

A risky proposal for at-risk private colleges:

Ten reasons why the Board of Higher Education must rethink its plan

by Gregory W. Sullivan



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Introduction

The financial pressures on small private liberal arts colleges are well known and represent an important public policy challenge, with potential impacts on students, faculty and staff, communities, and public institutions of higher education. The problem is particularly critical in Massachusetts, which is home to a concentration of small private higher education institutions. In just the last 18 months, the Commonwealth has seen the closure of Mount Ida and Newbury Colleges, and moves made by the administration at Hampshire College suggest a potential wind-down of its activities as a standalone institution. The pressures on these institutions include technological disruption, changing student demands, and ever-escalating costs.

In the coming decade, the problem is only going to get worse, so doing nothing is not an option. A July 2017 report from Moody's states that the rate of closures or mergers at approximately 1,700 private, not-for-profit U.S. colleges was less than 1 percent per year from 2004–2014, averaging 5 per year, but grew to 11 in 2017.¹

The Massachusetts Board of Higher Education (BHE) and Department of Higher Education (DHE) have proposed creating a new state agency, called the Office of Student Protection (OSP), that would be granted unilateral authority to order colleges to notify students and other stakeholders by December 1st of any academic year where a meaningful risk exists that the college cannot complete the current school year and the next one. It could also require colleges to institute an OSP-approved "transfer and teach-out plan" that could include changes to the operating model and parameters of the institution or transactions such as land sales and/or mergers.² Under the proposal, OSP would be empowered to order a December 1st notification even if the college has a current satisfactory Financial Responsibility Composite Score from the U.S. Department of Education, qualifying its students to receive federal financial aid and loans, and even if the college is currently accredited by the U.S. DOE's approved regional accrediting agency, the New England Commission of Higher Education (NECHE).³

On March 6, 2019, Governor Baker filed Senate Bill 2183, which proposes giving BHE authority to request information from private higher education institutions "to accurately and fairly determine the institution's financial condition and to monitor such condition over time" and "to impose sanctions on institutions that do not comply in a timely manner." The legislation also proposes giving BHE authority to compel higher education institutions "to prepare and submit to [BHE], for its approval, a contingency closure plan which shall include a process for providing enrolled and admitted students and staff with timely notification of the institution's financial condition" and "arrangements for enabling students to complete

their programs of study" if BHE identifies the institution as having liabilities or risks that may result in imminent closure or jeopardize the institution's ability to fulfill its obligations to current and admitted students. Under the proposed legislation, such contingency closure plans would be subject to BHE approval. The proposed legislation would exempt information submitted by institutions of higher education at BHE's request from the Massachusetts public records law.⁴ The proposed legislation also directs BHE to establish regulations interpreting and applying this new section of law, following consultation with representatives of public and private colleges and universities.

The stated goal of BHE's proposal is to protect students from sudden, unexpected closings such as what happened with Mount Ida College. According to BHE and DHE, their proposal would provide an earlier warning of potential college closures than has historically been provided by USDOE and NECHE.

Pioneer Institute identifies 10 serious problems with the BHE/DHE proposal:

1. **The TVM metric has the potential to ruin colleges that it identifies as "high risk" when they are in fact "false positives."** BHE's report did not disclose the components of the Teach-out Viability Metric (TVM) that it proposes to use to identify colleges that are potentially at risk, its built-in assumptions, or the colleges it identified as high risk. Therefore it does not allow third parties to test whether the calculation of a university's TVM may indicate potential risk at an institution where there is none. In addition, this calculation relies on Integrated Postsecondary Education Data System (IPEDS) data, which is typically 18–24 months old at the time of release.
2. **The OSP-ordered December 1st notifications will serve as an effective drop-dead date for colleges, creating a self-fulfilling prophecy.** Once a college is required by OSP to notify students, their parents, faculty, and stakeholders of a meaningful risk that the college cannot complete both their current school year and the next one, there is substantial likelihood that applicants for admission will virtually disappear, current students will transfer or drop out, faculty and staff will leave, donors will dry up, and lenders and vendors will stop doing business with the college. Thus, the notification will have the effect of dooming the institution.
3. **OSP's "black box" process for determining the fate of colleges makes it highly susceptible to political influence.** The BHE proposal would vest overly broad authority in OSP officials to determine, behind closed doors, what standards it will use to impose December

UMass President Meehan publicly stated that UMass should be “part of the equation” when more private colleges close.

drop-dead notifications on colleges during OSP’s closed review process. The subjectivity, secrecy, and unilateral authority of OSP’s review makes it highly likely that lobbyists, well-connected alumni, and other influential persons may seek to influence the risk-assessment process to spare some colleges and push others into mergers or shutdowns.

