

BOARD OF HIGHER EDUCATION

September 22, 2021
10:00 a.m.
Livestreamed, via Zoom

Meeting Minutes

A meeting of the Board of Higher Education ("BHE" or "the Board") was held virtually on Wednesday, September 22, 2021 on the web-conference platform Zoom.

The following Board Members were present:

Chris Gabrieli, Chair
Ann Christensen
Veronica Conforme
Alex Cortez
Cameron Costa
Patty Eppinger
Sheila Harrity
Paul Mattera
Judy Pagliuca
Secretary James Peyser
Paul Toner
Bill Walczak

Jorgo Gushi, non-voting Student Advisor, Community College segment
Cindy Mack, non-voting Student Advisor, State University segment

Carlos E. Santiago, Commissioner and Secretary to the Board

The following Board Members were absent:

Mike O'Brien

I. WELCOME

Chair Chris Gabrieli called the meeting to order at 10:03 a.m. and announced that the meeting was being held remotely and in accordance with relevant amendments to the Open Meeting Law. Chair Gabrieli announced that the meeting is being livestreamed via Zoom. Department of Higher Education (DHE or Department) Chief of Staff Elena Quiroz-Livanis, then took roll call attendance (see above for attendance roster).

After providing brief opening remarks, Chair Gabrieli turned to Commissioner Santiago. Commissioner Santiago welcomed the Board and reviewed the agenda and objectives for today's Annual Meeting:

- Build Community Among the Board (meet and greet)
- Share Update on Lumina TIE Goals
- Discuss FY22 Equity Agenda Priorities
- Participate in an Equity Agenda Focus Group
- Establish Advisory Councils
- Engage in Professional Development

II. MEET & GREET

After finishing his remarks, Commissioner Santiago turned the meeting back to Chair Gabrieli who turned to the next item on the agenda. He commented that Board members had expressed a desire to get to know each other better and how difficult that had become because of the pandemic. In that spirit, he explained the first part of the meeting would consist of a social hour so to speak— or “meet and greet”, facilitated by Chief of Staff Quiroz-Livanis. Chief of Staff Quiroz-Livanis asked Board members to spend a couple of minutes introducing themselves by perhaps sharing personal background information and describing an item on their bucket list.

III. FY22 STRATEGIC PRIORITIES

List of Documents Used

[FY22 Strategic Priorities Presentation](#)

Chair Gabrieli thanked Chief of Staff Quiroz-Livanis and said he appreciated the opportunity to get to know his fellow Board members. The next item on the agenda was the result of conversations at the Special BHE meeting in August when, at the request of the Executive Committee, the Commissioner presented a series of policy priority options. Chair Gabrieli shared his excitement at the ability to identify key policy priorities for the upcoming fiscal year, and potentially beyond. Chair Gabrieli then turned the meeting over to Commissioner Santiago.

Commissioner Santiago began the presentation by revisiting goals adopted by the Board at its May 2020 meeting. He first presented on a metric that was a snapshot of the people living in Massachusetts in a given year, and what percentage of them have a high-quality certificate or higher. The graph showed that currently Massachusetts was first in the nation on this metric with 62%, with the exception of Washington DC, which was at 69%. The goal was to reach 70% by 2030.

Commissioner Santiago turned to the second metric which was a snapshot of the people living in Massachusetts in a given year, and what percentage of them have a high-quality certificate or higher. The goal here was to begin close equity gaps in attainment of associate degree and higher credentials and it looked at the percent of African American and Latinx Massachusetts

residents ages 25–64 who hold an associate degree or higher. Even if the goals were met, 43% and 32% for African American and Latinx adults respectively, large disparities would still persist. Questions from Board members on this metric included whether it can or should include data on Asian students, and whether the African American and Latinx data including or could be broken down to identify immigrant groups.

