

STATEMENTS OF FISCAL EFFECT AND SMALL BUSINESS IMPACT

The Board of Higher Education seeks to promulgate final regulations 610 CMR 14.00: Coordination with Local Law Enforcement to Prevent and Respond to Sexual Misconduct. In January 2021, the Governor signed *An Act Relative to Sexual Violence on Higher Education Campuses*, (Chapter 337 of the Acts of 2020). Generally, this law—commonly referred to as the “2021 Campus Sexual Assault Law”—establishes two new broad sets of requirements for all public and private institutions of higher education located in the Commonwealth and authorized to grant degrees, one of which is a new requirement that institutions of higher education adopt certain policies, procedures, and reporting requirements with regard to identifying, preventing and responding to sexual misconduct involving students or employees of the institution (codified as a new section 168E to M.G.L. c. 6).

The final regulations (610 CMR 14.00) relate exclusively to language embedded in subsection (c) of Section 168E of M.G.L. c. 6, which requires all public and private higher education institutions located in the Commonwealth and authorized the grant degrees, “to the extent feasible,” to enter into memoranda of understanding (MOUs) with local law enforcement agencies regarding the respective roles and responsibilities of the parties in the prevention of and response to on-campus and off-campus sexual misconduct. The 2021 Campus Sexual Assault Law includes a specific timeline on regulation promulgation, mandating the Department of Higher Education (the “Department”) to, “promulgate regulations to implement subsection (c) of Section 168E of chapter 6 of the General Laws not later than August 1, 2021.” Section 2 Chapter 337 of the Acts of 2020.

The final regulations seek to establish the minimum, baseline requirements for the statutorily-mandated MOUs, including content criteria; an annual reporting and certification procedure for institutions to inform the Department on their progress in establishing MOUs; and a reporting process for institutions to submit to the Department determinations on the “feasibility” of entering in to MOUs with local law enforcement agencies. Finally, the regulations require the Department to create and publish an annual report on the status of each institution’s compliance with the statutory and regulatory MOU requirements.

Fiscal Effect on the Public and Private Sectors

M.G.L. c. 30A provides that, before any regulation can become effective, agencies of the Commonwealth must file an estimate of its fiscal effect on both the public and

private sectors for the first and second years and a projection for the first five years; or state that there is no fiscal effect (if that is the case). According to the Secretary of the Commonwealth's Office, this requirement is not the cost/benefit analysis that accompanies federal regulations, but rather the agency's best judgment of the "out of pocket" expenses that will be incurred in complying with the regulation.

These changes will impact the public and private higher education sector in Massachusetts. Currently there are 29 public higher education institutions and 82 private higher education institutions located in the Commonwealth and authorized to grant degrees. In addition, the public safety sector, specifically local law enforcement agencies which are geographically proximate to higher education institution campuses, will be impacted by the regulation. The final regulations will not have an impact on the competitive environment in Massachusetts because the MOUs that will be entered into likely will not create additional work in addition to that already required of institutions and local law enforcement agencies in preventing and responding to incidences of sexual misconduct.

The Board strongly believes that the fiscal effects associated with these final regulations outweigh any potential costs because the regulation follows the statutory qualification that institutions of higher education and local law enforcement agencies need only enter into MOUs which are determined to be feasible by institutions of higher education; and when such institution or agency or agencies enter into such MOU, the clarity in protocol will enable public and private institutions of higher education and law enforcement agencies alike to adequately plan and allocate necessary state resources for responding to reports and incidences of sexual misconduct.

Small Business Impact

In addition, M.G.L. c. 30A provides that before any regulation becomes effective, agencies of the Commonwealth must file with the Secretary of State a statement considering the impact of said regulation on small businesses. Such statement of consideration shall include, but not be limited to, an estimate of the number of small businesses subject to the final regulation; projected reporting, recordkeeping, and other administrative costs required for compliance with the final regulation; the appropriateness of performance standards versus design standards; an identification of relevant regulations of the promulgating agency, or any other state agency, which may duplicate or conflict with the final regulation; and an analysis of whether the final regulation is likely to deter or encourage the formation of new businesses in the Commonwealth.

An estimate of the number of small businesses subject to the final regulation

There are approximately 82 private independent institutions of higher education in Massachusetts that would be subject to these regulations. The BHE believes that no more than 10 to 15 of these institutions fall under the definition of "small business" as established by the U.S. Small Business Administration in 13 CFR § 121.201.

Projected reporting, recordkeeping, and other administrative costs

Though some of these institutions may need to allocate additional resources to comply with these regulations, it is expected that all institutions, including small ones, should have existing relationships with local law enforcement agencies. The final regulations seek to codify and define the protocols regarding those relationships. As such, some institutions may wish to involve legal counsel in the review or drafting of potential MOUs with local law enforcement agencies. It is expected that all institutions, including small ones, should have either in-house counsel or access to legal services for such work.

Appropriateness of performance standards versus design standards

The 2021 Campus Sexual Assault Law only requires institutions to enter into MOUs which the institutions deem to be feasible. These regulations reflect the minimum requirements of the new law, and institutions which deem entrance into such MOUs infeasible are not required to do so.

Identification of duplicate or conflicting regulations

The Board has been unable to identify any duplicate or conflicting regulations promulgated by any state agency.

Analysis of whether the final regulation is likely to deter or encourage the formation of new businesses in the Commonwealth

These regulations are unlikely to have any impact on whether institutions wish to begin or continue operating in Massachusetts. Economies of scale with respect to best practices will likely be developed to ease the regulatory burden on institutions.