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**MEMORANDUM**

DATE: March 27, 2017

TO: Sue Orchard, Vice President of Student Services  
Lower Columbia College

FROM: Dave Stolier, Sr. Assistant Attorney General

SUBJECT: **Learning Management Systems – FERPA**

**Question Presented.** When using a learning management system such as Canvas, are student privacy protections under the Family Educational Rights Privacy Act (FERPA) implicated if students from one class would be able to identify information pertaining to students enrolled in another class?

**Background.** Canvas is a learning management system (LMS) that provides a virtual space to build course content. Instructors will open a “shell” for each course. If an instructor teaches more than one section of a course, it may be more efficient for the instructor to push out notifications and curriculum-related information to students of all sections just once through the LMS, rather than creating the same information multiple times for multiple sections. However, merging or combining separate sections in one shell may result in students of one section being able to view information related to students of another section. Such information could take the form of student discussions about academic subjects, or it could simply reveal that a particular student is enrolled in a different section of the same course.

Within the last year, former Department of Education official LeRoy Rooker answered a FERPA question on a professional website for college registrars, stating that while an institution is permitted to identify a student in the class that the student is attending, FERPA does not then permit the disclosure of that same student’s attendance information to another class.<sup>1</sup> Mr. Rooker’s comment was picked up in a discussion on the Canvas

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<sup>1</sup> Mr. Rooker was for many years the executive director of the Family Policy Compliance Office (FPCO) in the U.S. Department of Education. The FPCO is the sub-agency charged with enforcing compliance with FERPA. Mr. Rooker is apparently doing some kind of FERPA Q&A for The American Association of Collegiate Registrars and Admissions Officers (AACRAO).

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community site, which included the following posting interpreting Mr. Rooker's comments.<sup>2</sup>

Essentially, LeRoy Rooker's statement is that an institution can allow a student to see other students in a course for which the student is officially registered, but cannot allow a student to see (or be seen by) other students in another (cross-listed) class in the LMS. To me, it sounds like the door remains open for true cross-listed, in-person courses (like a Psychology and Neuroscience course which are really one-in-the-same, but some students register as PSY and others as NEU) since those students meet at the same time in the same physical classroom with each other. But this new interpretation seems to shut down courses where one instructor teaches 4 sections of the same Accounting course and simply wants to cross-list those into one course shell in Canvas for the sake of their own convenience and the students would not normally see each other in the physical classroom since they are 4 separate Accounting classes.

This interpretation stimulated more discussion on the site and several Washington colleges forwarded the posting to their attorneys seeking review of this interpretation and more definitive guidance on the issue.

**FERPA.** FERPA is a federal law enacted by Congress in 1974. FERPA both guarantees students in postsecondary institutions access to their own education records and protects those same records from disclosure to others. It generally prohibits educational agencies or institutions from disclosing personally identifiable student information from an education record without consent of the eligible student. 34 C.F.R. § 99.30.<sup>3</sup> "Education record" includes those records that are (a) directly related to a student; and (b) maintained by the educational institution. 34 C.F.R. at § 99.3. "Personally identifiable information" has been defined to include a student's name and other information that would make a student's identity easily traceable. *Id.* Absent written consent of a student, educational institutions may disclose personally identifiable student information only pursuant to one

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<sup>2</sup> <https://community.canvaslms.com/thread/11133-new-ferpa-requirements-for-cross-listed-courses> (last visited March 20, 2017).

<sup>3</sup> The federal statute is codified at 20 U.S.C. § 1232g. This Memorandum cites exclusively to the implementing regulations of the U.S. Department of Education (Code of Federal Regulations), 34 C.F.R. Part 99.