The next two sets of goals were focused on public higher education. Commissioner Santiago explained that this was the area where there was an intersection between the biggest impacts of BHE policy and the highest percentage of Students of Color served. He stated that 62% of the African American undergraduate student population in Massachusetts was enrolled at a public institution. The rates were 61% and 54% for Latinx and White students respectively. Even more compelling was the fact that of all Massachusetts public high school graduates who enrolled in college anywhere, larger shares of Students of Color enroll in public higher education. Specifically, 68% of African American Massachusetts public high school graduates and 73% of Massachusetts public high school graduates were enrolled in Massachusetts institutions of public higher education. The third goal then looks at the annual outcomes of the Massachusetts public higher education system. For the Equity Agenda, the Department is looking at these outcomes a bit differently from standard institutional/segmental graduation rates. The DHE is looking at all new students who enrolled in any Massachusetts public institution in a given year and whether they earned a credential anywhere within six years, and if so then it could be considered a system-level outcome. He noted this was a lagging indicator and once again the idea would be to address racial disparities in completion of students who started at one of the public institutions. There were goals set by 2024 and 2030 for both African American, 44% and 51% respectively, and Latinx students, 42% and 50% respectively. Once again, even if the goals there were met, there would still be significant racial disparities.

The final goal the Commissioner reviewed looked at a series of momentum metrics. These metrics examined first year success by look at the completion of college-level English and mathematics in the first year, on-time credit accumulation, and persistence to a second year of postsecondary education. After reviewing progress across the three segments of public higher education, the Commissioner then turned the FY22 Policy Priorities.

After reviewing the Equity Agenda’s Racial Equity Principles, Commissioner Santiago stated that DHE staff identified different policy priorities by considering different Equity Agenda inputs, such as the New Undergraduate Experience and the Policy and Program Audit, as well as feedback from Board members at the August 23rd Special BHE meeting. He reviewed the 10 potential policy levers that were presented at the August 23rd meeting, explaining that they saw these initiatives as advancing access, retention, and completion efforts and/or continuing conversations around strategic financing. Based on the Board’s feedback, the five policy priorities identified for FY22 involved: MassGrant Plus, Early College, expansion of the SAT Optional Pilot, Developmental Education, and Public Higher Education Strategic Finance.

Commissioner Santiago continued to offer the PowerPoint presentation through which he reviewed each of the five priority areas. He noted that most of the slides should be familiar to

Board members given that in many cases DHE staff presented similar information during the August meeting. After each priority, he described the FY22 Workplan for each priority area. The Board engaged in a brief discussion on the data used to inform the goals.

Board members also engaged in a discussion of whether the definition of student “unmet need” was capturing the right definition or whether it was too narrow. Board Member Mattera expressed concerns about intentionally excluding other living expenses (i.e., parking, clothing) as a too narrow definition could be an impediment to persistence. Deputy Commission Simard acknowledge these additional concerns but given the realities of budget limitations a more expansive definition to include such stipends were not feasible. Board members also asked if whether any federal legislation passes- such as free community college- how that would be worked into the equation. Chair Gabrieli noted that we would need to keep a close eye on work at the federal level and be able to take a position. Board members agreed to continue to explore the definition of unmet need in their work and discussions this fiscal year.

Board members asked questions about the admissions standards and the SAT Optional pilot. Board members were interested to hear more this about what is in their authority to establish in this area. Chair Gabrieli expressed interest in exploring admissions standards, but skepticism on the potential impact that expanding the SAT Optional pilot will have on moving the needle in this regard. On this point, he wanted to see more data on acceptance rates within the State University and the University of Massachusetts segments in particular.

Board members also asked questions about the public higher education strategic finance review and how that was intended to move forward. Chair Gabrieli indicated that there will be an RFR to procure consultant assistance and there will be a strategic project management team to help advance the work. Board Member Mattera asked how the Advisory Council work will relate to the Executive Committee work and the work of this project management team and whether they were all the same or subsets of each other. Chair Gabrieli indicated that the three would be interrelated.

Chair Gabrieli then asked that the Board transition to the next agenda item. He thanked the Commissioner and Department staff for their presentations and suggested that the Board take a short break before reconvening to continue the discussion and questions in the smaller breakout groups.

