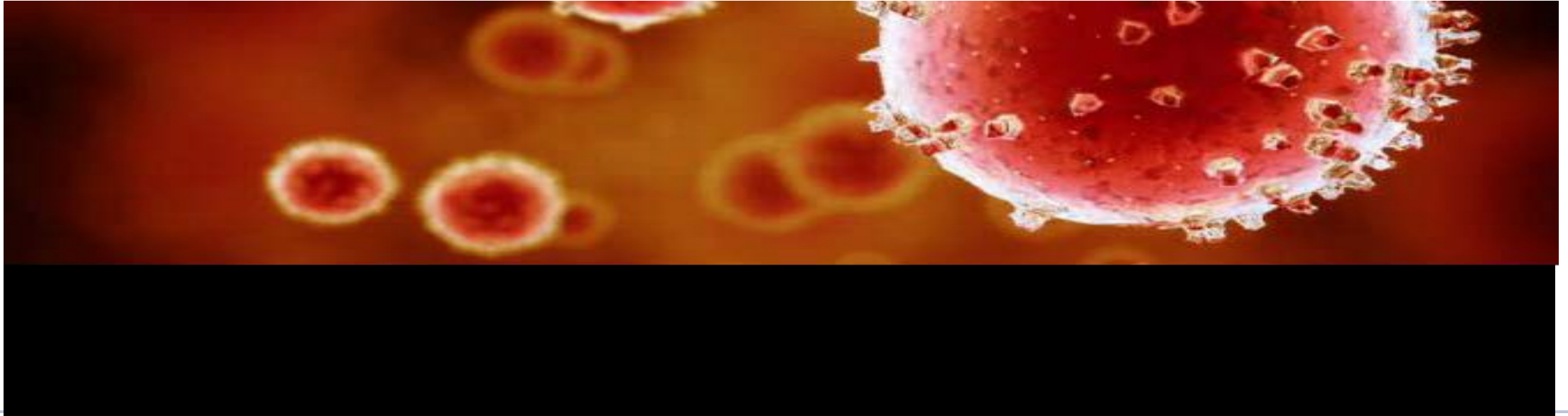


# AIMS Legal Update #2 on COVID-19

## April 8, 2020



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# How you may feel about another Zoom meeting



# Agenda

1. Who is on campus now with Stay At Home Orders

2. Recommended employer documentation for Stay at Home Orders

3. Planning for end of year, summer

4. Reporting Covid-19 positive tests, illness

5. Fundraising, converting tuition refund to voluntary donation

6. CARES Act PPP and FFA, Families First unemployment insurance

7. Remote counseling 1:1 considerations

8. Distance learning issues

9. Zoombombing

# 1. Who is on campus?



Most recent Maryland,  
DC Stay At Home  
Orders 3.30.20



Both refer to federal  
guidance



Grey areas - minimum  
operations standard



Enforcement,  
penalties: fine, jail

# Essential employees

- Md. Interpretive Guidance, DC Order reference Cybersecurity and Infrastructure Security Agency for essential employees
- <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>
  - *Workers to ensure continuity of building functions*
  - *Security staff to maintain building access control and physical security measures*
  - *Educators supporting public and private K-12 schools, colleges, and universities for purposes of facilitating distance learning or performing other essential functions, if operating under rules for social distancing*
  - *Persons facilitating remote working by other staff*
  - *Performing essential administrative functions such as picking up mail, processing payroll*
- Schools should limit staff to these functions; apply minimal operations standard
- Document requirements for social distancing, environmental cleaning and disinfection

Letter to assist employees establishing need to travel if challenged.



Recommended employer documentation

Include on letterhead:

Name, address of employee

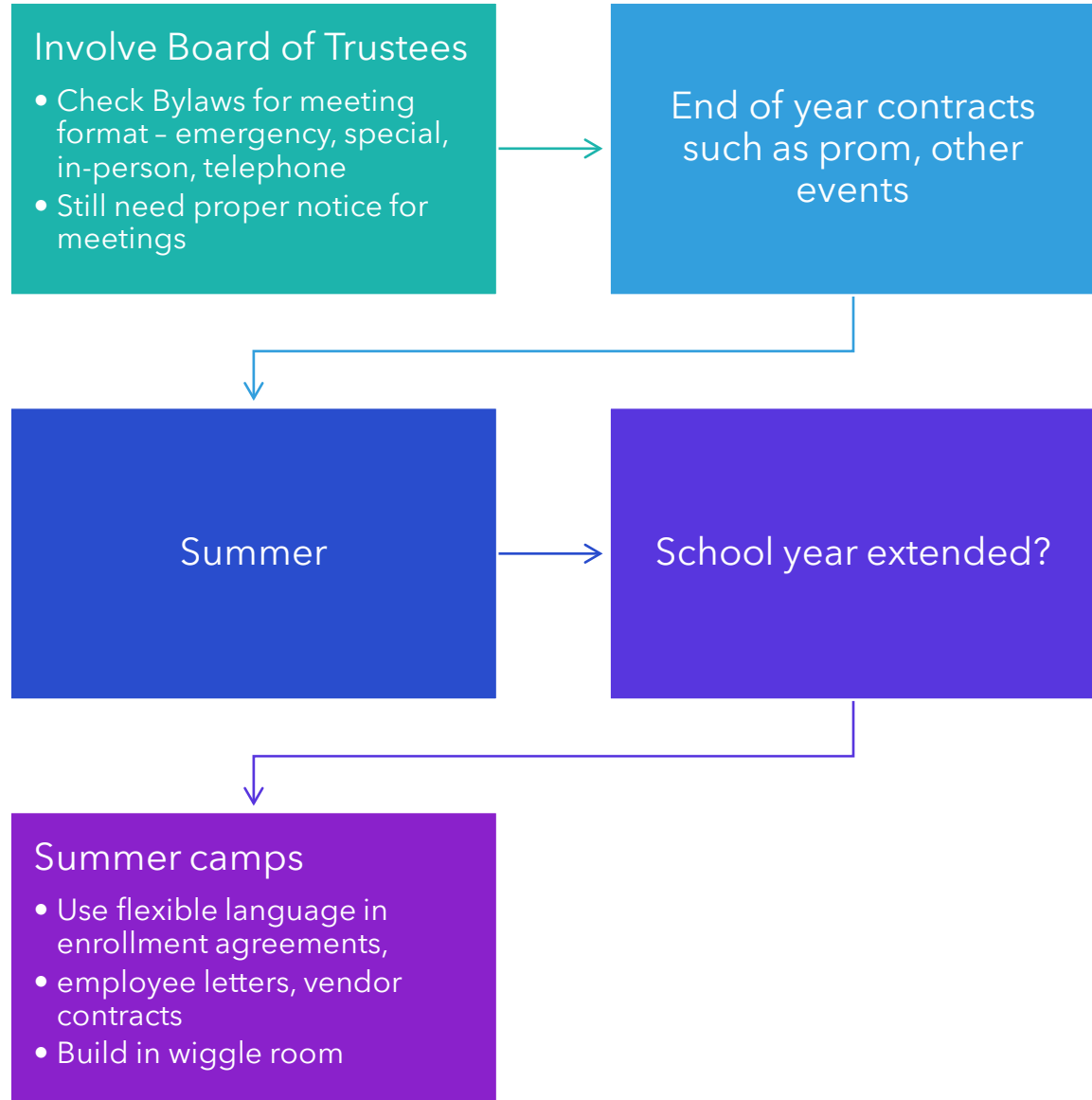
Name, address of employer


Nature of employee's work

Brief reference to campus closure with essential personnel

Signature, contact information for employer

## 2. Planning for end of year, summer





### 3. Reporting Covid-19 positive tests, illness

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Trend away from reporting illness

Less rationale to report the longer we are socially distanced and isolated

Presume everyone is positive or asymptomatic carrier

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If you report, no identifying information

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Urge families to contact health care provider

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School nurse or other staff member to contact local public health official





## 4. Fundraising

- Different approaches
  - None
  - Business as usual
  - Key supporters
  - Online events
- Tuition refunds to voluntary contributions
  - Voluntary donation
  - No goods or services in exchange

# Can tuition refunds result in contributions?

Contribution must be “voluntary and made without getting, or expecting to get, anything of equal value.”

Must get proper documentation

Return donation must be voluntary, not coerced.

Portion of refund for contribution?

Tuition from 529 plans cannot become charitable contribution

Send letter that no goods or services were received in exchange for donation; disclaimer for family to consult its tax advisor.

Slippery slope/precedent? Make clear that current pandemic is unique.

