



**TO:** The Honorable the Members of the Board of Regents  
**FROM:** Daniel Morton-Bentley   
**SUBJECT:** 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

**DATE:** September 2, 2021

**AUTHORIZATION(S):** 

**SUMMARY**

**Issue for Discussion**

Should the Board of Regents adopt the proposed amendment 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?

**Reason(s) for Consideration**

Review of Policy.

**Proposed Handling**

The revised proposed amendment will be presented to the Full Board for discussion at the September 2021 meeting of the Board of Regents. A copy of the proposed rule is included (Attachment A).

**Procedural History**

The proposed amendment was presented to the Full Board for discussion at its April 2021 meeting. A Notice of Proposed Rule Making was published in the State Register on April 28, 2021 for a 60-day public comment period. Following publication, the Department received one comment on the proposed regulation. An Assessment of Public Comment is included (Attachment B). The proposed amendment has been revised in response to public comment. A Notice of Revised Rule Making will be

published in the State Register on September 29, 2021 for a 45-day public comment period. Supporting materials are available upon request from the Secretary to the Board of Regents.

### **Background Information**

Education Law §310 authorizes the Commissioner of Education to decide appeals of persons considering themselves aggrieved by actions taken at a school district meeting or by school authorities. The appeal decisions of the Commissioner are quasi-judicial in nature and are officially reported and indexed in the Education Department Reports. These reports are now entirely digital and are posted on the Department's website. The Commissioner issues approximately 200 decisions a year on a wide range of subjects including student residency, student discipline, school district elections, transportation, and personnel matters. The regulations governing the practice to be followed in §310 appeals are found in Parts 275 and 276 of the Commissioner's Regulations.

### **Initial Proposed Amendment**

The proposed amendment makes technical changes to the service of memorandum of law to expedite the processing of administrative records; it also poses other clarifying amendments. Specifically, the Department proposes to:

- amend section 276.4 of the Commissioner's regulations to update the requirements for service and filing of memoranda of law such that a petitioner serve and file any memorandum of law with the petition; a respondent serve and file any memorandum of law with the answer; and a petitioner serve and file any reply memorandum of law with the reply;
- make a corresponding amendment to section 275.8(a) of the Commissioner's regulations to provide that a memorandum of law be served with the petition;
- make a corresponding amendment to section 275.13 of the Commissioner's regulations to provide that a memorandum of law be served with the answer;
- make a corresponding amendment to section 275.14 of the Commissioner's regulations to provide that a memorandum of law be served with the reply; and
- amend section 276.5(b) of the Commissioner's regulations to clarify that in an appeal regarding a homeless child's or youth's access to a free appropriate public education pursuant to section 100.2(x) of the Commissioner's regulations, the application must be served along with proposed affidavits, exhibits and other supporting papers, consistent with the requirements of subdivision (a) of such section. Additionally,

subdivision (b) is amended to remove the reference to section 275.13(b) of the Commissioner's regulations in reference to service of such appeals.

In addition, the Department proposes to make a technical amendment to section 277.1(b) of the Commissioner's regulations relating to the initiation and conduct of proceedings for removal of school officers. The proposed amendment removes the title "SIR" from the required notice to be included in the petition for removal.

### **Proposed Revisions**

In response to public comment the proposed amendments made to section 276.4 of the Commissioner's regulations have been revised and the corresponding amendments to sections 275.8(a), 275.13 and 275.14 have been removed. The revised amendment no longer requires that any memorandum of law be served and filed with the petition, answer, or reply. Rather, the Department now proposes to amend section 275.4 of the Commissioner's regulations to require that a petitioner serve and file any memorandum of law within 40 days after service of the petition, and a respondent serve and file any memorandum of law within 50 days after service of the petition. The Department further proposes clarifying the language in section 276.8(a) of the Commissioner's regulations; indicating in a single place, for example, that the procedures applicable to charter school location/co-location appeals are set forth in section 276.11 of the Commissioner's regulations.

### **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)

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

April 2021: [Proposed Amendment of Parts 275 and 276 and Section 277.1 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/4211brd2.pdf)

(<https://www.regents.nysed.gov/common/regents/files/4211brd2.pdf>)

### **Recommendation**

Not applicable.

### **Timetable for Implementation**

It is anticipated that the revised proposed rule will be presented to the Board of Regents for adoption at the December 2021 Regents meeting, after publication of the revised proposed amendment in the State Register and expiration of the 45-day public comment period required by the State Administrative Procedure Act for revised rulemakings. If adopted at the December 2021 meeting, the revised proposed rule will take effect on December 29, 2021.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

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

1. 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 [and except in the case of a charter school location/co-location appeal pursuant to section 276.11 of this Part shall file such memorandum of law, with proof of service thereof in accordance with section 275.9 of this Title, within 20 days after service of the answer or 10 days after service of the reply, whichever is later] 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 [and, except in the case of a charter school location/co-location appeal pursuant to section 276.11 of this Part, shall file such memorandum] 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[, within 30 days after service of the answer or 20 days after service of the reply, whichever is later. Where the answer is served upon petitioner or petitioner's counsel by mail, the date of mailing and the four days subsequent thereto shall be excluded in the computation of the 20-day period in which petitioner's memorandum of law must be served and filed. Except in the case of a charter school location/co-location

appeal pursuant to section 276.11 of this Part, reply memoranda will be accepted only with the prior approval of the commissioner]. The commissioner, in his/her sole discretion, may permit the late 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. [In a charter school location/co-location appeal pursuant to section 276.11 of this Part, memoranda of law shall be served and filed in the manner prescribed in such section 276.11 of this Part.] 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.