IV. DISCUSSION BREAOUTS BY ADVISORY COUNCIL

After a short break (approximately 10 minutes), the Board reconvened and Chair Gabrieli moved to the next agenda item which was intended to give Board members the opportunity to participate in small group conversations to discuss the FY22 strategic priorities. Chief of Staff Quiroz-Livanis explained that Board members would breakout into the following three groups based on their areas of interest and prior committee work: Academic Affairs & Student Success (AA&SS), Finance and Administrative Policy (FAAP), and Strategic Planning. She explained that during the breakouts, Department staff who will support the Advisory Councils (ACs) would

facilitate conversations about the charges to the ACs and the work of the upcoming year considering the previous discussion. Staff would take notes, and a lead BHE member for each group would be expected to report back to the full Board, after a short break. Chair Gabrieli asked Board members to spend at least 20 minutes on their sessions, then take a lunch break, and reconvene here at this same Zoom link at 1:15 to resume the meeting. Chair Gabrieli asked that to the extent there were any members of the public participating and listening in, or if others join the main meeting link while the sessions are in progress, that DHE staff help facilitate access to the break-out sessions by helping to direct people to the right Zoom links.

V. DISCUSSION REPORT OUTS

Chair Gabrieli welcomed everyone back and stated that he wanted to jump right in to the break-out session report-outs, starting with the AA&SS report, followed by FAAP and then Strategic Planning.

Board Member Eppinger summarized the conversation on behalf of the AA&SS team, stating that she was joined by Vice-Chair Sheila Harrity, segmental advisor Jorgo Gushi, Judy Pagliuca, and Paul Toner. Board Member Eppinger stated that the AA&SS group focused on the following four topics:

- Early College- It was noted that while a subset of the Board is working on and is well-versed on this topic, the full Board has not received a briefing in some time. The group had questions about: the dollar impact and how that translates to student success; the cost and other implications on staffing; issues and agreements with unions; whether there were student scheduling complexities; the reach of the program and whether/ how to expand enrollment to more students and additional communities (e.g., is it broad enough? Is anyone left out?).
- SAT Optional Pilot Program Expansion: Questions from the group included- what does the current policy look like? what are the institutions currently using?
- Developmental Education: The group embraced this priority but had a few questions, particularly, noting that if students fall behind with the proposed approach, what do we fall back on? How do we meet students where they are? The group also agreed with the need to continue to work with the Department of Elementary and Secondary Education to help students be college-ready, while of course continuing to make sure that our institutions are student-ready.
- Mass Grant- The group asked whether we should look at refining the goal and questioned how to define unmet need, and whether the program is skewed towards lower-level credentials.

Board Member Conforme summarized the conversation on behalf of those who joined including Chair Gabriel and Paul Mattera the FAAP group, stating that the group spent most of their time discussing the public higher education strategic finance review initiative. She stated that the group spent time discussing what it all means—e.g., how it will be approached- and how a

project like this would roll out. Board Member Conforme observed that, similar to the AA&SS group, the FAAP group had a lot of questions about admissions and the SAT-optional program and how it all aligned. Main questions that kept coming up are: what is possible within our statutory authority, and within the context of COVID? On the latter, the concern was that we should not be operating from a paradigm that was pre-COVID. Board Member Mattera added that there was a lot of discussion around the importance of how we define unmet need for the purposes of MassGrant expansion.

Chair Gabrieli thanked members Conforme and Mattera for their comments, noted that there was a lot of work that had to be done within the context of the strategic review of public higher education finance. He added that the Board will need to work with the Commissioner on how the Board engages with him on some of these issues. For example, on the question of unmet need, Chair Gabrieli noted that there will be an upcoming Board discussion and vote on the FY23 budget; it will be important to engage the Board on this topic at that time so as to dig deeper into this conversation.