4. **Conflict of interest.** BHE and DHE are statutorily mandated to act as advocates for public higher education institutions that compete directly with private colleges. For this reason, it is wholly inappropriate to give BHE and DHE authority to shut down private competitors. It is noteworthy that DHE’s proposal exempts public colleges from the same review it proposes to conduct of all private colleges.
5. **The proposal ignores the existence of ongoing national efforts to improve early warning.** Currently, there are many other ongoing federal and accreditation-related processes being developed, which began long before the BHE. The board has minimal experience in the area of campus finance and it makes little sense to develop an entire new bureaucracy (OSP) when the federal processes that are being developed will likely bring to bear more sophisticated analytic abilities than BHE could muster.
6. **Negotiations between OSP and colleges would be difficult, if not impossible, to keep confidential in the period before the legal notification obligation is triggered.** Due to the substantial number of persons who would be involved in and become aware of a college’s review, it’s very unlikely that information regarding the OSP’s monitoring of a college’s financial condition would remain private.
7. **EY-Parthenon’s no-bid *pro bono* agreement creates an unfair competitive advantage.** EY Parthenon, the private company that developed the TVM under a pro bono, non-competitively bid agreement with DHE, has gained an unfair advantage in the competition to win future contracts.
8. **Lack of effective enforcement authority.** Under the Governor’s proposal, BHE would be empowered “to impose reasonable sanctions on any such institution that does not comply in a timely manner with such notification requirements and requests.” The Governor’s bill does not, however, specify the means by which BHE would enforce the much more onerous OSP-approved

transfer and teach-out contingency plans, under which OSP could impose changes to the college’s operating model and parameters to transactions such as land sales and/or mergers.

9. **Proposed sanctions are not fair, effective, or reasonable.** DHE has proposed three possible sanctions if colleges do not comply fully with financial disclosure and OSP-mandated contingency plans, none of which are fair and reasonable, including prohibitions on student financial aid, revocation of the college’s degree-granting authority, and consumer-protection actions against the college brought at BHE’s request by the Massachusetts Attorney General. For reasons explained later, none of these are likely to be effective.
10. **Fast tracking regulations is dangerous.** Fast-tracking this regulatory proposal does not allow for the inclusive deliberation needed to produce a fair and effective result. The BHE-approved timetable includes hearings on proposed regulations in July 2019 and final approval in October 2019. Given the proposed process’s potential vulnerability to political influence and favoritism; the broad and subjective authority it would grant to government officials acting behind closed doors, exempt from public scrutiny; and the potential for “false positives” in instances where OSP misjudges a college’s capacity to continue operating; the administration’s expedited timetable poses significant danger. Furthermore, DHE’s timetable for regulatory approval by October 2019 ignores initiatives currently underway to improve USDOE’s and NECHE’s earlier warning system for potential college closings.

While the Baker administration has recognized that unexpected college closings represent a legitimate and significant problem, its proposed solution would institute a process that is unfair, unworkable and vulnerable to political influence—and there are very persuasive reasons to conclude that the administration should slow down and re-think its proposal. Pioneer makes four recommendations:

1. **The administration should slow the process** in consideration of numerous issues raised in this memo, as well as questions as to whether the bill filed by the Governor (S.2183) will pass.

The Baker administration’s proposed solution would institute a process that is vulnerable to political influence, unfair, and unworkable.

2. **BHE should disclose, completely and exhaustively, the underlying components of the TVM metric and its built-in assumptions** to NECHE to allow stakeholders parties to assess its strengths and weaknesses.
3. **USDOE and NECHE are the appropriate impartial entities to monitor and assess financial viability.** Massachusetts should join with other New England states in the elaborate ongoing national effort to make Financial Accountability Scores available in a timelier, more informative fashion.
4. **BHE should give real consideration to the DHE Working Group's proposal to more fully educate, inform and support [college] board[s] of trustees or a "governance improvement" collaboration with NECHE.**⁵

What BHE and DHE are Proposing

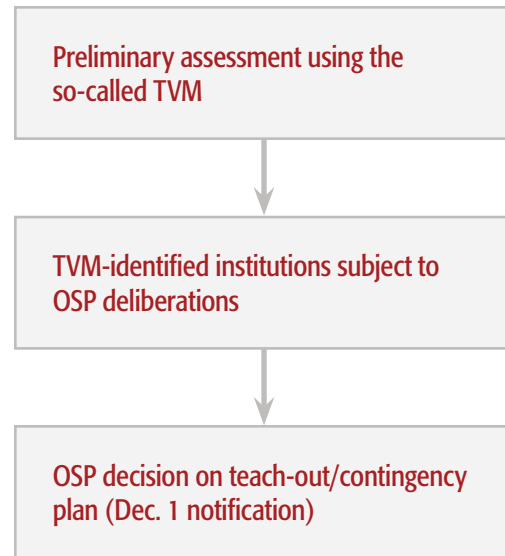
Under the proposal approved by the BHE on January 22, 2019, DHE is proceeding to promulgate regulations that would establish a three-step process by which OSP would be allowed to order a December notification requirement.

The first step would be for OSP to conduct a preliminary assessment of the financial condition of all Massachusetts private colleges using a custom designed metric, the details of which have thus far been kept secret, called the "Teach-out Viability Metric." TVM was developed under a no-bid *pro bono* agreement between DHE and EY-Parthenon, an organization that has not thus far successfully marketed the concept to other states. TVM uses publicly available data published on the U.S.DOE's database (typically with an 18–24 month lag time) and a series of additional corollary assumptions to assess whether the institution has sufficient financial resources to teach out current students through to graduation on its own campus.