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of the 16 exceptions set forth in the law. 34 C.F.R. at § 99.31.<sup>4</sup> One exception allows disclosure to school officials and teachers with legitimate educational interests. 34 C.F.R. at § 99.31(a)(1). Another exception allows disclosure of “directory information.” Directory information is designated by the college and may include information that is not considered private, such as name, photograph, duration of attendance at the institution, participation in officially recognized activities, degrees, and honors. An institution may disclose directory information without consent if it has given public notice to students of the types of information that the institution has designated as directory information and of a student’s right to opt out of having any or all of their information being included in the institution’s directory information. 34 C.F.R. at § 99.37. However, a student may not use the opt-out provision to prevent that student from having to disclose identifying information *in a class in which the student is enrolled*. 34 C.F.R. at § 99.37(c). It is this latter provision that Mr. Rooker was referring to that allows students to be identified to each other in the same class.

**Analysis.** First, terminology is important and I have observed that different people use the terms “merge” and “cross-list” inconsistently. Some use the terms interchangeably. Others make a distinction where “merge” refers to essentially combining separately enrolled sections or classes under one shell while “cross-listing” refers to the same class being listed by different departments. The latter usage is the distinction that seems to be made in the foregoing Canvas discussion board posting. For purposes of this analysis, I address the situation where students who are enrolled in separate sections or classes might be able to review information pertaining to students in a different, separately enrolled class or section through the LMS.

Because “personally identifiable information from student records” is defined quite broadly, it is my opinion that virtually any information linked to an individual student and ascertainable through an LMS is an education record covered by FERPA. Therefore, if any such information is to be disclosed to third parties in an LMS environment without the student’s consent, it must fall under one of the FERPA exceptions. A student’s identity in connection with her enrollment in a class is available to faculty based on the legitimate educational interest exception discussed above. In relation to other students in

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<sup>4</sup> Penalties for violation of FERPA may include withholding of federal payments under any applicable federal program or termination of eligibility to receive federal funding under any applicable program. 34 C.F.R. § 99.67. If an educational agency believes it cannot comply with FERPA due to a conflict with a state law, it must notify the Family Policy and Compliance Office within 45 days. 34 C.F.R. at § 99.61.

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her class, FERPA deems the student's identity to be directory information from which she may not opt out.

However, the student's identity connected to her enrollment in a particular class or classes is not necessarily available to other students outside her class, for good reason. A variety of situations can arise on campus that may necessitate keeping certain students away from each other, whether due to behavioral issues, protective orders, or other legal constraints (such as conditions placed on sex offenders). FERPA allows the student to control who has access to this information, subject to other exceptions that may apply.

It is therefore my opinion that the LMS contains student records subject to FERPA and a student's records, including the fact of her enrollment in a particular class should not be disclosed through the LMS to students in another class. From checking some resources around the country, this does not seem to be a controverted legal conclusion.

**Options to Avoid Inadvertent FERPA Violations.** I understand from talking to eLearning administrators at colleges that there are technological tools within Canvas that would allow an instructor to push out information to multiple classes without necessarily creating a window for one class to identify students in another class. Some institutions disable the chat and discussion forum and use Google Docs to have section discussions. I have included links to guidelines from three institutions that address ways to accomplish the desired result.<sup>5</sup>

**Conclusion.** FERPA prohibits disclosing the identities of students through a LMS to students in another class. The disclosure prohibition would not apply where merged courses are actually the same class, meeting at the same time, and in the same classroom (if there is a classroom component), but happen to be assigned different course numbers or names in the college catalogue or class schedule. The eLearning experts at the institution should be able to provide the necessary guidance to instructors to configure Canvas so that confidential information is not shared across sections.

I trust that this advice answers your question. Please feel free to circulate among other Washington community and technical colleges as you deem appropriate.

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<sup>5</sup> <https://docs.google.com/document/d/1NZ7jfX1khKzwFrAV-6pbcG0uJ75cZ0ndsh7uMBaOsKE/edit?usp=sharing>; <https://seattleu.instructure.com/courses/1061616/files/62970271/download>; <http://www.easternflorida.edu/faculty-staff/cte/enhance-learning/documents/ferpa-merged-courses.pdf> (hyperlinks last visited March 20, 2017).