Next, Board Member Walczak summarized the conversations on behalf of those who joined the Strategic Planning group, including Secretary Peyser, Alex Cortez, and Ann Christensen. He stated that they discussed the importance of distinguishing and defining the role of the Board in strategic planning, in contrast to and how it aligns with the role of the campus leadership at each institution (e.g., presidents and boards of trustees). The group asked whether the strategic planning process was intended to be “top down” or was it intended to be more about coordination? He added that Board members are interested in hearing more about what innovations are happening at the campuses based on student needs, and what are the needed financial supports across campuses to help advance the innovations. Board Member Cortez confirmed his sense of the discussion, noting that the group discussed the overarching purpose of strategic planning which was to help an entity articulate clear goals and to identify clear approaches, including decision points, on how to advance those goals. On the five strategic priorities reviewed earlier in the agenda, Board Member Cortez stated that on their balance the priorities are seeking to help students enroll and get through college; to the extent that the strategic plans, both at the campus level and at the system level, are not translating into action and positive outcomes for students, then we need to assess why not- is it because of navigation (strategic planning) or execution.

Chair Gabrieli thanked the Board members for their engagement and thanked the group leads for their reports.

VI. ADVISORY COUNCIL VOTES

List of Documents Used

[BHE 22-03 Establishment of Advisory Councils and Charges](#)

[BHE 22-04 Approval Vice Chair and Executive Committee Membership for FY22 By-Laws Presentation](#)

Chair Gabrieli introduced the next agenda item, which involved two votes that will help implement the new By-Laws approved by the BHE during its June meeting. He asked Chief Legal Counsel Papanikolaou to set the context. Ms. Papanikolaou offered a brief PowerPoint presentation which set the stage for the two motions up for consideration today:

- BHE 22-03: which establishes four Advisory Councils; approves the Charges and membership of the Councils; and approves guiding principles for a nomination process.
- BHE 22-04: which establishes the Executive Committee membership; and approves the appointment of the BHE Vice-Chair.

Chief Legal Counsel Papanikolaou reviewed the background which led to the establishment of the two motions and reviewed the intended “guiding principles” for revising and implementing the By-Laws, which were taken from Chair Gabrieli’s June 7, 2021 memorandum to the Board.

Chief Legal Counsel also briefly summarized the proposed approach, as implemented through the motions, which will create three standing Advisory Councils to replace the three standing BHE Committees and will also create a fourth Advisory Council by renaming the existing Evidence Based Policy Making (EBPM) task force. This will leave the BHE with two committees: the Executive Committee which is required in statute, and the Early College Joint Committee which is a joint committee with the Board of Elementary and Secondary Education (BESE) established through BHE and BESE motions.

She stated that the first motion before the Board today (BHE 22-03) sets up these Advisory Councils, establishes the initial membership of each Council, and also within that motion is a set of guiding principles for a nomination process that will allow for the addition of more members to any of those Councils, as needed. The guiding principles for the nomination process include that:

- the process will be open and transparent;
- the BHE will strive for diversity and geographic balance;
- the BHE will seek to establish a reasonable balance of members representing stakeholder interests, content experience and expertise; and
- the Executive Committee, in a governance role, will help screen applicants and nominees and formulate recommendations for appointment.

Chief Legal Counsel Papanikolaou concluded by reading the motion language for BHE 22-03 and BHE 22-04 and then turned to Chair Gabrieli to facilitate the discussion and the votes.

Board Member Mattera expressed concerns about maintaining an appropriate equilibrium on these Advisory Councils to help ensure that the Board is not delegating its fiduciary duty to non-directors (non-BHE Members). It was his understanding that these non-BHE members would

not have decision-making authority and their participation would only be advisory in nature. However, he expressed concern about equilibrium as he believed that even in the deliberation process for these advisory opinions there should always be a majority of BHE-members at the table for each Advisory Council. Accordingly, he suggested that the motion be more specific about that to ensure that the make up of each Advisory Council includes a majority of BHE-members. Chair Gabrieli acknowledged Member Mattera's concern but stated that he did not think that was necessary for a couple of reasons, mainly because the By-Laws already build in some protections here. In particular, the By-Laws require the BHE to approve Advisory Council membership, so theoretically the Board will need to vote on adjustments and additions to each Council. So, the Board will be able to monitor equilibrium as we add members. In addition, the By-Laws do include an annual review, during the BHE's annual meeting, of the governance of the Board, which will include a review of the composition and functioning of the Councils and any committees.