## 5. CARES Act

- \$2 trillion Coronavirus, Aid, Relief and Economic Security (CARES) Act passed
- Will send checks to many families

# CARES – Paycheck Protection Program (PPP)

- PPP for small businesses with less than 500 employees, including 501(c) schools
- Formula: average monthly payroll **minus** compensation paid to any employee over \$100,000 **divided** by 12 and then **multiplied** by 2.5.
- Provides \$350 billion in loans through Small Business Administration approved banks, credits unions or money to maintain workforce and operations 2.15.20-6.30.20
- Application: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>
- Approved lenders: <https://www.sba.gov/partners/lenders/microloan-program/list-lenders>
- Interim final rule: <https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf>
- Payments of principal, interest, fees deferred 6-12 months
- Loan forgiveness for retaining certain percentage of workforce, use 75% of loan for payroll costs, don't reduce salary by more than 25% compared to most recent quarter before covered period
- Use loan money for salaries, compensation; avoid mortgage or rent for buildings because federal compliance may continue beyond loan period (up to two years - more later).
- Involve Board in decision due to FFA consequences
- Consider optics, newspaper publicity of loan amount

# Federal Financial Assistance (FFA) from PPP

- SBA FAQ April 4, 2020 - all recipients of loans under PPP considered recipients of FFA - application form, Q and A from SBA on religious schools
- <https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf>
- FFA triggers compliance with certain federal non-discrimination laws such as Age Discrimination Act, Title IV, Title IX, Section 504 of Rehabilitation Act
- NAIS getting further guidance, advocating for relief
- FERPA not applicable because no funds from US Dept. Ed.

# Length of time for compliance unknown (but not forever)

- **Not permanent - for length of loan until paid off or forgiven - a few months? up to two years? Can pay off early w/o prepayment penalties. BUT...**
- **If used for mortgage/rent, continue compliance for useful life of building??**
- **School may have to meet requirements incurred while loan was outstanding, such as continuing to honor commitments to accommodate disabilities for student admitted during that period.**
- **Provide accommodations for Sec. 504 student as long as student in school? Have to accept other Sec. 504 students with IEPs?**
- **May have to comply for fiscal year in which you receive loan**
- **May be short-term compliance obligation but unclear**



# Federal Financial Assistance

- Current application: “All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R. Parts 112, 113, and 117 of the SBA Reg.”
- Laws include Age Discrimination Act of 1975, Title VI of Civil Rights Act of 1964, Title IX of Education Amendments of 1972, Sec. 504 of Rehabilitation Act.
- Issue: are federal funds used in discriminatory manner?

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# Strings attached to FFA: Title IX, Education Amendments of 1972



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Prohibits discrimination on basis of sex in any education program or activity. 13 C.F.R. Section 113 et seq.

Explosion in Title IX guidance, laws, policies extensive for K-12 schools on sexual harassment prevention and response.

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Started as parity in athletic teams and facilities, but includes any possible discrimination based on sex, including sexual harassment allegations, recruitment, admissions, financial aid, employment, education programs, housing and health benefits, athletics

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Enforced by Office of Civil Rights, Dept. of Ed.

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Need attorney for compliance, program, policy;

Hire Title IX compliance coordinator; publish procedures.





# Title IX grievance procedure

- Notice to students, parents, employees, how to file complaint
- Procedures apply to complaints alleging harassment by employees, students, third parties
- Definitions of sex discrimination, sexual harassment, other bad conduct
- Promise of reliable investigation of complaints, including opportunity to present witnesses and other evidence; much expanded over current process for independent schools without FFA.

# Title IX Grievance Procedures



Time frame to complete process (60 days urged)



Notice to parties or parents of outcome



Assurance school will prevent recurrence of any harassment and collect any discriminatory effects on complaining party



Prohibition of retaliation, how to report subsequent problems



Use preponderance of evidence standard (more likely than not, or 51%) to determine violation



Both parties can appeal outcome

More strings  
attached from  
other laws



Title  
VI

**Title VI of Civil Rights Act of 1964 (prohibits discrimination on basis of race, color and national origin; 13 C.F.R. Section 112 et seq.):**

**Already required as non-profit institution, law adds obligation more clearly protecting students who are English language learners. New remedies like compensatory damages available for intentional discrimination.**

Age  
Discrimina-  
tion Act

**Age Discrimination act of 1975 -prohibits discrimination on basis of age in denial of admissions, financial aid, or otherwise treat individual differently in business and activities due to age - applies to students, parents and others**



# Section 504, Rehabilitation Act of 1973

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Prohibits discrimination against qualified individuals on basis of handicap; 29 U.S.C. Section 701 et seq.

Schools may not exclude qualified handicapped students if student can, with minor adjustments, get appropriate education. **Provide same evaluation and placement requirements as public schools. 34 C.F.R. Sec. 104.39.**

Must designate employee to coordinate compliance; provide written "assurance" of compliance, grievance procedures.