(b) Notwithstanding the provisions of subdivision (a) of this section, in an appeal regarding a homeless child's or youth's access to a free, appropriate public education pursuant to section 100.2(x) of this Title, the parent or guardian of a homeless child or youth or unaccompanied youth as defined in section 100.2(x) of this Title may serve a [memoranda] memorandum of law [may be served] in the manner provided by [either] section 275.8 [(b)] (a) or (e) of this Title.

2. Subdivision (b) of section 276.5 of the Regulations of the Commissioner of Education is amended to read as follows:

(b) Notwithstanding the provisions of subdivision (a) of this section, in an appeal regarding a homeless child's or youth's access to a free, appropriate public education pursuant to section 100.2(x) of this Title, the application and proposed affidavits, exhibits and other supporting papers may be served in accordance with [either] section 275.8(b) or (e) [or section 275.13(b)] of this Title.

3. Subdivision (b) of section 277.1 of the Regulations of the Commissioner of Education is amended to read as follows:

(b) the petition must include a notice to the officer in substantially the following form:

[SIR:]

Take notice that the petition and affidavits, copies of which are herewith served upon you, will be presented to the Commissioner of Education at Albany, and application thereon made for your removal from the office of..... of ..... School District ..... of the Town of ....., ..... County, and that you are required to transmit your answer to such application, duly verified, with an affidavit of service of a copy thereof upon petitioner, to the Office of Counsel, New York State Education Department, State Education Building, Albany, N.Y. 12234, or the charges contained in such petition and affidavit will be deemed to be admitted by you.

Please take further notice that your answer must conform with the provisions of the regulations of the Commissioner of Education relating to appeals before the Commissioner, copies of which are available from the Office of Counsel, New York State Education Department, State Education Building, Albany, N.Y. 12234. Such regulations require that an answer to the petition must be served upon petitioner, or if he be represented by counsel, upon his counsel, within 20 days after the service of the petition, and that a copy of such answer must, within five days after such service, be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, N.Y. 12234.

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(Signature)

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P.O. Address

ASSESSMENT OF PUBLIC COMMENT

Following publication of the Notice of Proposed Rule Making in the State Register on April 28, 2021, the Department received the following comments on the proposed amendment.

1. COMMENT: A commenter recommended that the Department maintain the current structure for service of memoranda of law. The commenter contends that the current structure for service of memorandum of law allows the parties to brief legal arguments after “the allegations are spelled out through the sequence of petition, answer, and reply.” They explain that adding submission of a memorandum of law to the obligation of answering the petition within 20 days “is unduly burdensome.” The commenter states that an unintended consequence of this amendment would be an increase in extension requests. The commenter also predicts that another unintended consequence of the proposed amendment would be that the opportunity to submit a reply memorandum of law will lead petitioners to refrain from filing a memorandum of law with the petition, knowing they will have an opportunity to submit such with a reply, which may preclude respondents from addressing these arguments in their memoranda of law.

As an alternative to keeping the status quo, the commenter provides alternative recommendations. The first recommendation is to increase the respondent’s time to answer to allow respondent to file its answer and memorandum of law within 30 days. The second alternative suggestion is to condition a petitioner’s right to submit a reply memorandum of law on prior approval of the Commissioner’s office. The commenter indicates that petitioners that elect not to submit a memorandum of law with the filing of the petition should not be granted the opportunity to submit a reply memorandum of law.

## DEPARTMENT RESPONSE:

The comment reveals that it has been the experience of some practitioners that the clarity of allegations and claims increases as parties, particularly those who are not represented by attorneys, submit pleadings (i.e., a petition, answer, and reply). Thus, the current structure of submitting memoranda of law after submission of all pleadings can, in some instances, provide parties with a definitive statement of the claims and issues from which to frame their legal arguments.

In response to the comment, and in consideration of the Department's interest in achieving greater stability and predictability in the submission of memoranda of law, the Department has revised the proposed regulation to: (1) require the petitioner to serve a copy of any memorandum of law upon every other party to the appeal within 40 days after service of the petition; (2) require the respondent to serve a copy of any memorandum or law upon every other party to the appeal within 50 days after service of the petition; and (3) maintain the requirement that reply memoranda will only be accepted with the prior approval of the commissioner. The Department further proposes clarifying the language in section 276.8(a); indicating in a single place, for example, that the procedures applicable to charter school location/co-location appeals are set forth in section 276.11 of the Commissioner's regulations.