

# GENERAL COUNSEL'S CORNER

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## Proctoring and Privacy: Preparing for the Perils of Exam Season in the Ongoing COVID-19 Pandemic

Online test-proctoring services have become increasingly popular among higher education institutions during the COVID-19 pandemic. These services provide many benefits to students: greater control over their physical testing environment; greater flexibility in the test scheduling; and electronic administration eliminates the burden of handwritten essays. Institutions also enjoy many benefits from the use of online testing modules: lightening of the administrative burden relating to the hiring of test proctors and provision of physical space for testing; removal of geographic barriers for testing of students off campus and abroad; introduction of novel means to safeguard academic integrity.

The benefits of such services do not inure without commensurate concerns. Students, privacy advocates, disability advocates and some faculty have raised significant concerns about the impact of online test proctoring tools on: (1) student privacy, (2) academic integrity and (3) discrimination. Students with disabilities, women, students of color and religious minorities appear most vulnerable to the adverse impacts of online proctoring.<sup>1</sup> These concerns have led to a U.S. Senate inquiry letter directed at three of the top proctoring companies. The senators who authored the inquiry letter expressed concern that “the [test proctoring] software has not been designed to be inclusive and mindful of all students’ needs,” and challenged the proctoring companies to, “demonstrate that you are respecting students’ privacy.”<sup>2</sup>

While many of the concerns became apparent during the first year of the pandemic, they continue to persist. This post will explore the various issues raised by the utilization of online test-proctoring services and suggest methods for institutions to address them as exam season fast approaches.

**Student Privacy.** Critics allege that online test-proctoring services engage in excessive collection of students’ biometric and other personal data. For example, according to the Electronic Privacy Information Center, online test-proctoring services collect extensive personal data from students, including video, audio information and key stroke patterns.<sup>3</sup> One proctoring service, ProctorU, is currently being sued for violating the Illinois Biometric Information Privacy Act on these grounds after a data breach affected nearly 500,000 users. Critics allege that the use of the services forces students to waive their privacy rights in order to pursue their education.

In response to these criticisms, one test-proctoring service, Proctorio, has stated that it does not require test takers to enter personally identifiable information by default, and instead institutions can use its systems through their own test taking platforms or through a third-party learning management

1 See generally “How it Feels When Software Watches You Take Tests.”

2 See e.g., [Senate Inquiry Letter to ExamSoft](#).

3 “[In re Online Test Proctoring Companies](#).”

system so as not to share such information with Proctorio. Proctorio argues that institutions determine the extent to which student information is disclosed, and institutions can limit such disclosure while utilizing its services.<sup>4</sup> Other systems such as ProctorU and ExamSoft have responded to these criticisms by referring to their internal data security and compliance programs, essentially arguing that students should not fear sharing their personally identifiable information because it is being used and stored in compliance with applicable law.<sup>5,6</sup>

**Academic Integrity.** The information collected by these services is often analyzed for indications of cheating. Critics argue that students' rights are violated when the systems use proprietary algorithms to analyze test performance, because the systems do not disclose the analytics used to flag individuals for potential cheating. Research suggests that many faculty members rely solely on these data analytics to flag students for possible cheating without conducting an independent or second review.<sup>7</sup> Not only is the accuracy of the algorithms questionable,<sup>8</sup> the use of "secret analytics" raises due process concerns for students accused of cheating.

**Discrimination.** Civil rights advocates have raised concerns that the artificial intelligence used to detect cheating is biased in its application. For example, advocates point out that many of the proctoring services utilize facial recognition software and collect information including a test taker's intimate surroundings, allowing for adverse inferences based on personal and environmental factors that correspond with protected aspects of identity like disability, religious affiliation, familial or marital status, and race or color.<sup>9</sup> For example, advocates note that students with certain disabilities may be flagged for cheating based on behaviors directly relating to their disabilities such as food consumption and insulin administration (diabetes), frequent bathroom breaks (Crohn's disease), motor tics (Tourette's syndrome), involuntary spasms (cerebral palsy) and stimming (autism).<sup>10</sup> Additionally, advocates argue that the use of an invisible, virtual proctor may exacerbate symptoms of students who suffer from anxiety or post-traumatic stress disorders.<sup>11</sup> According to Vice News, research suggests that the facial recognition software used by one service, Proctorio, is ineffective at detecting the faces of students of color,<sup>12</sup> and anecdotal evidence suggests students with caregiving responsibilities and those who live in multi-family homes may be more likely to experience interruptions during test taking.<sup>13</sup>

## Examples of Current Challenges

Several institutions of higher learning have already encountered challenges in their use of such systems. For example, Northwestern University and DePaul University have both been sued under the Illinois Biometric Information Privacy Act based on their use of online test proctoring software.<sup>14</sup>

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4 See [Letter from Proctorio dated January 7, 2021](#).