Hearing no further questions or comments, Chair Gabrieli asked for a motion to accept motion BHE 22-03. The motion was duly moved and seconded. With no further discussion the motion proceeded to a roll call vote and passed unanimously by all Board members present, as follows:

Ann Christensen – Yes

Veronica Conforme – Yes

Alex Cortez – Yes

Cameron Costa – Yes

Patty Eppinger – Yes

Sheila Harrity – Yes

Chris Gabrieli, Chair – Yes

Paul Mattera – Yes

Judy Pagliuca – Yes* (due to technical difficulties, Member Pagliuca was unable to vote verbally, with her camera on, and stated in the chat function that she supported the motion and was voting "yes")

Secretary James Peyser – Yes

Paul Toner – Yes

Bill Walczak – Yes

**BHE 22-03 ESTABLISHMENT OF BOARD OF HIGHER EDUCATION ADVISORY
COUNCILS**

VOTED: The Board of Higher Education hereby approves the establishment of the following four Advisory Councils, in accordance with the charges and membership set forth in **Attachment A**:

- Finance and Administrative Policy (FAAP)
- Academic Affairs and Student Success (AA&SS)
- Strategic Planning
- Evidence Based Policy Making (EBPM)

Provided further that the Board may add additional members to the Advisory Councils at an appropriate pace, and as needed from time-to-time, subject to a nomination process consistent with the guiding principles set forth herein.

Authority: Massachusetts General Laws Chapter 15A, Section 4; BHE By-Laws Article I, Section 3 and Article III, Section 2 (as amended, June 22, 2021).

Contact: Constantia T. Papanikolaou, Chief Legal Counsel

Next, Chair Gabrieli asked for a motion to accept the motion BHE 22-04. The motion was duly moved and seconded. With no further discussion the motion proceeded to a roll call vote and passed unanimously by all Board members present, as follows:

Ann Christensen – Yes
Veronica Conforme – Yes
Alex Cortez – Yes
Cameron Costa – Yes
Patty Eppinger – Yes
Sheila Harrity – Yes
Chris Gabrieli, Chair – Yes
Paul Mattera – Yes
Judy Pagliuca – Yes* (due to technical difficulties, Member Pagliuca was unable to vote verbally, with her camera on, and stated in the chat function that she supported the motion and was voting “yes”)
Secretary James Peyser – Yes
Paul Toner – Yes
Bill Walczak – Yes

BHE 22-04 APPROVAL OF BHE VICE-CHAIR APPOINTMENT AND EXECUTIVE COMMITTEE MEMBERSHIP

VOTED: The Board of Higher Education (BHE) By-Laws, as amended, require the BHE to annually review and renew the appointment of the BHE’s Vice-Chair and the BHE’s Executive Committee membership.

For fiscal year 2022 (AY2021-2022) the BHE renews and approves the appointment of Sheila Harrity as BHE Vice-Chair. The BHE further approves the BHE Executive Committee membership as follows:

- Chris Gabrieli, Chair of the BHE (and Chair of the Executive Committee)
- Sheila Harrity, Vice-Chair of the BHE
- Veronica Conforme, BHE Chair of the Finance and Administrative Policy Advisory Council
- Patty Eppinger, BHE Co-Chair of the AA&SS Advisory Council
- Bill Walczak, BHE Chair of the Strategic Planning Advisory Council

Authority: Massachusetts General Laws Chapter 15A, Section 4; BHE By-Laws Article I, Section 3 and Article III, Section 2 (as amended, June 22, 2021).

Contact: Constantia T. Papanikolaou, Chief Legal Counsel

VII. STRATEGIC PLAN FOR RACIAL EQUITY UPDATE AND FOCUS GROUP

[List of Documents Used](#) [Strategic Plan Presentation](#)

Chair Gabrieli then turned the meeting to Chief of Staff Quiroz-Livanis to provide an update on the Strategic Plan for Racial Equity. He also welcomed members of the Deloitte team, who would engage Board members in a focus group sessions intended to inform the development of the strategic plan.