The second step would be for colleges preliminarily identified by the TVM to be made subject to active OSP monitoring, including disclosure of proprietary financial records and documents, for OSP to determine whether, in its judgment, the college will have sufficient financial resources to complete both their current school year and the next one ("the 18-month threshold").

The third step, if the DHE Commissioner determines the college "will imminently cross the 18-month threshold," is for DHE to require two actions: 1) Require the college to submit a thorough transfer and teach-out contingency plan subject to OSP's approval, which could impose changes to the operating model and parameters of the institution or transactions such as land sales and/or mergers; and 2) Once the college has submitted a fully developed contingency plan that is acceptable to OSP for transfer and teach out, notify students and other stakeholders by December 1st. OSP would be empowered to approve or disapprove required changes to the operating

model and parameters of the institution or transactions such as land sales and/or mergers.



What does the TVM attempt to assess?

"[The TVM] assesses a four-year institution's ability to provide the resources required to allow currently admitted and enrolled students to complete their degrees within a reasonable timeframe."⁶ The TVM appears to rely on one core financial test and a series of additional corollary assumptions. The core financial test appears to be an assessment of whether the institution has sufficient financial resources to teach out current students through to graduation on its own campus. The additional corollary assumptions relate to changing enrollment, revenue, expenses and assets over the period of a four-year teach out.

While the details of these built-in assumptions are not specified in the EY Parthenon report, they are described generally as:

Assumption	IPEDS data used
Expected enrollment and associated revenue will decrease at a predetermined, constant rate as students graduate and/or leave	Tuition and fees, educational, and auxiliary revenue for undergraduate enrollment
The closing institution's other revenues will decline faster than enrollment	Contracts/grants and private gifts, graduate revenue, and investment revenue
Some expenses are more closely linked to enrollment than others	Student support, instruction, benefits
Some expenses cannot be reduced until full closure	Property, plant, and equipment
Increasing losses can be funded by liquidating unspecified assets belonging to the closing institution	Available assets

The core financial test appears to be an assessment of whether the institution has sufficient financial resources to teach out the current students through to graduation on its own campus.

What happens if the TVM score indicates a college is at risk?

If found to be at risk, OSP would notify the college that its TVM score has preliminarily identified it as being at risk and “work with the college to confirm this is reasonable.”⁷ The OSP would then lay out a plan to actively monitor the college’s condition, key parameters, and plans.

The college could remain in active monitoring for any length of time and could exit if its financial condition improves sufficiently. However, it would also be assessed each year against a well-defined “18-month threshold.”⁸ If the DHE concludes there is meaningful risk that the college cannot complete its current school year and the next one, the department would require the college to complete a thorough contingency plan for transfer and teach out, and to notify students and other stakeholders by December 1st.⁹

Ten Reasons To Slow Down And Rethink This Proposal

1. **The TVM metric has the potential to produce “false positives” that would erroneously subject a college to active OSP monitoring and cause irreparable harm if such active monitoring became publicly known.** The TVM metric has the potential to doom a college, despite the fact that it is intended to be used only as a preliminary screening tool. Given the practical impossibility of insuring the confidentiality of OSP’s designation of a college as being at “high risk” on the TVM scale and how unlikely it is that OSP’s active monitoring of a college would be kept secret, the TVM has the potential to trigger a chain of events that leads to a college closing. One need only ask the question, Would a prudent parent have his or her child apply to or enroll in a college that has been preliminarily designated by the Massachusetts Board of Higher Education as being at risk of not being able to meet its teaching obligations to current undergraduates through to their expected graduation date? No single metric should be relied upon to trigger such a designation, even if the TVM is intended to be used only as a preliminary screening tool, given the real world danger it poses. Such a momentous designation requires additional contextual information

weighted by experience. Making matters worse is the fact that the TVM relies entirely on Integrated Postsecondary Education Data System (IPEDS) data that is typically 18–24 months old at the time of release.¹⁰

In addition, BHE and DHE have not thus far disclosed the components of EY-Parthenon’s TVM metric or its built-in assumptions. The EY-Parthenon report does not disclose the methodology and assumptions underlying TVM to allow interested parties to independently calculate a university’s TVM and determine whether the metric may produce false positives. BHE should engage with the U.S. DOE’s approved regional accrediting agency, NECHE, to allow stakeholders to assess the strengths and weaknesses of TVM.

While BHE and DHE debate the fine points of a single metric “early warning signal” to identify at-risk private higher education institutions, there are nine more significant issues related to what happens after the early warning signal, however faulty, is sounded. The Institute believes the administration, which prides itself on cool-headed judgment and decision making, is embracing a reckless approach to problem solving.

