

BOARD OF HIGHER EDUCATION
REQUEST FOR COMMITTEE AND BOARD ACTION

NO.: BHE 20-03

BOARD DATE: January 10, 2020

APPROVAL AND ADOPTION OF 610 CMR 13.00: FINANCIAL ASSESSMENT AND RISK MONITORING OF INSTITUTIONS OF HIGHER EDUCATION

MOVED: The Board of Higher Education (BHE), having solicited and reviewed public comment in accordance with the Administrative Procedure Act, M.G.L. c. 30A, § 3, hereby adopts the following regulations: Financial Assessment and Risk Monitoring of Institutions of Higher Education, to be codified at 610 CMR 13.00.

The BHE directs the Commissioner to develop an implementation plan and policy, including a proposed Memorandum of Understanding (MOU) with the New England Commission of Higher Education (NECHE) consistent with statutory and regulatory requirements, for BHE consideration and at its next regularly scheduled board meeting (February 4, 2020).

VOTED: Motion adopted by BHE 1/10/2020.

Authority: M.G.L. c. 69, § 31B; M.G.L. c. 15A, § 9; M.G.L. c. 30A, § 3; and 950 CMR 20.00

Contact: Carlos E. Santiago, Commissioner
Constantia T. Papanikolaou, Chief Legal Counsel
Thomas J. Simard, Deputy Commissioner for Administration & Finance

Massachusetts Board of Higher Education

Approval of Final Regulations for the Financial Assessment and Risk Monitoring of Private Higher Education Institutions

Background

At its June 18, 2019 meeting, the Board of Higher Education (BHE or Board) voted (BHE 19-06) to authorize the Commissioner to solicit public comment on proposed regulations that will govern the Department's screening, monitoring, and review of Massachusetts private higher education institutions for financial stability and risk of imminent closure.

On June 28, 2019, the regulations were submitted to the Secretary of the Commonwealth's office to be put out for public comment. The Department elected to hold three public hearings – in Worcester, Springfield, and Boston – and maintained the originally anticipated 4-week public comment period.

On July 12, 2019, notice of the three public hearings on the proposed regulations was published in the *Massachusetts Register* (the Secretary of the Commonwealth's official regulatory publication) and in the *Boston Globe*, the *Worcester Telegram & Gazette*, and the *Springfield Republican*. The public comment period also commenced the same day. The public hearings were held in Worcester and Springfield on August 5, 2019 and in Boston on August 8, 2019. The Commissioner also, at the request of two legislators from the region, held a town meeting in Amherst on July 26, 2019; though this meeting did not constitute an official public hearing pursuant to M.G.L. c. 30A, many comments were received and were taken under consideration.

During the public comment period, the Department received thirteen written comments. At the Springfield public hearing, the Department received four comments. At the Boston public hearing, the Department received three comments. Two written comments were also submitted after close of the public comment period.

After the close of the public comment period, and while the Department was evaluating the comments and considering amendments to the regulations, the Legislature moved forward with a revised statute, based in part on a bill proposed by Governor Baker in March 2019, that established minimum statutory requirements for the BHE's conduct of financial assessments of private higher education institutions. The bill was enacted on November 6, 2019 and Governor Baker signed it into law on November 14, 2019. The new law aligns closely in spirit with the draft regulations as initially approved by the BHE; however, in order to ensure that the language of and processes envisioned by the statute and the regulations cannot be read to conflict in any way, the Department made additional changes to the regulations.

Changes to Regulations

As a result of the public comment received as well as the enactment of the new law, the Department has made several changes to the regulations since the Board first approved the regulations to be put out for public comment in June. These changes are contained in a redline version of the regulations (**Attachment A**).

1. Changes Resulting from Public Comment

The public comments received had several overarching themes and broad recommendations, which the Department addresses as follows:

A. Community Involvement

- *An institution's host community should be kept informed of and receive notice regarding the possible closure of said institution.*

The Department agrees that it is important for the local community to receive notice, along with other relevant stakeholders, when an institution is determined to be at risk of imminent closure.

B. The Role of the Accreditor

- *The Department should collaborate with NECHE/let NECHE conduct the screening/defer to NECHE and its new early-warning dashboard process as developed by the Boston Consortium.*

The Department agrees that a collaboration with the regional accrediting agency would be beneficial and continues to explore ways to work in partnership with NECHE to advance and implement some of the requirements of these regulations, while balancing the need to enforce the BHE's consumer protection role.

- *These regulations are redundant now that NECHE has adopted its own evaluation system.*

The Department disagrees that state oversight of the financial stability of private institutions of higher education is unnecessary because NECHE announced that it will also be conducting an enhanced review of the financial stability of institutions that it accredits. The "triad" concept of higher education regulatory oversight, which involves a balanced relationship of regulatory responsibility between and among the state authorizing agencies (the Board), accreditors (NECHE), and the federal government (USDOE), is well established. The Board, working by and through the Department, has a different responsibility and focus than NECHE, as

the Board has a consumer protection obligation that is not uniformly shared by NECHE, and the Board, as a state entity, is accountable to the public in a way that NECHE is not.

In addition, there are 95 private higher education institutions in the Commonwealth, and not all are accredited by NECHE; because NECHE will not be able to use its new evaluation system on institutions accredited by different accrediting agencies, the Department will need to conduct its own evaluations on a subset of those 95 institutions. However, as stated above, the Department is interested in collaborating with NECHE to help advance and implement some of requirements of these regulations and continues to pursue a partnership.