Chief of Staff Quiroz-Livanis thanked Chair Gabrieli and began to present on the plans for development of the statewide Strategic Plan for Racial Equity. She said the plan would be developed in partnership with key stakeholders from across the Commonwealth. Further, the strategic plan will be informed by several key inputs including an environmental scan, the New Undergraduate Experience Report, and leading best practices. She also mentioned there would be several opportunities to engage the BHE as the plan was being drafted.

Chief of Staff Quiroz-Livanis then provided a timeline for key project milestones. She that the environmental scan would include multiple components including data from a systemwide survey, analysis of institutional data, stakeholder interviews, and focus groups. Chief of Staff Quiroz-Livanis reported that the systemwide survey would be released later that day and had been piloted by campus colleagues earlier in the fiscal year. The survey would be released to all students, faculty, and staff across the community colleges and state universities. She also described the different stakeholders who would be interviewed and participate in interviews and

let Board members know they would be the first focus group. Before turning the meeting to colleagues from Deloitte, Chief of Staff Quiroz-Livanis reviewed the draft research questions informing the environmental scan. She covered the different data categories which ranged from affordability, to campus climate, to faculty characteristics, to pathway partnerships, and relevant demographics.

Chief of Staff then turned the meeting to team members from Deloitte, who after brief introductions began the focus group portion of the meeting. Board members were asked to speak about:

- What they believe are racial equity-related strengths within the Commonwealth’s public higher education system that should be preserved? What were the most pressing racial equity-related challenges across the system that should be addressed?
- What does success with racial equity efforts look like in:
 - 10 years?
 - What can be done in the meantime? What could change look like in 3-5 years?
- What needs to be included in the strategic plan so that the Board was comfortable moving forward with it?
- Were the goals that the Board adopted in May 2020 in furtherance of the Equity Agenda still relevant for this strategic plan?
 - What might need to be changed?
 - What was missing?
- What policies, programs, or issues aren’t getting enough attention?
- What concerns, if any, do they have regarding the implementation of the strategic plan? What about regarding participation by the individual institutions?
- What would need to be true for this plan to be successful?

At the end of the focus group, Chair Gabrieli thanked colleagues from Deloitte and suggested that at the next Board meeting Department staff present on the relationship between the different Equity Agenda elements, the Statewide Strategic Plan for Racial Equity, and the systemwide master plan required by statute.

VIII. BOARD PROFESSIONAL DEVELOPMENT

List of Documents Used

[Legal Orientation Presentation](#)

Chair Gabrieli thanked Board members for their engagement and turned to the final agenda item on Board professional development. Although the Board has not had a retreat in recent years, it is typical and best practice for time to be set aside during retreats for a review of legal requirements and responsibilities. Chair Gabrieli then turned the meeting over to Chief Legal Counsel Papanikolaou, who offered a PowerPoint presentation entitled “Legal Orientation Refresh for BHE Members.”

Chief Legal Counsel Papanikolaou set the context for the presentation, stated that she would be presenting an abbreviated version of a much longer presentation that she provides to new BHE members, during which we set aside at least 90 minutes to review these items in some detail. Today, however, she said she would seek strike an appropriate balance and summarize major concepts, focusing areas that have traditionally been challenging or carry with them risks—such as Open Meeting Law, Public Records Law and Conflict of Interest Law. To help frame the discussion, she stressed that the goal was less about reviewing a checklist of legal issues or rules, but rather more about seeking to help advance board efficacy to help Board members: understand the legal framework within which you operate; review statutory, ethical and fiduciary principles; promote overall transparency and accountability; and promote board efficacy (e.g., being a “consequential” or active board member). Board members who had specific questions on an item not covered today, or questions on an issue that the member wanted to discuss in greater detail, were encouraged to follow up directly with Chief Legal Counsel Papanikolaou. Chief Legal Counsel Papanikolaou turned first to Board Meetings and Operations and reviewed the Board’s enabling legislation. She specifically reviewed board composition (e.g., appointed v. elected members); quorum requirements (seven members); minimum meeting requirements (i.e., the board must meet 6 times annually); and reimbursement allowances. Ms. Papanikolaou stressed that there was a very important statutory attendance requirement, in that Board members cannot miss more than three regularly scheduled meetings in an academic year. This attendance requirement does not apply to committee meetings or special meetings, but if a Board member misses a fourth regular meeting, this results in automatic removal from the Board.