2. **The TVM and December notification directive have the potential to precipitate the demise of a college.** Once the college is required to notify students, their parents, and presumably the accrediting body (NECHE), of a meaningful risk that the college cannot complete their current school year and the next one, there is a substantial likelihood that the college will lose accreditation, and therefore lose access to federal financial aid. At this point, some students would likely seek to transfer to other colleges.

Negotiations between OSP and colleges would be difficult, if not impossible, to keep confidential in the period before the legal notification obligation is triggered to notify the stakeholders (students, faculty, staff etc.). Even if the OSP review process were made exempt from the public records law, colleges would be in great danger that word would get out, triggering adverse consequences.

More than debate the fine-points about the early warning metric, we are concerned about the Baker administration’s embrace of a process that is vulnerable to political influence, unfair, and unworkable.

This would likely result in a sizable number of faculty and employees seeking employment elsewhere, with little hope of replacing them. The college would also be disadvantaged in federal financial aid, grant applications, student and faculty recruitment, alumni and other fundraising, vendor contracting, and borrowing. The resulting drop in enrollment would likely have a deleterious short- and long-term effect on college finances.

Oversimplification and overreliance on a single metric to identify financially at-risk institutions is inherently dangerous when coupled with public notification requirements. Because at-risk institutions are likely to have small, restricted endowments, their most available asset to fund a teach out will often be real estate. This conflicts directly with EY-Parthenon's assumption that the teach out will take place on the closing institution's campus for at least four years.

DHE's proposal fails to consider the impact and importance of:

1. Improvements in college and university governance practices, including the development of best practice guidelines;
 2. Recommendations for experience matrices in guiding board selection and composition;
 3. Recommendations for developing board training resources and programs;
 4. The impact that such a program would have on loan covenants with banks and the potential of making debt immediately callable.
3. **OSP's review process is opaque.** The "black box" nature of the proposed decision-making process, to be conducted behind closed doors, exempt from the public records law, and with broad discretion and subjective judgement, makes it highly susceptible to abuse and favoritism. In my former capacity as state Inspector General under Governors Swift, Romney, and Patrick, I observed that arrangements such as the one being proposed here, i.e., those with high-dollar stakes, low transparency, high subjectivity, and loosely defined decision-making standards, make the process highly vulnerable to improper influence. The combination of subjectivity, secrecy, and unilateral authority means OSP will have the effective power to choose which colleges will close, in what order, and, significantly, which institutions will remain open. It is highly likely, if not inevitable, that lobbyists, well-connected alumni, bankers, vendors, and politically influential persons will seek to influence the OSP decision-making process to spare some colleges and push others into mergers or shut downs. This includes the possibility that colleges will be effectively forced into merging with other institutions and others will be forced

to sell under duress to real estate developers. Standards underlying public warnings by government entities about a college's financial condition should be specific, quantifiable, broadly and continuously vetted, publicly disclosed, and completely transparent.

4. **The BHE and DHE are conflicted by their statutory role as advocates for public institutions.** Massachusetts General Laws Chapter 15A Section 5 provides that BHE and DHE are mandated to act as "advocates of public higher education institutions." BHE is responsible for defining the mission of and coordinating the state's higher education system in accordance with the provisions of Chapter 15A Section 1(c). Both the board and the department have approved the rapid and dramatic expansion of UMass, a direct competitor with Massachusetts private colleges, despite declining numbers of high school graduates. Between 2005 and 2014, UMass enrollment increased by more than 27 percent. Over the same period, enrollment at the other five New England public universities rose less than 2 percent. Some private college officials believe this growth is a direct cause of the woes some small liberal arts colleges in Massachusetts are experiencing.

BHE's recent performance overseeing a college closing offers little reassurance that the board would not act as an advocate for public colleges if its proposal were adopted. In 2017, BHE approved UMass's acquisition of Mount Ida for use as a satellite campus of UMass Amherst, resulting in the termination of all Mount Ida faculty and expulsion of Mount Ida students from the campus. Nor can much reassurance be gleaned from the public statements of UMass President Marty Meehan, who publicly stated at a May 2018 Senate Post Audit hearing about the Mount Ida sale that UMass should be "part of the equation" when more private colleges close.¹¹

The question of whether BHE and DHE should be overseeing a process of notifying students, parents, and stakeholders that their private colleges are at risk raises a legitimate conflict of interest issue.¹² The OSP's opaque review process and DHE's advocacy for public colleges that are competing with private ones make an overwhelming case that improvements in the "early warning" system for college closings should be made by an independent entity.

5. **The proposal is myopic.** Currently, there are many other ongoing federal and regional accreditation-related efforts underway aimed at providing earlier warnings of college closings. These began long before the BHE's and bring to bear more sophisticated analytic abilities than the BHE will likely be able to muster.

