

BOARD OF HIGHER EDUCATION

REQUEST FOR BOARD ACTION

NO.: BHE 22-36

BOARD DATE: February 1, 2022

**CREATION OF THE BOARD OF HIGHER EDUCATION COMMISSIONER SEARCH
ADVISORY COUNCIL**

MOVED: The Board of Higher Education (the Board) hereby approves the establishment of an advisory council to advise and assist the Board in the conduct of a national search for the next Commissioner of the Department of Higher Education, in accordance with the attached charge. The Board authorizes and delegates to the Executive Committee approval of Advisory Council membership, subject to the guiding principles set forth in the attached charge.

VOTED: Motion adopted by BHE 2/1/2022.

Authority: M.G.L. c. 15A, §6; BHE By-Laws, Article III, Section 2.

Contact: Constantia T. Papanikolaou, General Counsel

Background

The Board of Higher Education (BHE or Board) is charged with the responsibility to select and appoint, subject to the approval of the secretary, the Commissioner¹ of the Board's executive agency, the Department of Higher Education. M.G.L. c. 15 A, §6. Specifically, the BHE's statute provides that the BHE shall "whenever a vacancy may occur, by two thirds vote² of all its voting members, submit to the secretary, for the secretary's approval, a recommended candidate to serve as the commissioner of higher education." M.G.L. c. 15A, §6. The secretary may then either approve the appointment of the recommended candidate as Commissioner, or if the secretary declines to approve the appointment, the BHE must submit a new candidate for consideration. M.G.L. c. 15A, §6; and M.G.L. c. 6A, §14A(c)(3) (stating that the secretary shall have the authority to "approve the appointments" of the commissioners of early education and care, elementary and secondary education, and higher education).

The BHE's By-Laws establish the organizational and governance process pursuant to which the BHE agrees to conduct and advance the duties, powers and responsibilities of the Board. To that end, the By-Laws allow for the establishment of committees and, if non-BHE member participation is warranted, advisory councils to help advance and inform the BHE's work. *BHE By-Laws, Article III*. The use of a committee or advisory council to help advance the Board's work is particularly helpful where, as here in the conduct of the Commissioner's search, screening and interviewing preliminary candidates by the full board or by a committee of the whole would prove to be unwieldy for scheduling and other reasons. For example, the Massachusetts Open Meeting Law provides that a public body is not required to create a preliminary screening committee to consider or interview applicants. However, if the body chooses to conduct the review of applicants itself, it may not do so in executive session.³

The inclusion of stakeholders in the preliminary screening process for the search and selection of the Commissioner is consistent with precedent for all prior DHE Commissioner searches, in alignment with national best practice within higher education administration and the BHE's

¹ The Commissioner is the "executive and administrative head" of the Department of Higher Education. M.G.L. c. 15A, § 6.

² Although a 2/3 vote is required for the Commissioner appointment process, the Commissioner may be removed by the Board by a majority vote of all its members, and such removal is not subject to the approval of the secretary. M.G.L. c. 15A, § 6.

³ Relevant provisions of the Open Meeting Law would prohibit the full board or a committee of the whole from screening and interviewing initial candidates in executive session. However, "exemption 8" of the Open Meeting Law allows a public body to consider or interview applicants for employment or appointment by a preliminary screening committee, provided that: 1) the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; and 2) such interviews and screenings are conducted by a preliminary screening committee which must contain less than a quorum of the public body. The ability to use an executive session for considering or interviewing applications ceases and does not apply to any stage of the hiring process after the screening committee votes to recommend candidates to its parent body. M.G.L. c. 30A, § 21(a)(8); [MA Attorney General's Open Meeting Law Guide](#) at 14-15.

expectations and requirements for the community colleges and state universities in the selection of campus chief executive officers⁴, and is also in alignment with the state's Open Meeting Law.⁵ Accordingly, the Chair is recommending the establishment of an ad hoc advisory council which will include broad stakeholder representation to conduct preliminary screenings of applicants and advise the Board on the appointment of the Department's next Commissioner.

The process for establishing an advisory council is clearly laid out in the BHE By-Laws, and the accompanying BHE motion which implemented the By-Laws (BHE 22-02). The By-Laws provide that "the Chair, with the approval of the Board, may appoint advisory councils as may be deemed necessary to advise the Board and Department" on matters pertinent to the Board. *BHE By-Laws, Article III, Section 2(a)*. The By-Laws further provide that the "membership, charge and duration of the advisory councils shall be recommended by the Chair, in consultation with the Commissioner, and subject to board approval." *BHE By-Laws, Article III, Section 2(b)*.