On Board Operations, Chief Legal Counsel Papanikolaou stated that in addition to being subject to the Open Meeting Law, the Board operates under parliamentary procedure which is not just a body of rules to advance efficiency but is also a body of ethics that governs meetings of deliberative assemblies. To that point, the basic principles delineate the rights of Board members, which include: majority vote decides; the rights of the minority must be protected; and all members have equal rights and privileges. In addition, the body of ethics supports each Board member’s right to engage in full and free discussion of every proposition presented; the right to know the meaning of each question and its effect; and that all meetings must be characterized by fairness and good faith. And with Board member “rights” come Board member “responsibilities” (listed on Slide 8 and taken from Association of Governing Boards (AGB) guidance) on how to be a “consequential” Board member. Chief Legal Counsel Papanikolaou stated that such responsibilities include basic principles such as being present and engaged; bringing your knowledge and expertise to the table; being and active listener and asking questions; and understanding the legal and cultural framework within which you operate as Board members.

Chief Legal Counsel Papanikolaou next turned to the Open Meeting Law, confirming that all BHE meetings, including committees and the new Advisory Councils are subject to the Open Meeting Law, which means the meetings must be open to the public and fair, accurate and timely notice must be posted. Minutes must also be taken and maintained. The Commissioner, as Secretary to

the Board, is responsible for minutes and takes care of this on behalf of the BHE. On the application of the law, Chief Legal Counsel Papanikolaou stated that the Open Meeting Law requires that any communication between or among a quorum of a public body on any matter within its jurisdiction must be conducted during a noticed meeting. She noted that there were a number of explicit statutory exemptions which allow a public body to meet in executive session to discuss a matter (e.g., to discuss collective bargaining issues; the reputation or character of an employee). However, what she wanted the Board to focus on today was on communications among a quorum outside of a noticed meeting. The Open Meeting Law prohibits such communications on any matters within the Board's jurisdiction. Such communications include any verbal and non-verbal exchanges. And a "quorum" is defined as "a simple majority of the members of the public body, unless otherwise provided in law," which for the BHE a quorum is 7 members.

On individual communications between and among Board members outside of a noticed meeting, the case law on this is very clear on this point. The Open Meeting Law prohibits serial communication between or among members of a public body that reach a quorum of members outside of a noticed meeting. By way of example, where a sub-quorum discusses a topic, which is then shared with another sub-quorum outside of a meeting, it may be considered improper deliberation. Chief Legal Counsel Papanikolaou referenced a 2009 case involving the Wayland School Committee, in which the Massachusetts SJC held: "Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via serial private messages, whether electronically, in person, over the telephone, or in any other form." On Open Meeting Law enforcement, Chief Legal Counsel Papanikolaou stated that the risks of running a procedural foul and taking shortcuts are real, as a finding of an intentional violation could include a court order invalidating any action taken at meeting where the law was violated. Accordingly, she advised that all discussions and deliberations on substantive matters within the Board's jurisdiction be conducted during a publicly noticed meeting.

Turning to Public Records Law, Chief Legal Counsel Papanikolaou stated that it is important to keep in mind that, even if an individual communication among BHE members is not deemed an Open Meeting Law violation it will most likely be deemed a public record, which can be accessed by the public upon request, or can be discoverable and subject to disclosure through a court proceeding, as we saw recently in a matter involving texts between two Boston City Council members. She stated that under the public records law, every record made or received by a state employee is presumed to be a public record unless a specific exemption applies. Chief Legal Counsel Papanikolaou reviewed the exemptions which include attorney/client privileged documents; records exempt by statute; and personnel records. In addition, the deliberative process exemption exempts from disclosure documents and other materials related to policy positions that are under development, the release of which before the policy decision is made could taint the deliberative process if prematurely disclosed. Ms. Papanikolaou cautioned, however, that this is a temporary exemption with limited reach, and advised that once the policy decision is made and/or any reports are issued, the underlying documents may be subject to disclosure.

