed primarily for administrative purposes, class management, course management or supervision.
- (c) Where instructional materials are available to a student temporarily through a license or access fee, the student shall be provided options at the time of purchase to maintain full access to the instructional materials for varying periods of time ranging from the length of the class up to at least two years. The terms of the license or access fee shall be provided to the student in a clear and understandable manner prior to purchase.
- (d) Except as specifically authorized or required in the Education Code, the governing board of a community college district shall not require a student to pay a fee for any instructional materials required for a credit or noncredit course.
- (e) The Chancellor's Office shall adopt guidelines for districts implementing this subchapter.