Accept placements from local Dept. of Ed for students with Individual Education Plan (IEP), due process for appeals, meetings with parents.

Must give notice to participants, applicants and employees that you do not discriminate on basis of handicap.

Process process process!



# NAIS overview of FFA

<https://www.nais.org/media/MemberDocuments/Legal/>

[NAIS Legal Advisory Guide for Considering Federal Financial Assistance 2018.pdf](https://www.nais.org/media/MemberDocuments/Legal/NAIS_Legal_Advisory_Guide_for_Considering_Federal_Financial_Assistance_2018.pdf)

[http://www.nais.org/Articles/Documents/Independent Schools and Federal Laws Advisory 2013.pdf](http://www.nais.org/Articles/Documents/Independent_Schools_and_Federal_Laws_Advisory_2013.pdf)

# Office of Civil Rights, U.S. Dept. Ed.

- Investigates complaints, conducts compliance reviews
- If violation found, school to remedy violation voluntarily, OCR can terminate federal funding or refer to US Dept of Justice to pursue enforcement in federal court.
- Anyone can file complaint with OCR, or compliance review even without complaint.
- OCR can request information from school.



# SBA loan through PPP



If you consider participating, apply soon.



Program is capped at \$10 billion; SBA expects all money to be used. Do not wait!



Loans to take several weeks. Gives time for more information about NAIS/NBOA advocacy to change rules or get further guidance.



Loans require final acceptance by school before money disbursed. School can reject money if FFA too burdensome. Accepting loan money, not submitting application, triggers compliance.

# Cost- benefit analysis for PPP loan for independent\* schools

\* sort of

- **NAIS/NBOA advocating for relief.**
- **Talk to your Board.**
- **Important decision with consequences.**
- **Learn more about compliance obligations before you accept PPP \$\$**
- **Are benefits of accepting the forgivable loan greater than risks and obligations?**
- **Balancing \$\$\$ with short-term compliance obligations.**
- **Significant, expensive burden to comply with federal laws.**
- **Will make "independent" schools less "independent".**
- **Do you need the money from PPP?**
- **Explore alternatives without FFA strings.**



New  
unemployment  
insurance  
benefits  
(Families First  
Act)



13 more weeks + normal 26 weeks;  
\$600 weekly + state payment

## Employee Retention Credit (CARES Act)

Refundable payroll tax credit of 50% of wages (3.13.20 - 1.1.21)

Available if school moved to distance learning and had operations partially suspended due to COVID-19

Not available if wages paid for Families First leave benefits (Family leave, paid sick leave)

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# DOL guidance on paid leave under Families First Act

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- <https://www.dol.gov/agencies/whd/pandemic>
- <https://www.dol.gov/agencies/whd/pandemic/ffcr-a-employee-paid-leave>
- <https://www.dol.gov/agencies/whd/pandemic/ffcr-a-employer-paid-leave>
- [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA Poster WH1422 Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA%20Poster%20WH1422%20Non-Federal.pdf)





## 7. Remote Counseling

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Office hours/appointments

Sample remote 1:1 form consent form distributed earlier

Not individual therapy

Avoid recording

Boundaries compliance

## 8. Distance learning as extension of School campus

Set expectations about compliance with Handbook, honor code, code of conduct, Acceptable Use Policy

Obtain student and family consent form explaining distance learning, documenting expectations

Do not assume your universal permission for photos and videos is sufficient for school closure context

Teachers should comply with School Acceptable Use Policy during distance learning.

Teachers should not do private recordings or story-telling to students on Utube or other platforms other than School's official distance learning platform

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<https://www.washingtonpost.com/technology/2020/04/03/zoom-video-set-up/>

Zoom under scrutiny by NY AG for data privacy, security practices to detect hackers

Zoom slow to address security flaws allowing malicious third parties to gain access to consumer webcams

Internet trolls exploit Zoom screensharing feature to hijack meetings, post inappropriate comments = Zoombombing

## 9. Zoombombing

Students should not share screens

Don't make meetings public or share links publicly.

Updated privacy policy a few days ago.

Use updated program.

Some districts have prohibited using Zoom as platform

# Recommendations to minimize Zoom bombing



Minimize or eliminate recording



If you do record, use random file name or call it something unique



If you do record, don't post to social media or anywhere.



Do not publicly share Zoom meeting ID.



Set password for meeting



Screen sharing "Host Only"



Use Waiting Room feature preventing new participants from joining call until host approves.

# Let's take a breath





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# Q and A