The BHE's go-it-alone approach has also led it to give

insufficient consideration to related federal higher education processes. For example, under the proposal, OSP would be empowered to trigger a December notification even if the college had a satisfactory Financial Responsibility Composite Score from the U.S. Department of Education, qualifying its students to receive federal financial aid and loans, and even if the college had an unqualified accreditation from NECHE stating that the college is financially stable.¹³

6. **The review process between OSP and colleges is unlikely to remain confidential.** Negotiations between higher education institutions and OSP prior to triggering the legal notification obligation would be difficult, if not impossible, to keep secret. The DHE Working Group Report stated that “All information about the existence of the monitoring and the contents of communication and data shared by the [colleges] in accord with the protocol should be held to strict confidentiality.” The likelihood that information about the existence of OSP’s close monitoring of a college’s financial condition, and designation of the college as being at risk of closure, will not become public is practically nonexistent given the substantial number of persons who, by necessity, would become aware of such review.
7. **EY-Parthenon’s services were not competitively procured** by DHE but were instead provided on a *pro bono* basis, according to the Working Group report, under an arrangement that could give the company an unfair competitive advantage to win continuing contracts. EY-Parthenon is reportedly marketing the metric to other states, but has been so far unsuccessful. Closed arrangements such as this one, wherein a vendor provides free services to a state agency, often lock out competing companies going forward and serve as a marketing tool to win business elsewhere.
8. **Lack of enforcement** authority. BHE currently lacks statutory authority to compel colleges to notify it of financial difficulties and turn over financial records at its request.¹⁴ Under the Governor’s proposed bill, BHE would be empowered “to impose reasonable sanctions on any such institution that does not comply in a timely manner with such notification requirements and requests.”

The proposed legislation does not, however, specify the means by which BHE would enforce OSP-approved transfer and teach-out contingency plans, under which plans OSP could impose changes to the college’s operating model and parameters, or transactions such as land sales and/or mergers. BHE’s lack of such authority is cited in DHE’s Working Group Final Report and Recommendations.

DHE proposes three work arounds to coerce colleges to voluntarily comply. This is explained in the following excerpt from the Working Group Final Report, as follows:

The intent of the proposed plan is to empower the DHE, through the OSP, with the support of the external Council, to enter into a constructive dialogue and process with relevant NPIHEs. We hope and assume that all NPIHEs will engage constructively with the proposed process throughout. Recent experience with one NPIHE that has announced its decision to close at the end of this school year provided a useful and encouraging case study. *Nonetheless, there is risk that some NPIHEs will resist the proposed process including refusing to share needed information for monitoring or to abide by decisions such as arise from crossing the 18-month threshold. We have identified at least two sanctions and one enforcement agency available to the DHE to address problems of non-compliance.*

9. **Proposed sanctions are neither fair, effective, nor reasonable.** DHE has proposed that it be allowed to impose sanctions if colleges do not voluntarily comply fully with all aspects of OSP-mandated contingency plans. DHE proposes three ways to make colleges “voluntarily” comply, none of which is fair and reasonable. The DHE proposal presented the following three work arounds to its self-identified enforcement problem:
 - a. *Make state-funded student financial aid contingent upon a college agreeing to “active monitoring” and OSP-approved contingency plans.* Two obvious drawbacks to this proposed pseudo-enforcement mechanism are that 1) the average Massachusetts financial aid grant for students attending private colleges was just \$657 per year in 2017, rendering such sanction largely ineffectual, and 2) such action would represent more of a punishment to the student than to the college;
 - b. *Revoke the college’s degree-granting authority.* The second cited alternative proposed by DHE is for BHE to revoke the degree-granting authority of colleges that do not voluntarily cooperate, which the Working Group Final Report conceded would be “draconian,” or;
 - c. *Request that the Massachusetts Attorney General bring a consumer protection action against the college.* The third alternative would be for DHE to request that the state Attorney General bring a consumer-protection action against the college. This is the shakiest of the three proposed pseudo-enforcement mechanisms because Massachusetts consumer protection law does not require colleges to turn over such records and a legislative amendment would be required to add such a requirement.

10. **The proposal is moving too fast to allow for the kind of deliberations needed, especially given the potential impact of related initiatives, federal and otherwise, already underway.** The proposal is being fast-tracked by BHE and DHE, with a BHE-approved timetable that includes hearings on proposed regulations in July 2019 and final approval in October 2019.
- At the January 22, 2019 BHE meeting, the following timetable for the Transitions in Higher Education: Safeguarding the Interests of Students (THESIS) Working Group implementation plan was presented, including publication of draft regulations by July 2019 and the vote on final regulations no later than October 2019. The timetable is included in the following endnote.¹⁵
 - Other college financial indicators, including the US Department of Education Financial Responsibility Composite Score, have undergone an elaborate, extensive, and continuing peer review and collaborative assessment process.¹⁶
 - The timetable for THESIS implementation set forth by BHE and DHE is extraordinarily rapid and constrained within the Massachusetts regulation promulgation hearing process. This is especially worrisome because of its vast potential impact not just on the affected students but also on the jobs of faculty and staff, and ultimately on a sizable portion of the state economy.
 - The Working Group report paid little attention to the potential impact of required changes in financial reporting standards for private colleges and universities that became effective in FY 2019—in particular:
 - Revised classifications for net asset reporting;
 - Revised disclosures for liquidity and restricted assets;
 - Revised categorization of operating expenses (natural vs. functional).
 - Additional time is needed to consider improvements in data collection, analysis and communication processes by institutions identified as being at risk by accreditors and relevant state offices.