C. Confidentiality is Essential

- *The regulations could actually close institutions that may not have needed to close because the preliminary disclosure of which institutions are struggling could result in a student/applicant exodus and therefore closure would be a self-fulfilling prophecy.*

The Department agrees that it is important to avoid a scenario wherein an institution's financial difficulties become public knowledge too early. The Department shares the commenters' concerns about confidentiality and reiterates its position, as set forth in 13.06, that all records received or created through this process will be kept confidential to the maximum extent permitted by law. It is important to note that the new law guarantees confidentiality for "any information submitted to or developed by the board in furtherance of" the statute, so the concerns raised about confidentiality during the public comment process should be largely assuaged.

D. Data/Metric/Process Questions

- *The metric is unknown so it can't be evaluated/the Department should not rely on a single metric/the TVM is flawed.*

Although the THESIS report discussed a single metric, the Department has since moved away from that approach and is exploring the use of multiple metrics, as well as a collaboration with the regional accrediting agency for purposes of the screening process. Institutions that are screened in under the BHE regulations will have the opportunity to review and respond to the BHE's analytical methodology.

E. Application to Public Institutions

- *The regulations should also apply to public institutions, since the demographic and financial difficulties facing private higher education are shared by the public sector.*

The Department recognizes that public higher education institutions can also face financial challenges, and the possible closure of programs. However, Massachusetts law has established a different set of requirements and regulations for the Department's oversight of public higher education. Public institutions have extensive statutory reporting requirements, are required to submit performance measurement reports, financial data and statements to the Department on an annual basis, and most, if not all, of their data is publicly available. In addition, the Board also has the existing statutory authority to recommend to the legislature the closure or consolidation of public institutions in whole or in part. Because the Department already exercises considerable authority with respect to public institutions of higher education and has mechanisms in place to assess and respond appropriately to their financial health, amending the regulations to include public institutions is not necessary and would not be appropriate.

F. Mandatory Notification

- *If an institution is deemed to be at risk of imminent closure such that contingency planning for closure is triggered, the institution should be required to notify the public; the notification should not be optional.*

The Department agrees that it is important for students, families, employees, and the local community to be aware of the status of an institution and to be able to plan and adjust accordingly if an institution's financial stability is such that it is at risk of closing within the ensuing 18 months. However, the Department is also aware, through its extensive experience in dealing with institutional closures of all kinds, sizes, and timelines, that each closing institution has differing circumstances and nuances that may impact the timing of when public notification is required. The amended regulations take into account all of these considerations and strike an appropriate balance. Under the amended regulations, public notification is mandatory, consistent with the new law, but the Commissioner retains discretion on when and how to notify the public, so as to permit a non-disruptive transition. The Commissioner, after providing the institution with notice of his/her decision and an opportunity to cure, will exercise that discretion based on his or her assessment of the best interests of all involved, including and especially students, faculty, staff, and community stakeholders.

G. Changes to Existing Law

- *Host communities should be offered a "right of first refusal" if tax-exempt land is offered for sale.*
- *Chapter 93A should apply to non-profit institutions of higher education.*
- *Struggling institutions should be allowed to access restricted funds in their endowments if needed to teach-out students before closure.*

The Department appreciates the suggestions about amendments or improvements to existing laws that might enhance legal protections for students and communities. However, the Department is not able to make changes to existing statutory law through the regulatory process and cannot incorporate into its regulations requirements that fall beyond the scope of its statutory authority.

Based on the comments received, Department staff recommends the following adjustments to the proposed final regulations, as reflected in the attached redline document (Attachment B):

- 13.03: The revised language clarifies that the Department can delegate the conduct of the annual screening process and requires consultation with stakeholders, which can include institutional accreditors, before the screening tools are established.
- 13.04(1)(a): The revised language expands upon the requirements for contingency closing plans.
- 13.04(1)(b): The revised language requires that notification of a determination that an institution is at risk of imminent closure also be sent to local community leaders and other state government agencies. Another revision requires the institution to disclose that such a determination has been made in any promotional materials.
- 13.06: The revised language clarifies that information received or created by the Advisory Committee is also subject to confidentiality restrictions.

For a summary of all public comments received, see **Attachment B**.

2. Changes Resulting from the Enactment of 2019 Mass. Acts c. 113

The new law (**Attachment C**) necessitated some changes to the terminology and organizational format of the regulations, though the essence of the regulations remains the same. Based upon the language in the new law, Department staff recommends the following adjustments to the proposed final regulations, as reflected in the attached redline document (Attachment B):

- The term "financial review" has been replaced throughout with "financial assessment" to better align with the terminology in the statute which requires the Board to "annually assess each institution's financial information..."

- The statute grants the Board jurisdiction over institutions chartered prior to 1943 for purposes of the financial assessment and enforcement of any risk mitigation planning. Any references in the earlier draft of the regulations that tended to create a differentiation between those institutions and post-1943 institutions have been eliminated, since for purposes of 610 CMR 13.00, all private institutions of higher education will be subject to the same Board authority.
- The "Inquiry" phase of the earlier draft of the regulations has been renamed "Notification and Consideration of Other Information Relevant to the Screening," and the language therein has been slightly amended, both in order to align with the language and process required by the new law.
- The "Monitoring and Risk Mitigation Review" section has been renamed "Determination of Financial Risk" to align with the terminology in the statute. The language in that section has also been slightly amended to reflect the requirements in the new law.
- Under "Review and Evaluation of Risk Mitigation Plans" the language has been revised to align with the statute's public notification requirements.
- The statute requires that the contingency closure process begin upon a determination that an institution may be at Risk of Imminent closure; accordingly, language was added to require an initial contingency closure plan at the same time that an institution submits its risk mitigation plan.

Recommendation

Staff recommends that the Board approve and adopt 610 CMR 13.00 as attached to be submitted to the Secretary of the Commonwealth's office for final promulgation in accordance with M.G.L. c. 30A.