5 See [Letter from ProctorU dated December 17, 2020](#).

6 See [Letter from ExamSoft dated December 17, 2020](#).

7 See ["A Long Overdue Reckoning for Online Proctoring Companies May Finally Be Here."](#)

8 ["ExamSoft Flags One-Third of California Bar Exam Test Takers for Cheating."](#)

9 [According to Vice News](#), Proctorio software's facial detection model has failed to recognize Black faces more than 50% of the time, preventing students of color from taking certain high-stakes exams and adding unnecessary stress to minority students.

10 See *supra* note 7.

11 ["How Automated Test Proctoring Software Discriminates Against Disabled Students."](#)

12 *Supra* note 9.

13 See *supra* note 1.

14 ["DePaul Sued Over Facial Recognition Tech Used for Online Test Proctoring."](#)

Similarly, in response to a student petition raising privacy concerns, the City University of New York (CUNY) announced that students would not be compelled to agree to online proctoring, and the university would provide reasonable assessment accommodations upon request.<sup>15</sup> The University of Illinois at Urbana-Champaign has discontinued use of online exam-proctoring tools altogether.<sup>16</sup>

In addition to online proctoring software, some schools have utilized software developed for other purposes to enforce academic integrity standards. The dangers of this approach played out in the well-publicized controversy at Dartmouth Medical School. In that case, Dartmouth utilized information from its learning management system, Canvas, to charge students with academic integrity violations. This good faith attempt to root out cheating raised questions about the appropriate use of such software in this context.<sup>17</sup> Canvas is not an online proctoring tool and is not typically used for this purpose. The Dartmouth incident highlights the importance of careful scrutiny over not only *what* technology is used for online proctoring but also *how* available technologies are used by institutions of higher learning.

### Key Areas of Consideration

As institutions consider the role of online test proctoring in the upcoming exam season, they would be well-advised to consider the following issues in advance of implementation:

- Are there state law restrictions on the use or collection of biometric information that would apply to information collected by test-proctoring services?
- Are students required to agree to the terms of an online test proctoring provider in order to complete course examinations? Will the institution provide alternatives?
- If students are flagged for possible cheating by an online proctoring software, is there a second level of review by a professor or academic integrity committee?
- How will the academic integrity due process procedure apply to students accused of cheating in tests proctored online?
- What, if any, technologies other than online proctoring tools are utilized to administer examinations remotely? Is this use appropriate, or does it pose undue risk given the concerns outlined above?
- How will the institution meet the needs of students entitled to reasonable accommodations?
- Has the institution addressed concerns of race/color or religious discrimination if facial recognition is utilized by test-proctoring software?
- Has the institution addressed concerns of familial or marital status if interruptions or conversations during test-taking are considered as evidence of cheating by test-proctoring software?

### How to Plan Ahead

Educational technology remains at the forefront of higher education administration, delivery, and assessment. The recent scrutiny of online proctoring systems serves as an important reminder of the risks inherent in the use of such technology. These risks apply to all types of institutions and are a reflection of the ever-changing landscape of the academy. Conscientious, student-focused educators and administrators can easily find themselves in the throes of controversy given the dynamic nature

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<sup>15</sup> “CUNY Students Raise Concerns About Online Proctoring.”

<sup>16</sup> “Online Cheating Charges Upend Dartmouth Medical School.”

<sup>17</sup> *Id.*

of this environment. The means of delivery of education and the assessment tools employed by each institution will vary. There is no one-size-fits-all answer. However, encouraging stakeholders to consider these issues in advance allows institutions to make principled decisions based on institutional values and sound pedagogical goals.

If you would like support in assessing the risks and benefits of online test proctoring resources and what role they might play at your institution, please reach out to [Sarah Luke](#), any member of the [Bond Higher Education practice](#) or the Bond attorney with whom you are regularly in contact.

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*General Counsel's Corner is a publication presented by one of Bond's former general counsels and academic administrators of higher education institutions: [Monica Barrett](#) (Rutgers); [Sandra Casey](#) (SUNY and Siena College); [Shelley Sanders Kehl](#) (Pratt Institute); [Barbara Lee](#) (SVP for Academic Affairs at Rutgers); [Sarah Luke](#) (Governors State University); [Gail Norris](#) (University of Rochester); and [Jane Sovern](#) (CUNY). In each issue, a different attorney from this team will share with you recent legal developments, tips, strategies and useful information to assist you with your daily work on campus.*



Today's post is brought to you by [Sarah A. Luke](#) in our New York City office. Sarah served as General Counsel and Vice President of Governors State University, a regional public university in south suburban Chicago. She has held in-house positions at Wayne State University in Detroit, Michigan and at Rutgers, the State University of New Jersey.