Other Options

Pioneer Institute calls for a more thoughtful, expansive and deliberative process in consideration of the numerous issues raised in this memo. There are highly practical steps that stand a far better chance of improving board governance and accountability for these institutions.

Why a Massachusetts “solo” effort when there are important efforts to address this issue are underway around the country?

The development of a “solo” Massachusetts effort to address this problem is problematic. It smacks of myopia, given the robust federal efforts and the work already underway to enhance accreditation processes.

Following issuance of a U.S. General Accounting Office report that criticized USDOE for an untimely financial warning system, the department promulgated new standards that are scheduled to take effect on July 1, 2019. The new regulations were promulgated after an extensive, transparent consultation process with stakeholders. In its response to the GAO, USDOE stated that it requires audited financial statements to be prepared in accordance with generally accepted accounting standards as set forth by the Financial Accounting Standards Board (FASB), and that USDOE’s Financial Composite Score is derived entirely from data FASB requires colleges to report. USDOE has a far greater stake in financial accountability and transparency of colleges than does Massachusetts or any other individual state.

A Massachusetts “solo” effort is problematic and myopic, given the robust federal efforts and the current work being done to enhance accreditation processes already underway

Federal student higher education loans currently have an outstanding balance of \$1.44 trillion, more than 1,000 times greater than Massachusetts’s higher education loan balance. In 2017, the federal government provided \$30 billion in financial aid grants, more than 300 times greater than Massachusetts provided. Massachusetts’ average higher education grant to students attending private colleges in 2017 was \$657. Title IV of the Higher Education Act (HEA) authorizes programs that provide financial assistance to help students obtain a postsecondary education at certain institutions of higher education (IHEs). These IHEs include public, private nonprofit, and proprietary institutions. For students attending such institutions to qualify for Title IV assistance, an institution must meet basic criteria, including offering at least one eligible education program (e.g., programs leading to a degree or preparing a student for gainful employment in a recognized occupation). In addition, an IHE must satisfy the program

integrity triad, under which it must be:

- Licensed or otherwise legally authorized to operate in the state in which it is physically located;
- Accredited or pre-accredited by an agency recognized for that purpose by USDOE; and
- Certified by USDOE as eligible to participate in Title IV programs.

These requirements are intended to provide a balance between consumer protection, quality assurance, and oversight and compliance by postsecondary education providers participating in Title IV student aid programs.¹⁷

In addition, NECHE, which in 2018 was separated from NEASC to focus on higher education alone,¹⁸ has expertise in oversight of private colleges and undertaking programmatic and financial reviews. Given the need for confidentiality and trust in the oversight of private institutions, as well as the statutorily defined conflicts of the BHE and DHE, there is good reason to consider NECHE a more appropriate home for enhanced (more frequent, more robust) oversight of higher education finances.

Why give boards of trustees a pass?

Boards of trustees of higher education institutions have fiduciary responsibilities to protect the interests of students and faculty when the institution faces serious financial difficulty. BHE's proposal does little to hold boards accountable or to better prepare them to address these problems in a timely manner. In the case of Wheelock College, trustees actively sought a solution to financial and enrollment pressures, acting well before an urgent situation arose. Given that forward planning, no teach-out plan was required for Wheelock students who would continue their studies at Boston University without undue interruption. There was a plan for those not planning to continue at BU. That was not the case with Mount Ida, and it's hard to imagine that the trustees fulfilled their fiduciary role given the outcome for students, faculty and the local community.

The Commonwealth could use its existing powers to hold boards of trustees at each of the private institutions accountable for carrying out their fiduciary responsibilities. In practice, that means: consider DHE's proposal to more fully educate, inform and support [college] board[s] of trustees or a "governance improvement" collaboration with NECHE. The DHE Working Group Report included a recommendation that "DHE and [the Massachusetts Attorney General's office] should collaborate to more fully educate, inform and support [college] Board[s] of Trustees . . . with respect to the fiduciary duties of the Boards of Trustees . . . particularly for those in potential or actual financial distress."¹⁹

Recommendations

1. **Pioneer Institute calls for a more deliberative examination of the process** in consideration of numerous issues raised in this memo.
2. **Pioneer Institute calls for BHE to disclose, completely and exhaustively, the underlying components of the Teach-out Viability Metric and its built-in assumptions** to NECHE to allow stakeholders to assess its strengths and weaknesses.
3. **The U.S. Department of Education and the New England Commission of Higher Education are the appropriate impartial entities to thoroughly and confidentially conduct financial viability assessments; Massachusetts should join with other New England states in the ongoing national effort to make Financial Accountability Scores available in a more timely manner.** BHE should engage with the U.S. DOE's approved regional accrediting agency, NECHE, to allow stakeholders to assess the strengths and weaknesses of TVM.
4. **BHE should give real consideration to the DHE Working Group's proposal to more fully educate, inform and support [college] board[s] of trustees or a "governance improvement" collaboration with NECHE.**

