



TO: The Honorable Members of the Board of Regents

FROM: Daniel Morton-Bentley 

SUBJECT: Proposed Amendment of Sections 275.3, 275.9, 275.17, 276.4, and 276.8 Repeal of Section 276.2, and Addition of a New Section 276.2 to the Regulations of the Commissioner of Education Relating to Form of Pleadings, Electronic Filing, Extensions for Filing Memoranda of Law, Confidential Resolution Conferences, and Oral Arguments for Appeals to the Commissioner of Education under Education Law §310

DATE: December 29, 2022

AUTHORIZATION(S):



SUMMARY

Issue for Decision (Consent)

Should the Board of Regents adopt the proposed amendment of sections 275.3, 275.9, 275.17, 276.4, and 276.8, repeal of section 276.2, and addition of a new section 276.2 to the Regulations of the Commissioner of Education relating to form of pleadings, electronic filing, extensions for filing memoranda of law, confidential resolution conferences, and oral arguments for appeals to the Commissioner of Education under Education Law §310?

Reason(s) for Consideration

Review of Policy.

Proposed Handling

The proposed amendment is submitted to the Full Board for adoption as a permanent rule at the January 2023 meeting of the Board of Regents. A copy of the proposed rule is attached (Attachment A).

Procedural History

The proposed amendment was presented to the P-12 Education Committee for discussion at the September 2022 meeting of the Board of Regents. A Notice of Proposed Rule Making was published in the State Register on September 28, 2022, for a 60-day public comment period.

Following publication in the State Register, the Department received one comment on the proposed amendment. An Assessment of Public Comment is included (Attachment B). No changes to the proposed amendment are recommended at this time. A Notice of Adoption will be published in the State Register on January 25, 2023. Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

Education Law §310 requires the Commissioner to issue a decision in a proceeding regarding any official act of a school district, officer, or trustee, among other things. The Department has reviewed the current regulations implementing Section 310 and recommends the following changes. These changes, which include the introduction of style and page limit requirements to pleadings and memoranda of law, electronic filing, and confidential settlement conference procedures, will encourage the expeditious resolution of disputes that come before the Commissioner.

Proposed Amendment

Page Limitations and Formatting

The Department recommends that pleadings (i.e., petition, stay opposition, answer, or reply) be typewritten and limited to 15 pages in length, while memorandum of law is limited to 30 pages in length. There would be no page limitation on supporting materials and evidence such as affidavits and exhibits. The Commissioner may grant a party permission to submit handwritten pleadings. The Department believes that these limitations strike a balance between allowing parties to present their case while ensuring that allegations are concise and non-repetitive. A party seeking to exceed the page limitations may submit a written request to do so in the manner described in Section 275.3 (b).

Electronic Filing with the Department

In addition to serving copies of papers and pleadings on the opposing party, parties must file a copy of all pleadings with the State Education Department pursuant to 8 NYCRR 275.9 (a). During the COVID-19 pandemic, the Department granted several requests to file these documents electronically. This saved time and money, as parties were able to instantaneously transmit documents without incurring copying and shipping costs. The Department did not experience any difficulty accessing digital files sent as .pdf attachments.

Therefore, the Department proposes that electronic filing as an email attachment, in a secure digital format that cannot be edited, serve as the default method of filing pleadings and papers under 8 NYCRR 275.9 (a). For parties unable to utilize email, the Department will continue to accept pleadings and papers by mail. Petitioners will remain obligated to commence an appeal through personal service of the petition as set forth in 8 NYCRR 275.8.

Extensions of Time to Serve Memoranda of Law

The Department proposes clarifying amendments to 8 NYCRR 276.4 (a) to confirm that any party may prospectively seek an extension of time to serve and file a memorandum of law ahead of the deadline for submission. The current provisions permitting the late service and filing of a memorandum of law upon good cause shown will remain in effect.

Confidential Resolution Conference/Oral Argument

Finally, the Department recommends a new, confidential resolution conference procedure in lieu of oral argument. The Department believes that the ideal outcome of an appeal to the Commissioner is an agreement between the parties to work together and move forward, whether through mutually acceptable resolution or agreement on the issues to be addressed.

The proposed procedure would authorize counsel, on behalf of the Commissioner, to convene a conference “for the purposes of considering settlement, simplifying the issues, resolving procedural problems, and/or discussing any matters which may aid in the expeditious disposition of the appeal.” These conferences may be held in a manner convenient for the parties, including in-person, telephone, or digital conferencing software. The counsel or counsel’s designee may require an authorized school district representative familiar with the facts of the appeal to attend. The conference would not be recorded or admissible in the appeal or any other proceeding.

This process would replace the oral argument procedure currently authorized by 8 NYCRR 276.2. That procedure has fallen into disuse; the Commissioner has not entertained oral argument for decades. The Department believes that the confidential resolution conference process is more likely to produce positive outcomes for students, families, and schools.