Through BHE Motion 22-02, the BHE further established guiding principles for the appointment of non-BHE members to advisory councils as follows:

- the process shall be open and transparent;
- the BHE will strive for diversity and geographic balance (*BHE By-Laws, Article III, Section 2(c)*);
- the BHE will seek to establish a reasonable balance of members representing stakeholder interests, content experience and expertise. (*BHE By-Laws, Article III, Section 2(c)*); and
- the Executive Committee, in furtherance of its organizational and governance role, will help screen applicants/ nominees and formulate recommendations for appointment to a council (*BHE By-Laws, Article III, Section 1(a)(i)*).

Proposal- Charge

BHE Motion 22-36 seeks approval of the Board for the Chair to appoint a time-limited, ad hoc advisory council to assist and advise the Board in its search for the next Commissioner of the Department of Higher Education in accordance with the following charge, membership structure, and duration:

- Name: Board of Higher Education Commissioner Search Advisory Council
- Charge: The BHE Commissioner Search Advisory Council will assist the Board in conducting a national search for the next Commissioner of the Department of Higher Education. The Council shall serve in an advisory capacity to the Board, which

⁴ [BHE Guidelines and Procedures on the Search, Selection, Appointment and Removal of Community College and State University Presidents.](#)

⁵ Exemption 8 of the Open Meeting Law recognizes that public bodies may include non-members of the public body on preliminary screening committees. [MA Attorney General's Open Meeting Law Guide](#) at 14.

has the statutory authority to appoint the Commissioner, subject to the approval of the Secretary of Education. The Council shall work with an external search consultant retained by the BHE and shall:

- Finalize a statement of desired qualifications for the position of Commissioner that will guide the search and selection process and be shared with candidates and nomination sources.
 - Conduct an active national search to attract highly qualified and diverse candidates.
 - The Chair of the Council shall periodically report to the Board about the progress of the search.
 - Bring forth the names of three to five finalist candidates to the Board, which retains the right to select and appoint the Commissioner, subject to the approval of the Secretary of Education.
 - Observe strict confidentiality in the conduct of the search, while also adhering to Massachusetts Open Meeting Law. Any member of the Council who breaches confidentiality may be removed from the Council without replacement.
 - The Council's members will sign a code of ethics and non-disclosure agreement which, among other things, requires members to promptly disclose all conflicts of interest—real, potential or apparent—to the chair of the Council or the entire Council, as may be warranted by the circumstances.
 - The Chair of the Council and/or their designee will be the sole spokesperson for the Council to the Board, campus constituencies and other stakeholders, the news media, and the broader external community.
- BHE Membership and Non-BHE Membership: The Chair of the BHE shall chair the advisory council. The Executive Committee in furtherance of its organizational and governance role will review membership proposed by the Chair and approve the final slate of BHE and non-BHE membership. BHE members and others who wish to nominate members for the Chair's consideration shall submit the nominee's CV and either the nominee's statement of interest and/or a letter of support to Chief Legal Counsel Dena Papanikolaou at cpapanikolaou@dhe.mass.edu by 5:00 p.m. on Tuesday, February 15. In exercising this authority, the Executive Committee will be guided by the principles established in BHE 22-02:
- the process shall be open and transparent;
 - the BHE will strive for diversity and geographic balance (*BHE By-Laws, Article III, Section 2(c)*); and
 - the BHE will seek to establish a reasonable balance of members representing stakeholder interests, content experience and expertise. (*BHE By-Laws, Article III, Section 2(c)*).
- DHE staff support: Chief of Staff Elena Quiroz-Livanis

- Duration and Meeting Structure: Working with the external search consultant, the Advisory Council will adopt a timetable and meeting cadence for the search that will permit the appointee to begin by July 1, 2022, or as soon thereafter as is possible. The Council should be convened no later than mid-February and the Board should be positioned to select the Commissioner no later than mid-May. The Advisory Council's responsibilities will be satisfied and cease when the Council advances three to five candidates to the Board for consideration, and the Council will be discharged upon the conclusion of the search.