Conclusion

The issues facing small private liberal arts colleges are real and likely to worsen over time. That said, the proposal offered by EY-Parthenon and the Massachusetts Board of Higher Education does not offer a sound remedy. Rather, it seeks to impose a dangerous public notification system predicated on an untested and simplistic benchmark that has the potential to precipitate the demise of colleges by producing "false positives." Moreover, the board and Department of Higher Education are conflicted by their statutory roles as advocates for public institutions that compete directly with the private institutions they seek to regulate. Given the smooth and responsible closures that have occurred since Mt. Ida (Wheelock's merger with Boston University and Newbury College's December announcement that it would close in June), the Baker administration should not only slow this proposal down but also rethink it from top to bottom.

Endnotes

- 1 https://www.moodys.com/research/Higher-education-US-Sustained-stress-will-drive-more-private-colleges--PBM_1133814
- 2 <https://commonwealthmagazine.org/education/meehan-many-more-college-closures-coming/>. From the article: “There are going to be other closures, and there ought to be some kind of standards set up for when private universities close,” Meehan told lawmakers.” “This is going to happen over and over and over again. It’s around the corner.” Also, later in the piece, when a member of the Massachusetts Senate Committee on Post Audit and Oversight asked UMass President Marty Meehan at its hearing on the Mount Ida acquisition, if UMass would be a player in future transactions as other colleges close, the President responded, “I think as a public research university committed to service and to students, that we should be part of the equation.”
- 3 https://www.neche.org/wp-content/uploads/2018/12/Standards_for_Accreditation.pdf
- 4 <https://malegislature.gov/Bills/191/SD2323>
- 5 <https://www.mass.edu/bhe/documents/THESIS%20Working%20Group%20Final%20Report.pdf>
- 6 <http://www.mass.edu/strategic/documents/EY-Parthenon%20Transitions%20in%20Higher%20Ed.pdf>
- 7 <https://www.mass.edu/bhe/documents/THESIS%20Working%20Group%20Final%20Report.pdf>
- 8 Ibid.
- 9 Ibid.
- 10 <https://nces.ed.gov/ipeds/>
- 11 <https://commonwealthmagazine.org/education/meehan-many-more-college-closures-coming/>
- 12 For example, it is worth asking how long negotiations go on confidentially between governmental oversight organizations and the at-risk schools before triggering a legal obligation to notify the shareholders (students, faculty, staff etc.).
- 13 https://www.neche.org/wp-content/uploads/2018/12/Standards_for_Accreditation.pdf
- 14 The administration has belatedly recognized that the proposed OSP financial review of private records and imposition of OSP-approved contingency plans exceeds current statutory authority. BHE and DHE’s proposal to compel private colleges to provide private financial records and documents to OSP exceeds BHE’s and DHE’s statutory authority and would require legislative approval. Furthermore, BHE and DHE’s proposal to compel colleges to submit to active monitoring by OSP and to fully comply with OSP-imposed contingency transfer and teach-out plans lack legislative authority.
 - a. BHE is currently statutorily empowered under MGL .G.L. c. 69, §30 to authorize the establishment of new educational institutions and to conduct “periodic inspections of every such educational institution within the twelve years next following its approval of the certificate of organization, but not thereafter. Thus, colleges older than 12 years are grandfathered in and protected from BHE’s authority to conduct periodic inspections of a college’s financial condition;
 - b. BHE is currently empowered under 610 CMR 2.07(3)(f) (2) to require colleges to “safeguard the needs of students by organizing educational transfer opportunities” in instances where a college, on its own volition, notifies BHE that it may close or if it is planning to merge with another institution. In such instance, “[the college] shall so notify the Board and should follow appropriate procedures as far as possible in advance of the closure or merger.” Nothing in M.G.L. C. 69, §§ 30, 30A, or 31A authorizes BHE to compel a college to submit involuntarily to a transfer and teach out contingency plan approved by OSP;
 - c. MGL Chapter 30A grants BHE authority to establish standards “for financial organization of private colleges” and allows it to suspend or revoke the power of an institution to grant degrees subject to an adjudicatory hearing and judicial appeal if DHE “has reason to believe” that the institution is not complying with the standards. Nothing in Chapters 30, 30A or 31A, however, empowers BHE or DHE to compel the production of financial records by private colleges. Under current statute, the only means by which DHE would have “reason to believe” that private colleges are not complying with its “financial organization standards” is by reviewing public documents such as a college’s audited financial statements, which are public documents. BHE and DHE lack statutory authority to compel production of non-public documents and records;
 - d. DHE’s Working Group Report presented to BHE in January 2019 acknowledged that BHE and DHE currently lack statutory authority to compel colleges to disclose such records. If passed, the legislation proposed by Governor Baker would provide such authority.
- 15 <https://www.mass.edu/bhe/documents/THESIS%20Implementation%20Timeline.pdf>:
 - **January 22, 2019:** BHE Meeting (Motion to Receive Report Issued by the Transitions in Higher Education: Safeguarding the Interests of Students (THESIS) Working Group and Charge to the Commissioner to Develop Implementation Recommendations)
 - **February 2019:** Commissioner outlines the vision and identifies contingencies and timeline for establishing the DHE Office of Student Protection; convenes meeting with NECHE; establishes Advisory Council membership
 - **February – March 2019:** DHE develops draft regulations and policies, revised OSFA Participation Agreement
 - **March 5, 2019 BHE Committee Meetings (March 12, 2019 BHE Meeting):** DHE staff to provide updates to the Board
 - **February – April 2019:** Informal stakeholder vetting (AICUM, NECHE, AGO, etc.) and legislative discussions if necessary (will include several public comment sessions)
 - **April 30, 2019 BHE Committee Meetings (May 7, 2019 BHE Meeting):** DHE staff to provide updates to the Board; target date for approval of formal amendment to OSFA Participation Agreement for OSFA use/institution signature over summer 2019 and implementation for 2019–2020 academic year (if possible)