Related Regents Items

October 2008: [Proposed Amendment of Parts 275 and 276 and 100.2\(y\) of the Regulations of the Commissioner of Education Relating to Education Law 310 Appeals to the Commissioner of Education](https://www.regents.nysed.gov/meetings/2008Meetings/October2008/1008brd1.htm)
(<https://www.regents.nysed.gov/meetings/2008Meetings/October2008/1008brd1.htm>)

December 2010: [Technical Amendments to Parts 275 and 276 of the Regulations of the Commissioner, Relating to Appeals to the Commissioner Under Education Law §§310 and 2853](#)

(<https://www.regents.nysed.gov/common/regents/files/documents/meetings/2010Meetings/December2010/1210bra4.pdf>)

September 2021: [Proposed Amendment of Part 276 and Section 277.1\(b\) of the Regulations of the Commissioner of Education Relating to Education Law §310 Appeals to the Commissioner of Education and the Initiation and Conduct of Proceedings for the Removal of School Officers](#)

(<https://www.regents.nysed.gov/common/regents/files/921brd1.pdf>)

September 2022: [Proposed Addition of Part 130 of the Regulations of the Commissioner of Education Relating to Substantially Equivalent Instruction for Nonpublic School Students](#)

(<https://www.regents.nysed.gov/common/regents/files/922p12a7.pdf>)

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That sections 275.3, 275.9, 275.17, 276.4, and 276.8 of the Regulations of the Commissioner of Education be amended, section 276.2 of the Regulations of the Commissioner of Education be repealed, and a new section 276.2 of the Commissioners Regulations be added, as submitted, effective January 25, 2023.

Timetable for Implementation

If adopted at the January 2023 meeting, the proposed amendment will become effective on January 25, 2023.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 305, 310, and 311 of the Education Law.

1. Subdivision (c) of section 275.3 of the Regulations of the Commissioner of Education is amended to read as follows:

(c) Form of pleadings. Documents that do not comply with the requirements of this section may be rejected at the sole discretion of the Commissioner. All pleadings and affidavits [shall be submitted in typewritten form, double spaced, on white paper 8 1/2 by 11 inches in size, and] shall set forth the allegations of the parties in numbered paragraphs. Such pleadings shall be addressed "To the Commissioner of Education," and shall be filed in accordance with the provisions of section 275.9 of this Part. All pleadings and affidavits, unless an exception is granted by the Commissioner, shall be submitted in the following form:

(1) typewritten in black ink, on single-sided pages, and text double-spaced (block quotations and footnotes may be single-spaced), on white paper 8 1/2 by 11 inches in size;

(2) all text, except page numbers, shall appear on pages containing margins of at least one inch. Text shall appear as minimum 12-point type in a legible font (serif preferred). Footnotes may appear as 10-point or 12-point type;

(3) pages consecutively numbered; and

(4) the petition, stay opposition, answer, or reply shall not exceed 15 pages in length; a memorandum of law shall not exceed 30 pages in length. Parties seeking to exceed these limitations may submit a written request in the manner described in Section 275.3 (b).

2. Subdivision (a) of section 275.9 of the Regulations of the Commissioner of Education is amended to read as follows:

(a) Within five days after the service of any pleading or paper or, in the case of a charter school location/co-location appeal pursuant to section 276.11 of this Title, within the period specified in such section 276.11 of this Title, a complete electronic copy of the original, together with the affidavit of verification and an affidavit proving the service of a copy thereof, shall be transmitted to the Office of Counsel as an email attachment, in a secure digital format that cannot be edited, at the following email address: legal@nysed.gov. Provided, however, that if electronic filing cannot be accomplished, the original pleading or paper, together with the affidavit of verification and an affidavit proving the service of a copy of the pleading or paper, shall be transmitted to the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234. The affidavit of service shall be in substantially the form set forth below and shall indicate the name and, if applicable, the official title of the person upon whom service was made.

3. Section 276.2 of the Regulations of the Commissioner of Education is REPEALED and a new section 276.2 is added to read as follows:

276.2 Confidential Resolution Conference.

(a) The Commissioner may schedule and direct the parties to participate in a confidential resolution conference with the counsel or the counsel's designee. Such conferences shall be for the purposes of considering settlement, simplifying the issues, resolving procedural issues, and/or discussing any matters which may aid in the expeditious disposition of the appeal.

(b) The resolution conference may be held in-person, by telephone, or by digital conferencing software and may be continued, as necessary.

(c) The counsel or designee may require an authorized school district representative familiar with the facts of the appeal to attend.

(d) The confidential resolution conference shall not be recorded, no evidence may be introduced or received, and any statements made therein shall not be admissible in the appeal under review, or in any other legal proceeding.