Chief Legal Counsel Papanikolaou advised that electronic records are public records and this includes emails, as well as texts, on both private or government-issued phones or accounts. On this point, she advised that Board members use their state email addresses for all Board related communication. Case law has made it clear that the use of personal email by government officials while conducting government business renders the emails public records, unless otherwise exempt, and therefore subject to search, redaction, and disclosure. Those Board members who may not have been issued state email addresses will soon receive a notification from the Department's Chief of Staff on how to access their state email address. In addition, Chief Legal Counsel Papanikolaou reviewed records retention laws indicating that government records continue to be the property of the government office even after people leave service, so offsite storage is not safe and is not efficient. The use of state email addresses will help Board members and the Department maintain compliance with state records retention laws.

Finally, Chief Legal Counsel Papanikolaou provided a high-level summary of the Conflict of Interest Law, including the law's training requirements. She stated that as special state employees, the Conflict of Interest Law applies to Board members' conduct, both in their official and unofficial capacity, and also applies to the conduct of the new non-BHE-member Advisory Council members. The purpose of the Conflict of Interest Law is to ensure integrity and promote the public trust, and the focus of the law is the intersection between a state employee's private interests and public interest. Chief Legal Counsel Papanikolaou reviewed the five general areas (on slide 13) but noted that many of the Conflict of Interest Law's provisions are complex and contain exemptions regarding certain of the law's general prohibitions. She encouraged BHE members to review the law and to reach out to her or preferably to the Ethics Commission directly with any questions. In general, she provided two rules of thumb: 1) avoid situations which create a reasonable impression of favoritism or bias, including any impression that you are likely to act or fail to act because of kinship, rank, position, undue influence or self-dealing; and 2) when in doubt recuse yourself from a BHE matter and/or file a disclosure statement.

Chief Legal Counsel Papanikolaou concluded the Conflict of Interest law segment of the presentation by reviewing the state's mandatory training requirements. The law requires all state employees, including special state employees, to complete the Ethic Commission's online training program once every two years. She noted that the BHE is off cycle, as the Board has typically aligned review of this training requirement with the BHE's annual retreat, and this is the Board's first retreat since 2018. Many BHE members have taken this training recently over the past two years, and she asked those who have not taken it recently to do so within the next month or so, and preferably before the next BHE meeting. A question was asked if a Board member serves on multiple public boards and if the member took the training as part of that board service, will the training have to be repeated. Chief Legal Counsel confirmed that state employees, including special state employees who serve on multiple boards, only need to take the training once every two years.

Finally, Chief Legal Counsel Papanikolaou reviewed Board resources that are or will become available, including: access to the eight public higher education trustee training modules that

are be available on Blackboard; planned access to a BHE Intranet where staff will post the BHE "board binder," links to statutory authority summaries; and other training resources, such as AGB materials. Chief Legal Counsel Papanikolaou concluded by asking Board members to think about other training or professional development activities they would like to see included during next year's annual meeting. For example, she suggested that the Board should conduct a formal Board self-assessment facilitated by an external consultant, or that the Board could invite representatives from state oversight agencies, such as the Attorney General's Office or the Ethics Commission to present.

Chair Gabrieli thanked Chief Legal Counsel Papanikolaou and in the interest of time suggested that Board members follow up directly with legal counsel with any questions about the presentation. Chair Gabrieli then asked for a motion to adjourn.

IX. CLOSING THOUGHTS

Chair Gabrieli ended the meeting by sharing his appreciation for Board member engagement during the daylong annual meeting. He also thanked Commissioner Santiago for his leadership and Department staff for their efforts in preparation for the Annual Meeting.

X. ADJOURN

There being no other business, the meeting was adjourned at 4:05 p.m.

*Respectfully Submitted, Carlos E. Santiago
Commissioner and Secretary to the Board*