- **May 2019:** Revise draft regulations and policies based on informal stakeholder vetting
 - **June 4, 2019:** Draft regulations, policies, and motion to put regulations out for public comment distributed to BHE in board packet for review, as well as OSFA Participation Agreement if applicable
 - **June 11, 2019:** BHE Committee Vote to put draft regulations out for public comment; review draft policies/procedures (which will fill in substance where regulations allow for flexibility); review of formal amendment to OSFA Participation Agreement, for OSFA use/institution signature over summer 2019 and implementation for 2019–2020 academic year (if not done in May)
 - **June 18, 2019:** Full BHE Vote to put draft regulations out for public comment; review draft policies/procedures; review of formal amendment to OSFA Participation Agreement, for OSFA use/institution signature over summer 2019 and implementation for 2019–2020 academic year (if not done in May)
 - **TBD:** Regulations to be submitted to ANF for review/approval; ANF meets to discuss regulations
 - **June 28, 2019:** Draft regulations, small business impact/fiscal effect statements, and the notice of public hearing will be brought to the Secretary of the Commonwealth's office for publication in the July 12, 2019 edition of the Massachusetts Register; letters will be sent to DHCD/MMA per E.O. 145
 - **July 5, 2019:** The notices of public hearing will be sent to the Boston Globe for publication (publication in the Globe is likely to occur 3–4 days after submission)
 - **July 12, 2019:** Publication of draft regulations and notices of public hearing in the Massachusetts Register
 - **July 24, 2019:** Public Hearing date, One Ashburton Place, Room 1401
 - **July 12 – August 9, 2019:** Public comment period
 - **Mid-August 2019:** DHE revises draft regulations and policies
 - **By or Before August 22, 2019:** Potential Summer Special Meeting of BHE to approve regulations
 - **No later than October 2019 BHE Meeting:** Vote on final regulations
 - **TBD:** Final regulation promulgation deadlines TBD depending upon when final BHE vote is taken
- 16 It is worth noting that the U.S. Department of Education's financial responsibility scores for the last two fiscal years have not yet been published; as a result, if the BHE and DHE follow their prosed guidelines, they would likely opine *before* the US DOE scores are published.
 - 17 <https://fas.org/sgp/crs/misc/R43159.pdf>
 - 18 In 2018, the New England Association of Schools and Colleges (NEASC) completed a corporate restructuring to align with the US Department of Education's requirement that our higher education commission (CIHE) operate as a "separate and independent" entity. CIHE now operates as the New England Commission of Higher Education, Inc. (NECHE) and we continue to operate as NEASC. Complying with this legal requirement ensures that NECHE will remain the gatekeeper for access to federal financial aid by students of New England's colleges and universities. <https://www.neasc.org/colleges-and-universities>
 - 19 <https://www.mass.edu/bhe/documents/THESIS%20Working%20Group%20Final%20Report.pdf>

Authors

Gregory Sullivan is Pioneer's Research Director, and oversees the Centers for Better Government and Economic Opportunity. Prior to joining Pioneer, Sullivan served two five-year terms as Inspector General of the Commonwealth of Massachusetts and was a 17-year member of the Massachusetts House of Representatives. Greg is a Certified Fraud Investigator, and holds degrees from Harvard College, The Kennedy School of Public Administration, and the Sloan School at MIT. Gregory Sullivan is Pioneer's Research Director, and oversees the Centers for Better Government and Economic Opportunity. Prior to joining Pioneer, Sullivan served two five-year terms as Inspector General of the Commonwealth of Massachusetts and was a 17-year member of the Massachusetts House of Representatives. Greg is a Certified Fraud Investigator, and holds degrees from Harvard College, The Kennedy School of Public Administration, and the Sloan School at MIT.

About Pioneer

Pioneer Institute is an independent, non-partisan, privately funded research organization that seeks to improve the quality of life in Massachusetts through civic discourse and intellectually rigorous, data-driven public policy solutions based on free market principles, individual liberty and responsibility, and the ideal of effective, limited and accountable government.