4. Subdivision (a) of section 276.4 of the Regulations of the Commissioner of Education is amended to read as follows:

(a) Memoranda of law, consisting of the parties' arguments of law may be submitted by any party to an appeal and may be requested by the commissioner's counsel or by the commissioner. The petitioner shall serve a copy of any memorandum of law upon every other party to the appeal in the manner provided by section 275.8(b) of this Title within 40 days after service of the petition. Each respondent shall serve a copy of any memorandum of law, upon every other party in the manner provided by section 275.8(b) of this Title within 50 days after service of the petition. Reply memoranda will be accepted only with the prior approval of the commissioner. All memoranda of law shall be filed with proof of service thereof in accordance with section 275.9 of this Title. The commissioner, in [his/her] his or her sole discretion, may permit the late service and filing of memoranda of law upon written application by a party, setting forth good cause for the delay and demonstrating the necessity of such memoranda to a determination of the appeal, together with proof of service of a copy of such application upon all other parties to the appeal. The commissioner may also permit an extension of time to serve and file memoranda of law upon good cause shown

and upon such terms and conditions as the commissioner may specify. A party seeking an extension shall make such request to the Office of Counsel prior to the expiration of the time to serve such answer or reply. The procedures set forth in this subdivision shall not apply to charter school location/co-location appeals, which shall be governed by section 276.11 of this Part.

5. Subdivision (a) of section 276.8 of the Regulations of the Commissioner of Education is amended to read as follows:

(a) Any party to an appeal may, within 30 days after the date of a decision thereon, apply by petition to the commissioner for a reopening of said decision. Applications for reopening are addressed solely to the discretion of the commissioner, and will not be granted in the absence of a showing that the decision which is the subject of such application was rendered under a misapprehension as to the facts or that there is new and material evidence which was not available at the time the original decision was made. [No oral argument shall be had in connection with an application for reopening unless the commissioner directs that such argument be had.]

6. Section 275.17 of the Regulations of the Commissioner of Education is amended to read as follows:

Section 275.17. Amicus curiae

The commissioner may, in his/her sole discretion and upon written application submitted [at or before oral argument], permit interested persons or organizations to submit memoranda of law amicus curiae in connection with a pending appeal. Those permitted to submit memoranda amicus curiae shall not be considered parties to the appeal before the commissioner and shall not be entitled to receive copies of pleadings

and papers pertaining thereto or to participate in [oral argument] a confidential resolution conference pursuant to section 276.2 of this Chapter.

ASSESSMENT OF PUBLIC COMMENT

Since the publication of a Notice of Proposed Rule Making in the State Register on September 28, 2022, the State Education Department received the following comment on the proposed rule:

COMMENT: First, the commenter suggests that pleadings and affidavits should be accepted with either double or one-and-one-half line spacing.

Second, the commenter suggests that electronic service should be the default for commencing appeals against school district respondents. The commenter further states that electronic service addressed to any district clerk, superintendent or member(s) of a board of education should be considered as adequate service upon all respondents who are current employees or officers of the school district. The commenter states that there is no need for petitioners to be burdened with expenses relating to producing hard copies and either arranging for personal delivery or mailing them to multiple respondents.

Third, the commenter recommends that the Department increase the page limits for pleadings from 15 to 25 pages, and for memoranda of law from 30 to 40 pages.

Fourth, the commenter suggests that the resolution conference need not be confidential unless it strictly involves the action(s) of a student or a group of students. The commenter further recommends that the resolution conference should involve the creation of a document where the parties stipulate to a document containing "Facts in Agreement" and "Facts in Dispute." The commenter envisions that this document would become an admissible pleading in the appeal or other legal proceeding.

DEPARTMENT RESPONSE: The commenter's first and third recommendations pertain to measures enabling parties to increase the number of words or pages in their pleadings and other papers. The Department has considered such changes and determined that no revision to the proposed regulation is necessary. The regulation provides that a party seeking to exceed the page limitations imposed by the regulation may submit a written request to do so in the manner described in section 275.3(b). The Department believes that this flexibility in page limitations eliminates any necessity to alter spacing requirements or increase page limitations.

Regarding electronic service on school district respondents, the Department considered the proposed alternative but determined that no change is necessary. Personal service, required by 8 NYCRR 275.8, is commonly required or utilized in judicial and quasi-judicial proceedings (see Fed. R. Civ. P. 5 [a]; CPLR § 2103). Lack of jurisdiction due to inadequate service is an affirmative defense that a respondent may elect to raise in its answer to a petition under Education Law § 310 (see *generally Appeal of M.P. and T.P.*, 60 Ed Dept Rep, Decision No. 17,937). As such, school districts may, but are not required to, consent to electronic service of a petition.

At this time, the Department does not believe that a change in practice is warranted. The personal service requirement ensures that an appropriate employee or officer receives a copy of each appeal under Education Law § 310. However, electronic filing with the Department (following service) will reduce the costs incurred by petitioners in producing and mailing hard copies. The Department hopes to further streamline appeals processes in the future.

Finally, regarding the confidential resolution conference, the Department believes that it is important to keep such conferences confidential so that the parties can engage

in open discourse and trust that their statements will not be used against them in the future. However, if all parties agree, nothing would preclude them from stipulating to the facts and/or issues in dispute at the conference. The stipulated facts or issues would then be memorialized in writing following the conference. Thus, because the proposed regulation allows parties to stipulate to facts and issues, there is no need for revision of the regulation based upon the commenter's suggestion.